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Convener of the Economy, Jobs and Fair Work
Committee

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Dear Gordon

The Scotland Act 1998 (Insolvency Functions) Order 2017

I refer to the above draft Order which was laid before the Scottish Parliament on 14 September 2017 and is to be considered by the Economy, Jobs and Fair Work Committee on 31 October 2017. In light of the technical nature of the Order, I thought it may be helpful to set out some additional background and the context in which it is being introduced.

The Policy Note accompanying the draft Order explains that issues of mixed competence make the law on winding up in Scotland particularly complex. This presents certain challenges in the context of an ongoing project to modernise and update the Scottish insolvency rules in particular for companies, currently the Insolvency (Scotland) Rules 1986. These rules have been heavily amended since 1986 and it is accepted that they are in need of consolidation and modernisation, including to reflect recent changes to primary legislation. The commitment to undertake this modernising and updating project has been welcomed by the insolvency profession and other stakeholders involved.

A similar project was recently undertaken in England and Wales, with the Insolvency (England and Wales) Rules 2016 replacing the Insolvency Rules 1986. In common with the old and new rules in England and Wales, the Insolvency (Scotland) Rules 1986, which of course pre-date devolution, cover the different company insolvency procedures of: (i) company voluntary arrangements, (ii) administration, (iii) receivership and (iv) winding up. In terms of the devolution settlement in Scotland, company voluntary arrangements and administration are reserved; receivership is devolved; and winding up is, as noted, an area of mixed competence (in particular with the general legal effect of winding up reserved and the process of winding up devolved).

Against the backdrop of the devolution settlement the best way forward in terms of structure for the new Scottish rules has been considered by the Scottish and UK Governments and has also been discussed with the industry working group that has been established to support this significant project. The intention is that the new Scottish rules will span two instruments. A UK Government statutory instrument will include provision on the reserved areas of company voluntary arrangements and administration. A Scottish Government Scottish statutory instrument will include provisions on the devolved area of receivership and the mixed competence area of winding up.

This draft Order facilitates such an approach. It will, in particular, effect a mutual conferral of functions on each of the UK and Scottish Governments so that going forward both will be able to bring forward rules on winding up of companies irrespective of whether such rules relate to reserved or devolved aspects of winding up. The Order provides that functions conferred by it can only be exercised with agreement: so functions conferred on the Scottish Government can be exercised only with agreement of the UK Government and *vice versa*. As noted, the intention for the immediate purposes of the new Scottish rules project is for the Scottish Government to take forward rules on winding up in a Scottish statutory instrument. This will overcome the difficulties that would otherwise arise in drafting the new rules for winding up of companies which, in terms of the devolution settlement as it stands, would require to be split between a Scottish Government Scottish Statutory Instrument (SSI) and a UK Government Statutory Instrument. It would be problematic in drafting terms to separate out the reserved and devolved aspects of winding up to enable two distinct sets of rules to be drafted by each Government and, more importantly, would produce confusing rules.

It is essential that the new Scottish rules work for insolvency practitioners and all those that use, or are impacted by, the legislation. The rules modernisation project is, by its nature, complex and efforts are being made to ensure that the two instruments comprising the new Scottish rules will be similar in structure and also consistent with the style and format of the recently modernised rules introduced in England and Wales. This outcome would be severely compromised if the winding up provisions were to be contained within two separate instruments.

As to the role of the Scottish and UK Parliaments, in connection with the exercise of functions which would be conferred by this Order, I believe that, against the background of the devolution settlement, the proposed arrangement made possible by the conferral of functions effected by the Order is a sensible and pragmatic solution. To illustrate the position in relation to the role of the Scottish and UK Parliaments in connection with the exercise of functions conferred by this Order, an SSI as part of the new Scottish rules, including provision made with the agreement of the UK Government in exercise of functions conferred on the Scottish Government by the Order, would be laid and subject to scrutiny in the Scottish Parliament, but not the UK Parliament. The same will apply to any SSI in the future to amend or replace winding up provision in the new Scottish rules which might also include provision, with agreement of the UK Government, in exercise of functions conferred on the Scottish Government by the Order. The corollary is that any future UK Government instrument amending or replacing the new Scottish rules on winding up, which might contain provision with the agreement of the Scottish Government in exercise of functions conferred on the UK Government by the Order, would be laid and subject to scrutiny in the UK Parliament, but not the Scottish Parliament.

This is broadly comparable to the position for implementing EU obligations, by virtue of section 57(1) of the Scotland Act 1998, where the Scottish and UK Ministers have concurrent functions of implementing EU law in devolved areas. A recent example involving the exercise of these powers concerned the recast EU Insolvency Regulation (EU 2015/848). The Scottish Government agreed that necessary amendments to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 and the Cross-Border Insolvency Regulations 2006, insofar as they related to devolved matters, should be implemented by regulations (the Insolvency Amendment (EU 2015/848) Regulations 2017 (SI 2017/702)) made by the Secretary of State and laid in the UK Parliament by virtue of section 57(1) of the Scotland Act 1998.

In the event, therefore, that the Scottish Government gives its agreement to the UK Government exercising functions conferred by the Order to make subordinate legislation in relation to winding up in Scotland, the Scottish Government would give the commitment to write to the Convener of the Economy, Jobs and Fair Work Committee to advise that such agreement is being given.

I hope that this letter is helpful and I look forward to meeting with the Economy, Jobs and Fair Work Committee on 31 October 2017 in connection with the draft Order and will be happy to answer any questions in advance of this session.

Kind regards



PAUL WHEELHOUSE