31 May 2019

Dear Conveners,

THE INSOLVENCY (AMENDMENT) (EU EXIT) (No. 2) REGULATIONS 2019 EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers & Legislative Reform Committees in September 2018 setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification of a further SI in the area of insolvency which the UK Government propose to make, and the reasons why I would again be content that certain Scottish devolved matters are to be included in this SI.

Earlier this year we made arrangements to deal with deficiencies in insolvency legislation arising from a no deal exit from the EU. This involved making the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 (S.S.I. 2019/94) (an SSI dealing with devolved aspects of insolvency) and the Insolvency (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/146) (a UK SI dealing with reserved aspects and those spanning reserved and devolved competence). The latter following notification through the protocol. These instruments are due to come into force on exit day, or under arrangements to be made for an implementation period in a Withdrawal Agreement as may be agreed with the EU.
The policy rationale for the proposed approach is to remove areas of doubt and confusion in relation to insolvency process in Scotland, which span reserved and devolved competence. In preparing for a No-deal scenario, it provides the most effective means of dealing with these cross-competence elements of insolvency legislation. Insolvency stakeholders have consistently indicated support for amending legislation in this area, insofar as possible, within in a single instrument. The alternative approach in drawing out the devolved aspects of the cross-competence aspects of insolvency with an SSI would create significant complexity.

The remaining devolved deficiencies to be addressed within the further proposed SI stem from the separate significant exercise to modernise the corporate insolvency rules for Scotland which resulted in revised insolvency rules for Scotland coming into force on 6 April 2019. They concern equivalent provision in the new corporate Insolvency Rules to that made in the package of measures earlier this year to the Insolvency (Scotland) Rules 1986 in relation to company winding up which span reserved and devolved competence, and one change to the common EU Regulation dealing with the interconnection of insolvency registers which also affects personal insolvency. The proposed approach will see these issues addressed by provisions within the SI. The approach would be exactly in line with the previous exercise to update insolvency legislation for existing the EU and which was approved by the Scottish Parliament.

Please note that the date on which the UK Government proposes to lay these regulations is 2 September 2019, which would meet the 28 days outlined in our protocol.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you.

JAMIE HEPBURN