



The Scottish Parliament
Pàrlamaid na h-Alba

7 February 2017
SP Paper 86
8th Report (Session 5)

Delegated Powers and Law Reform Committee

Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Public Information on:
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Textphone: 0800 092 7100
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on:

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



dplr.committee@parliament.scot



0131 348 5212

Introduction

1. At its meeting on 7 February 2017, the Committee did not draw the attention of the Parliament to any of the instruments considered at its meeting. A list of these instruments is set out at the end of this report.
2. However, the Committee welcomed that the Scottish Government has undertaken to update the proposed Explanatory Document (SG/2017/9) for the following draft Order —

Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 - proposed draft Order and proposed Explanatory Document (SG/2017/8 and SG/2017/9)

3. The instrument is subject to a “super-affirmative” procedure. At this stage the draft Order is only laid for consultation purposes. It requires to be laid before the Scottish Parliament for 60 days, together with an Explanatory Document which fulfils the requirements of section 27 of the 2010 Act. The Order will be laid in draft for approval by the Parliament after the 60-day period has elapsed and after Ministers have had regard to representations.
4. In summary, the purposes of the draft Order are to:
 - modernise certain aspects of Scottish corporate insolvency law to bring them into line with the position in England and Wales;
 - promote the on-going operation and rescue of viable businesses that are subject to personal insolvency proceedings; and
 - apply certain aspects of the Public Services Reform (Insolvency) (Scotland) Order 2016 to a winding up of a company that is underway at the time that Order comes into force, as opposed to those aspects applying only to a new winding up.
5. The Scottish Government has agreed to update the Explanatory Document in the following respects:
 - To explain in further detail why the Scottish Government considers that article 6 of the draft Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise in accordance with sections 18(2)(e) and 27(1)(d)(i) of the Public Services Reform (Scotland) Act 2010; and
 - To explain why the Scottish Government considers that articles 6, 7 and 8 of the draft Order reduce a burden within the meaning of section 17(2)(c) of the 2010 Act (i.e. an obstacle to best regulatory practice) in accordance with section 27(1)(d)(ii) of the 2010 Act.

6. Furthermore the Committee agreed to encourage the Scottish Government to update the explanation provided in relation to articles 3 and 4 of the draft Order in the Explanatory Document to refer specifically to paragraph 10 of schedule 8 of the Insolvency Act 1986. This would assist the readers of the Explanatory Document to understand more fully the basis on which the powers and duties of liquidation committees are defined in rules made under section 411 of that Act.
7. Correspondence in relation to the draft Order can be found at Annex A.

No points raised

Economy, Jobs and Fair Work

Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 - proposed draft Order and proposed Explanatory Document (SG/2017/8 and SG/2017/9)

Education and Skills

Continuing Care (Scotland) Amendment Order 2017 [draft]

Finance and Constitution

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2017 (SSI 2017/23)

Scottish Fiscal Commission (Modification of Functions) Regulations 2017 [draft]

Health and Sport

National Health Service (Scotland) Act 1978 (Independent Clinic) Amendment Order 2017 [draft]

Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (Commencement No. 1) Regulations 2017 (SSI 2017/12 (C.2))

Justice

Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017 [draft]

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Temporary Exclusion Orders) 2017 (SSI 2017/26)

Local Government and Communities

Non-Domestic Rates (Rural Areas) (Scotland) Regulations 2017 (SSI 2017/22)

Annex A

Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 - proposed draft Order and proposed Explanatory Document (SG/2017/8 and SG/2017/9)

On 27 January 2017, the Scottish Government was asked:

1. Section 18(2)(e) of the Public Services Reform (Scotland) Act 2010 (the “2010 Act”) provides that the Scottish Ministers may not make provision under section 17(1) of that Act unless they consider that (where relevant) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

Paragraph 6.21 of the Explanatory Document acknowledges that the proposed amendment in article 6 of the draft Order would place certain restrictions on essential suppliers. In particular, paragraph 6.12 acknowledges that restricting suppliers from relying on insolvency-related clauses in their contracts will interfere with their rights of freedom of contract. Arguably, therefore, these are rights which a supplier of essential goods or services might reasonably expect to continue to exercise, even where there are limited protections for such suppliers.

Incidentally, paragraph 6.21 refers to the fact that the same restrictions as those proposed in article 6 of the draft Order already apply to suppliers of trading entities in England and Wales subject to an approved Individual Voluntary Arrangement. Section 372A was inserted into the 1986 Act by the Insolvency (Protection of Essential Supplies) Order 2015 (the “2015 Order”). However, that Order was made under specific powers in the Enterprise and Regulatory Reform Act 2013 (the “2013 Act”), rather than the powers to remove or reduce burdens equivalent to section 17 of the 2010 Act contained in section 1 of the Legislative and Regulatory Reform Act 2006.

a. Please provide further details as to why the Scottish Government considers that a supplier of essential services in Scotland might not reasonably expect to continue to exercise its contractual right to enforce an insolvency-related term of a contract (in accordance with section 18(2)(e) of the 2010 Act).

b. The amendments in article 7 of the draft Order will extend the categories of supplier in section 222(4) of the 1986 Act to which new section 173A of that Act as provided for in article 6 of the draft Order will apply.

Does the Scottish Government consider that this extension has a bearing on whether a supplier of essential services has a reasonable expectation to continue to enforce a right contained in an insolvency-related contract clause in terms of article 6 of the draft Order (per section 18(2)(e) of the 2010 Act)?

c. Would it be proposed to update the section of page 19 of the Explanatory Document considering the condition in section 18(2)(e) of the 2010 Act in light of these points to explain more fully in terms of section 27(1)(d)(i) why the Scottish Ministers consider that condition is satisfied?

2. Will the new Insolvency (Scotland) Rules be made and brought into force before the repeal of the definition of “prescribed” in section 70(1) of the Insolvency Act 1986 (i.e. before article 2 of the draft Order comes into force)? Otherwise, what will be the effect of repealing the definition of “prescribed” in section 70(1) of the 1986 Act on the law contained in the Receivers (Scotland) Regulations 1986 given that the meaning of “prescribed” will relate to rules made under section 411 of the 1986 Act by virtue of section 251 of that Act?

3. Likewise, will the new Insolvency (Scotland) Rules to be made under section 411 of the 1986 Act be brought into force before the repeal of sections 101(4) and 142(6) of the 1986 Act (i.e. before articles 3 and 4 of the draft Order come into force)? Otherwise, what will be the effect of repealing sections 101(4) and 142(6) on the powers and duties of liquidation committees in Scotland, if there is no cross-reference to the powers and duties of commissioners in a sequestration?

4. Section 27(1)(d)(ii) of the 2010 Act requires that the Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the Order would remove or reduce any burden or burdens within the meaning of section 17(1) of that Act.

Paragraphs 6.25, 7.23 and 8.23 of the Explanatory Document state that articles 6, 7 and 8 (respectively) of the draft Order reduce a burden within the meaning of section 17(2)(c) (i.e. an obstacle to best regulatory practice). However, it appears that no explanation is given as to how this is achieved. There is no reference to the factors contained in the definition of “best regulatory practice” in section 17(4) of the 2010 Act.

a. Please therefore explain (with reference to the appropriate factors of best regulatory practice as defined in section 17(4) of the 2010 Act) how section 27(1)(d)(ii) of that Act is complied with for each of articles 6, 7 and 8 of the draft Order.

b. Would it be proposed to update pages 20, 23 and 24, and 30 (respectively) of the Explanatory Document to explain more fully in terms of section 27(1)(d)(ii) of the 2010 Act why the Scottish Ministers consider that the condition in section 17(2)(c) is satisfied in relation to each of articles 6, 7 and 8 of the draft Order?

The Scottish Government responded as follows:

1. On point 1 a., as noted in paragraph 6.22 of the proposed Explanatory Document, new section 173A of the Bankruptcy (Scotland) Act 2016 (“BSA 2016”) would not apply to contracts entered into before that section comes into force – see section 173A(11), as would be inserted by article 6 of the Order. So section 173A will have no effect on contractual rights extant when these measures come into force.

In terms of freedom to contract, going forward suppliers have no reasonable expectation that the conditions under which they offer supplies will not be subject to any legislative change, including appropriate and proportionate restrictions as would be introduced by the proposed section 173A. Equivalent restrictions on suppliers’ ability to rely on insolvency related clauses in supply contracts already apply in the context of individual voluntary arrangements (“IVAs”) in England and Wales by virtue of section 372A of the Insolvency Act 1986 (“IA 1986”) inserted by the Insolvency (Protection of Essential Supplies) Order 2015 (S.I. 2015/989) (“the 2015 Order”), as well as in corporate insolvency across the UK. Particularly in those circumstances suppliers have no reasonable expectation they would

be able to continue to rely on insolvency related contracts without restriction in the context of protected trust deeds (“PTDs”) in Scotland, PTDs in Scotland being a broad equivalent of IVAs in England and Wales.

In addition, section 173A will not prevent suppliers from relying on insolvency related clauses in contracts. Rather restrictions are placed on suppliers’ reliance on such clauses, but subject to safeguards for the suppliers. For example, and as noted in paragraph 6.11 of the proposed Explanatory Document, the supplier may terminate the contract if charges for on-going supply are not paid timeously, or apply to the court for permission to terminate the contract on grounds of hardship. The supplier may request a personal guarantee from the trustee in relation to the continuing supply and terminate the supply if such guarantee is not provided. See in particular proposed new section 173A(3), (4) and (7).

On point 1 b. the Government does not consider separate considerations apply as a result of the extension of section 222 of BSA 2016 by article 7 of the Order. While those amendments affect the scope of the measures introduced, they are introduced at the same time and are considered justified by the same factors noted above.

For these reasons, with reference to section 18(2)(e) of the 2010 Act, the Government considers that proposed new section 173A of BSA 2016 does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

On point 1 c. we would be happy to update the proposed Explanatory Document to add this further explanation.

2. The intention is that the new Insolvency (Scotland) Rules are made before and brought into force to coincide with the repeal of the definition of “prescribed” in section 70(1) of IA 1986 (i.e. made before the coming into force of article 2 of the draft Order for all purposes).

In relation to the amendments to IA 1986 by article 2 of the Order, the intended effect of the partial commencement provision in article 1(3)(a) of the Order was to enable from 26th June 2017 the making of provision in relation to receivership which currently falls to be made by regulations under the relevant sections of the IA 1986 (listed in para 3.4 of the proposed Explanatory Document) instead by rules under section 411 of that Act (article 1(3)(a)(i) of the Order), but without disabling the making of provision by regulations at that date. Commencement for the limited purpose of enabling subordinate legislation to be made does not include commencement for the purpose of disabling it to be made.

The intention is that the new Insolvency (Scotland) Rules are made before, and come into force to coincide with the coming into force of, articles 2 to 5 for all purposes on the date provided for in article 1(3)(b).

For completeness, saving or transitional provision having effect in respect of the requirements of the current Receivers (Scotland) Regulations 1986 could be included in the new Insolvency (Scotland) Rules, ie exercising the power to make relevant provision in relation to receivership by rules after the commencement of the Order.

3. As suggested, the intention is that the new Insolvency (Scotland) Rules are made before and brought into force to coincide with the repeal of sections 101(4) and 142(6) of the 1986 Act (i.e. before articles 3 and 4 of the draft Order come into force for all purposes).

We do not consider that any issues arise. The relevant enabling power for conferral of functions on liquidation committees is currently section 411 of the Insolvency Act 1986 and that will remain the case. Articles 3 and 4 of the Order in particular by repealing section 101(4) and 142(6) of the Insolvency Act 1986 ensure appropriate flexibility and remove any doubt which might exist that the current ability to confer powers on liquidation committees in Scotland in rules is limited by reference to the powers and duties of commissioners in sequestration.

4. Paragraph 6.25 of the Explanatory Document states that article 6 of the draft Order, inserting proposed new section 173A BSA 2016 (effect of protected status of a PTD on essential supplies – restrictions in relation to insolvency- related clauses in supply contracts) reduces a burden within the meaning of section 17(2)(c) of the 2010 Act - i.e. an obstacle to best regulatory practice.

With reference to section 17(4)(a) of the 2010 Act, proposed new section 173A BSA 2016 will by making provision in relation to essential supplies in the context of PTDs in Scotland ensure transparent, accountable and, in particular, consistent regulation, following amendment of IA 1986 to insert a new section 372A in the context of the (broad equivalent of) IVAs in England and Wales by the 2015 Order. With reference to section 17(4)(a) and (b) of the 2010 Act, the regulation is targeted only in relation to PTDs in Scotland – and not also sequestration - for the reasons set out in the proposed Explanatory Document (in particular paragraph 6.12) and is therefore proportionate, targeted only at the cases which require action.

Paragraph 7.23 of the Explanatory Document notes that article 7 of the draft Order, amending section 222 BSA 2016 (protection of essential supplies in personal insolvency) reduces a burden in terms of section 17(2)(c) of the 2010 Act (i.e. an obstacle to best regulatory practice).

With reference to section 17(4)(a) of the 2010 Act, the amendments to section 222 BSA 2016 ensure transparent, accountable and, in particular consistent regulation of essential supplies in personal insolvency in Scotland, ensuring that not only traditional utilities suppliers are covered, as currently the case, but also ‘on-sellers’ of such supplies, and suppliers of IT services: see para 7.2 of the proposed Explanatory Document. As with section 173A, the amendment of section 222 BSA 2016 also ensures consistency with England and Wales following amendment of section 372 IA 1986 for England and Wales by the 2015 Order. With reference to section 17(4)(a) and (b) of the 2010 Act, as para 7.2 of the proposed Explanatory Document also details, the focus of the amendment of section 222 BSA 2016 is utilities and other supplies which are considered to be essential supplies, to bring regulation up to date with modern day commercial practice. This means that regulation is proportionate and targeted only at cases as require action.

Paragraph 8.23 of the Explanatory Document notes that article 8 of the draft Order, amending saving provision in the Public Services Reform (Insolvency) (Scotland) Order 2016 (“the 2016 Order”) reduces a burden within the meaning of section 17(2)(c) of the 2010 Act - i.e. an obstacle to best regulatory practice.

The amendment of those saving provisions is in particular to ensure that modernised provision to be made in new Insolvency (Scotland) Rules in due course can be enjoyed in all corporate insolvency processes in Scotland, regardless of whether those processes begin before or after the coming into force of the new rules, subject to appropriate exceptions, including the transitional arrangements as can be made in the new Insolvency (Scotland) Rules. This is in line with the starting point – including exceptions - for

commencement of the new Insolvency (England and Wales) Rules 2016 (see further para 8.5 of the Explanatory Document in particular). This is for clarity for the end user, ensuring that new modernised rules will be applicable wherever possible, but acknowledging that there may be the need for exceptions, and with a set of transitionals and savings set out so far as possible in one place in the new Rules. This contributes to making the regulation of corporate insolvency processes transparent, accountable, proportionate and consistent.

We would be happy to update the proposed Explanatory Document to add this further explanation.

