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# DEAR INSOLVENCY PRACTITIONER
# Issue 116 – December 2020

Message from the Insolvency Service

Dear Reader

This issue of Dear IP provides details of changes affecting the insolvency sector from 1 January 2021, as a result of the end of the EU exit transitional period during which EU rules have continued to apply.

The Insolvency Service would like to wish all our readers a Merry Christmas and Happy New Year.

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## 71) EU exit - legal changes following the end of the transition period

The UK has left the EU and 31 December 2020 marks the end of the transitional period in which, under the Withdrawal Agreement, EU rules have continued to apply. As a result, the legal frameworks under which insolvencies are managed across borders, and insolvency practitioners are recognised in the UK and the EU, are changing.

This article provides details of changes affecting the insolvency sector.

Management of assets in cross-border cases

Under the terms of the Withdrawal Agreement with the EU, article 67(3)(c), the existing rules contained in the EU Insolvency Regulation will continue to apply where main insolvency proceedings have been opened prior to the end of the transition period. In most cases therefore, the rules for handling insolvency proceedings opened before 1 January 2021 will not change.

Subject to the normal restrictions that apply under the Insolvency Regulation, UK insolvency practitioners in those cases will retain the legal authority to deal with assets located in any of the EU member states other than Denmark, without requiring further authorisation from local courts or other authorities. Many insolvencies commenced in EU member states before the end of the 2020 calendar year will, similarly, continue to be automatically recognised in the UK, and so EU insolvency practitioners will be able to deal with the insolvent's assets that are located here.

The current rules in the EU Insolvency Regulation will no longer apply to any new insolvencies in which the main insolvency proceedings are opened on or after 1 January 2021.

For these new insolvencies, recognition and enforcement of UK insolvency proceedings in EU countries, and the insolvency practitioner's ability to deal with assets there, will depend upon the individual country's own laws regarding non-EU insolvencies. The rules and the level of assistance that will be made available to UK insolvency practitioners vary between jurisdictions. In many cases insolvency practitioners will need to seek prior authorisation from the appropriate courts in each country before dealing with assets. Before proceeding, practitioners may wish to seek professional advice regarding the appropriate course of action and the likely costs of doing so.

New insolvency proceedings opened on or after 1 January 2021 in an EU Member State can be recognised in the UK under the Cross-Border Insolvency Regulations 2006 and the Cross-border Insolvency Regulations (Northern Ireland) 2007. These Regulations contain the UK's implementation

of the UNCITRAL Model Law on Cross-Border Insolvency, and already apply in respect of insolvency proceedings commenced outside of the UK and EU.

Recognition of foreign insolvency proceedings under the Cross-Border Insolvency Regulations requires an application to court: a judge will consider various factors such as where the insolvent is based in order to determine whether recognition is appropriate, and to decide what assistance will be provided to the foreign insolvency practitioner.

Claims for redundancy payments

Under the Insolvent Employers Directive (Directive 80/897/EEC, amended by Directive 2002/74/EC) each EU Member State must ensure arrangements are made to guarantee the payment of employees' redundancy-related claims should their employer become insolvent.

Where an employer is active in more than one state, the country responsible in relation to a given employee is usually the one in which the employee "works or habitually works". This means for example that if a company that enters insolvency in an EU Member State has a factory in the UK, the Insolvency Service's Redundancy Payments Service will make statutory redundancy payments to the factory employees from the National Insurance Fund. In the reverse situation where a company enters insolvency in the UK with a factory in an EU member state, that EU member state would make payments to the factory employees under its own guarantee arrangements.

No changes will be made to employees' eligibility for redundancy payments in the UK as a result of the end of the transition period. Insolvency practitioners should continue to facilitate claims as normal.

However, as the EU Directive will no longer apply to UK insolvencies, from 1 January 2021 employees of insolvent UK companies working in EU Member States may not be covered by those countries' guarantee arrangements. Whether employees are covered may depend, for example, on how the Directive has been transposed into each country's national law, and any changes that are subsequently made. Insolvency practitioners may direct employees to review the guidance provided by the country in which they work, or to make enquiries with the relevant guarantee institution(s).

Changes to recognition of insolvency practitioner qualifications

Under Directives 2005/36/EC and 2006/123/EC professionals within the EU can have their qualifications recognised from one country to the next and provide their services in countries other than the one in which they qualified.

An insolvency practitioner who has qualified in one EU state can seek to have their qualification recognised in another and apply to act in respect of insolvency proceedings opened in that other country.

From 1 January 2021, the above Directives will no longer apply to UK insolvency practitioners. Recognition may no longer be available on the above basis. Insolvency professionals who have relied on these provisions, or wish to rely on their UK qualification, may need to have that qualification officially recognised in order to work (even on a temporary or occasional basis) in the EEA or Switzerland. The qualification will need to be recognised by the appropriate regulator in each country where work is to be carried out.

A new temporary system will apply in the UK, which reduces the obligations placed on recognised professional bodies in respect of EU insolvency practitioners. The provisions allowing EU insolvency practitioners to provide services on a "temporary and occasional" basis have been removed: any future authorisation of EU practitioners in this way will be at the discretion of the recognised professional body, and subject to the full requirements for authorisation under UK law. In addition, EU insurance will no longer be recognised as fulfilling the bonding requirement for insolvency practitioners; in future insolvency practitioners must hold an appropriate bond in the form prescribed by UK law.

Opening insolvency proceedings

Prior to 1 January 2021 the opening of insolvency proceedings in the UK is restricted by the EU Insolvency Regulation. Where the insolvent's "centre of main interests" (COMI) is in the EU, main insolvency proceedings may only be opened in the UK where the COMI is here; if the insolvent entity has an establishment in the UK then secondary or territorial insolvency proceedings can be opened.

The court making a winding-up order, for example, will examine the company's COMI and include a declaration in the order to the effect that the proceedings are main proceedings, secondary proceedings, or proceedings to which the Regulation does not apply.

From 1 January this restriction no longer applies. Insolvency proceedings can still be opened in the UK where the COMI is here, or if the insolvent entity has an establishment. I; in addition, however, insolvency proceedings can be opened under any of the other grounds for opening insolvency proceedings that are set down in UK law. A small part of the EU Insolvency Regulation has been preserved in UK law for this purpose.

Under the new rules, the order or other declaration opening the insolvency proceedings must specify whether those proceedings are COMI proceedings (i.e. the centre of main interests is in the UK, which would previously have led

to the opening of main proceedings); establishment proceedings (where the COMI is elsewhere but the insolvent has an establishment in the UK, previously resulting in secondary or territorial proceedings); or proceedings to which the EU Insolvency Regulation as it has effect in the law of the United Kingdom does not apply (and one of the UK's other grounds for the opening of insolvency proceedings has been relied upon).

Further information regarding the changes introduced with the Insolvency (Amendment) (EU Exit) Regulations can be found in our previous articles at:

Dear IP issue 83 November 2018, Chapter 15 Article 62
https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/chapter15.htm#62

Dear IP issue 86 March 2019, Chapter 15 Article 64
https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/chapter15.htm#64

Dear IP issue 106 July 2020, Chapter 15 Article 68
https://content.govdelivery.com/accounts/UKIS/bulletins/293e669

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