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Economy, Energy and Fair Work Committee
Comataidh Eaconamaidh, Lùth is Obair Chothromach

**Legislative Consent Memorandum on
the Corporate Insolvency and
Governance Bill**



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Economy, Energy and Fair Work Committee

Remit: To consider and report on economy and fair work matters falling within the responsibilities of the Cabinet Secretary for Economy, Fair Work and Culture; matters relating to the digital economy within the responsibilities of the Cabinet Secretary for Finance, and matters relating to energy falling within the responsibilities of the Minister for Energy, Connectivity and the Islands.



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Introduction

1. The [Corporate Insolvency and Governance Bill](#) is a UK Government Bill introduced in the House of Commons on 20 May 2020. The Bill is currently in its third reading in that House.

About the Bill

2. The Bill contains a range of proposals which are intended to support companies facing financial difficulties. Some of these changes will be permanent, while some are time-limited in response to the current coronavirus crisis. The Bill's provisions would apply to companies. Separate insolvency arrangements apply to individuals, sole traders and partnerships. Some of the proposals would not apply to financial services companies (as this sector has additional legal obligations in insolvency situations).
3. The Bill comprises a package of measures, the overarching purposes of which are to help companies to continue trading throughout the Coronavirus pandemic and to increase the options for companies which may be at risk of insolvency as a result of the pandemic to re-structure or to consider rescue options free from creditor action.
4. A summary of measures in the Bill that require legislative consent can be found in the LCM (see Annex A).
5. A [legislative consent memorandum](#) was lodged by Fiona Hyslop MSP, Cabinet Secretary for Economy, Fair Work and Culture, on 2 June 2020. The LCM can be found in Annex A.

Permanent proposals in the Bill

6. **A “moratorium” for companies facing financial problems** - which would prevent creditors taking action against them for an initial 20 days (which can be extended). It would apply where it is likely that the moratorium would allow the company to be rescued as a going concern (rather than it collapsing and its assets being sold off). An insolvency practitioner would be appointed to monitor the process, but the company's directors would remain in control of day-to-day business.
7. **New option for corporate restructuring** - companies may need to restructure e.g. as a result of a merger, or because they cannot pay their debts. The changes would provide additional flexibility by enabling companies to force reluctant groups of creditors to agree to proposals (with the agreement of the courts). Being able to overrule the wishes of creditors like this is colloquially referred to as “cram down”.
8. **Protection of supply of goods and services to insolvent companies** – at present, suppliers may end their contracts or increase their prices as a result of a business becoming insolvent. The provisions would prevent changes to contracts for goods and services as a result of a company's insolvency. The courts would be able to exempt suppliers from these requirements if it would cause them hardship. There is also a temporary exemption for smaller businesses.

Temporary proposals in the Bill

9. **Wrongful trading** – currently company directors can become personally liable for company debts if they allow the businesses to continue to trade when there was no

reasonable prospect of avoiding insolvency. The Bill would suspend this duty from 1 March 2020 until a month after the Bill comes into force.

10. **Suspension of court action where coronavirus is a factor** – creditors would be prevented from asking the courts to wind up a company where coronavirus has had a financial effect on the business. There would be an exception where the creditor could show that the business would be unable to pay its debts even if the impact of coronavirus was discounted. Creditors would be unable to rely on a statutory demand for payment as the basis for a petition for winding up if the demand was issued between 1 March and 30 June.
11. **Changes to corporate governance** – companies have various legal obligations to supply information and hold meetings. The Bill would make certain changes and extend certain deadlines to provide flexibility during the coronavirus crisis. It would also enable further changes to be brought forward using secondary legislation.

Devolved Competence in this Area

12. The division between reserved and devolved competence for insolvency matters is complex. Broadly speaking, competence for the legal effect of corporate insolvency is reserved; competence for the legal effect of individual insolvency, as well as for the insolvency of partnerships and associations, is devolved.
13. However, competence for the procedures surrounding both corporate and personal insolvency is devolved, as is the effect of insolvency on court processes to enforce debts. Some additional areas of corporate insolvency are also devolved, including making provision in relation to registered social landlords and a form of insolvency known as administrative receivership.

Consideration by the Delegated Powers and Law Reform Committee

14. The Delegated Powers and Law Reform Committee considered the LCM at its meeting on 9 June 2020 and wrote to the Committee. The letter is attached in Annex B

Conclusion and recommendation

15. The Committee noted in its discussion of the LCM on [9 June 2020](#) that the UK Government had previously consulted on the permanent provisions in the Bill and the Scottish Government has undertaken to monitor and report on the devolved aspects of the temporary proposals.

16. **The Committee agreed with the recommendation of the Scottish Government that the Scottish Parliament should give its consent to the relevant provisions in the UK Corporate Insolvency and Governance Bill.**

Annex A

LEGISLATIVE CONSENT MEMORANDUM

CORPORATE INSOLVENCY AND GOVERNANCE BILL

Background

1. This memorandum has been lodged by Fiona Hyslop MSP, Cabinet Secretary for Economy, Fair Work and Culture under Rule 9B.3.1(a) of the Parliament's Standing Orders, and is supported by Jamie Hepburn MSP, Minister for Business, Fair Work and Skills. The Corporate Insolvency and Governance Bill ("the Bill") was introduced in the House of Commons on 20 May 2020. The latest version of the Bill can be found at—

<https://services.parliament.uk/Bills/2019-21/corporateinsolvencyandgovernance.html>

Content of the Bill

2. Plans to introduce the Bill were announced by the UK Government on 28 March 2020. It contains measures aimed at ensuring companies have an improved chance of surviving the economic crisis generated by the Coronavirus outbreak. A number of measures in the Bill were subject to a consultation by the UK Government in 2018, but have been awaiting a legislative slot to be taken forward. The pandemic has greatly increased the potential importance and hence the urgency of these reforms.

3. The Bill comprises a package of measures, the overarching purposes of which are to help companies to continue trading throughout the Coronavirus pandemic and to increase the options for companies which may be at risk of insolvency as a result of the pandemic to re-structure or to consider rescue options free from creditor action.

4. The Bill includes the following measures—

- A new moratorium to give companies a "breathing space" from creditor action, and to allow the company to consider rescue options that would allow it to continue as a going concern rather than enter insolvency;
- A new re-structuring process, to be known as a re-structuring plan, which can be proposed by companies and through which the objections of certain classes of creditors may be "crammed-down";
- A prohibition on termination clauses in supply contracts, enabling companies to continue to obtain essential goods and supplies while attempting a rescue;
- A temporary prohibition on the issuing of statutory demands under the Insolvency Act 1986;
- A temporary restriction on the court's powers to wind up a company on the grounds that it is unable to pay its debts where the company's financial position has been impacted by the Covid-19 outbreak;
- Temporary removal of the threat of personal liability of company directors arising from wrongful trading when making the decision as to whether to allow a struggling company to continue to trade;

- Adjustments to certain statutory deadlines applying to company filing requirements and company meetings, and provision to allow certain meetings to take place virtually;
- Power to make temporary amendments to corporate insolvency and governance legislation in response to the Covid-19 outbreak.

Provisions which relate to Scotland and require legislative consent

5. The majority of provisions in the Bill relate to reserved matters. The regulation of companies is a reserved matter and various aspects of corporate insolvency are also reserved. Several aspects of the Bill concern matters which are excepted from the relevant reservations and which engage the LCM process. Further detail on the parts of the Bill which engage the LCM process is set out in **Annex A**.

Consultation

6. The UK Government published a consultation on Insolvency and Corporate Governance in March 2018 receiving 93 responses, and published their intended way forward at the end of August that year. The Bill implements a selection of the proposals agreed then. There has been no consultation on the Bill itself, but those stakeholder organisations which commented on the Bill's publication were all supportive.

Financial Implications

7. It is not considered that the Bill will impose significant costs either on companies or on the various Regulators – indeed, it is designed to help reduce the challenges companies face, in particular in creating viable rescue plans, and as such, should reduce costs and preserve significant economic value. The Business and Regulatory Impact Assessment – available here <https://publications.parliament.uk/pa/bills/cbill/58-01/0128/IA200519.pdf>

- suggests the whole Bill has a net present value of £1.9bn, with a net saving to business of £223m pa. The main elements of cost are familiarisation (estimated as a one-off cost of £163m) and ongoing insurance costs to suppliers of being required to continue to supply essential services to businesses resulting from the suspension of ipso facto clauses (estimated at an annual cost of £290m).

Reporting on use of powers

8. As with the provisions of The Coronavirus Act 2020 (“the UK Act”) for which the Scottish Parliament gave legislative consent, and with the other legislation brought forward to expedited timescales to respond to the pandemic, we consider it essential that this legislation be supported by safeguards including regular reporting and review. At the time when the Scottish Parliament considered the Legislative Consent Memorandum for the UK Act, the Scottish Government gave a commitment to put in place its own reporting arrangements, consistent with the reporting requirements established within our own Scottish Acts. Those reporting arrangements will also be applied to the elements of the Corporate Insolvency and Governance Bill which are made for Coronavirus-related purposes and which are covered by this memorandum.

Conclusion

9. It is the view of the Scottish Government that it is preferable in ensuring the Scottish Government's response to the economic impact of the COVID-19 pandemic, and in particular that viable companies in financial difficulty have a better opportunity to be

rescued as a going concern, that the relevant provisions which fall within the legislative competence of the Scottish Parliament, or which alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

Draft Legislative Consent Motion

10. The draft motion, which will be lodged by Fiona Hyslop is—

“That the Parliament agrees that the relevant provisions of the Corporate Insolvency and Governance Bill, introduced in the House of Commons on 20 May 2020, so far as they fall within the legislative competence of the Scottish Parliament, or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT

June 2020

ANNEX A

Provisions of the Bill which extend to Scotland and engage the LCM process

Registered Social Landlords

Part 1 of the Bill inserts a new Part A1 and Schedule ZA1 into the Insolvency Act 1986 (“the 1986 Act”). Part A1 makes provision for a new moratorium. The purpose of the moratorium is to provide a company with temporary “breathing space” from creditor enforcement action. New Part A1 of the 1986 Act makes provision as to the manner in which a company may enter a moratorium; the office-holder appointed to supervise a moratorium and that person’s functions; and the effects of a moratorium. New Schedule ZA1 to the 1986 Act sets out which companies are eligible for the moratorium.

The new moratorium is a form of protection for a company from its creditors and, as such, these provisions fall within the reservation of insolvency which specifically covers procedures giving protection from creditors.

There is an exception to the reservation on procedures giving protection from creditors insofar as it applies to a moratorium on the disposal of property by companies which are registered social landlords (“RSLs”). New section A49 of the 1986 Act confers a power upon the Scottish Ministers to make regulations for the purpose of modifying new Part A1 of the 1986 Act as it applies in relation to a company that is a RSL, or to make provision in connection within the interaction between new Part A1 of the 1986 Act and the provision made by Part 7 of the Housing (Scotland) Act 2010 in relation to such a company. Schedule 3 to the Bill confers a further power upon the Scottish Ministers to apply the new moratorium, with or without modifications, to RSLs which are registered societies.

To the extent that the moratorium in new Part A1 of the 1986 Act would apply to companies which are also RSLs, the Bill makes provision in a devolved area. The powers conferred upon the Scottish Ministers in new section A49 of the 1986 Act and in Schedule 3 to the Bill to make regulations in connection with the moratorium and RSLs would alter the executive competence of the Scottish Ministers.

Prosecution of delinquent officers of company

New section A47 of the Insolvency Act 1986 requires the monitor in a moratorium to report to the appropriate national authority where the monitor considers that any past or present officer of the company has committed an offence in connection with the moratorium, and to provide that authority with such information as the authority requires. The appropriate national authority in relation to Scotland is the Lord Advocate. Although the Bill does not confer a function on the Lord Advocate expressly, the fact that the Lord Advocate can seek further information in response to a monitor's report under new section A47 indirectly affects the scope of Lord Advocate's functions in connection with the prosecution.

Prohibition on termination clauses on insolvency

Clauses 12 and 13 of the Bill make provision in relation to the termination of contracts for essential goods and services where a company enters an insolvency procedure.

Clause 12 inserts new section 233B into the 1986 Act. New section 233B(2) provides that a provision of a contract for the supply of goods or services which would either bring the contract to an end automatically on insolvency, or which would authorise the supplier either to terminate the contract altogether or to stop supplying the company on insolvency, ceases to have effect when the company becomes subject to a relevant insolvency procedure. Clause 13 creates a temporary exclusion from the prohibition for small suppliers for reasons connected to Covid-19.

The prohibition on termination clauses would apply where a company enters any of the insolvency procedures listed in new section 233B(2). The list of procedures includes administrative receivership, which is a devolved insolvency procedure. The Bill also confers power upon the Secretary of State to omit any insolvency procedure from the list in section 233B(2) by regulations. Insofar as that power may be exercised to remove administrative receivership from the list of relevant insolvency procedures, the Secretary of State must consult the Scottish Ministers before making the relevant regulations.

Restriction on winding up

Schedule 10 to the Bill contains temporary restrictions on the winding up of a company where the company's financial situation has been impacted by Covid-19, and adjusts the commencement date of a winding up where winding up is ordered within the relevant period. Schedule 10 makes relevant modifications of the 1986 Act including in respect of the rules on gratuitous alienations, unfair preferences and floating charges. The modifications have effect so that the "look-back" period applicable under those rules is adjusted to take account of the change in the commencement date of the winding up. The rules on prior transactions and floating charges are excepted from the insolvency reservation and so the adjustments the Bill makes to these rules relate to devolved matters.

Scottish Charitable Incorporated Organisations

The provisions in the Bill which would enable virtual meetings apply to Scottish Charitable Incorporated Organisations ("SCIOs"). The Bill also confers power upon the Scottish Ministers to make regulations which would alter the period of time within which virtual meetings of SCIOs are permissible and to make further provision in connection with virtual meetings of SCIOs. These provisions relate to charities, which are a devolved matter, and the powers conferred on the Scottish Ministers to make provision in connection with meetings of SCIOs would alter the executive competence of the Scottish Ministers.

Power to amend corporate insolvency and governance legislation

Clause 18 of the Bill confers power on the Secretary of State to make regulations modifying corporate insolvency and governance legislation (including the Insolvency Act 1986 and any instruments made under it) by altering the way insolvency processes apply to particular entities; or altering the conditions that must be met before particular entities enter an insolvency process. The power is time-limited and may only be used for specific coronavirus-related purposes, for example in order to reduce the number of entities entering into insolvency as a result of the pandemic.

To the extent that this power could be used to modify the law on receivership and the devolved elements of winding up it relates to devolved matters, and engages the LCM process. The Scottish Ministers must be consulted where the Secretary of State proposes to exercise the power in devolved areas.

Annex B

Delegated Powers and Law Reform Committee

Letter from the Convener of the Delegated Powers and Law Reform Committee dated 9 June 2020

Corporate Insolvency and Governance Bill (UK Parliament legislation)

Dear Michelle,

At its meeting on 9 June, the Delegated Powers and Law Reform Committee considered the delegated powers in the Corporate Insolvency and Governance Bill.

The Committee agreed to highlight the following issues for your consideration. The Committee nevertheless appreciates that due to timings your Committee may not have time to fully consider it in your own response on the Legislative Consent Memorandum. This letter has therefore also been copied to the Cabinet Secretary for Economy, Fair Work and Culture.

Clause 1 and section A49(3): Power to modify this Part etc in relation to certain companies

Schedule 1: GB moratoriums: eligible Companies: Schedule ZA1: paragraph 22: eligible companies)

In relation to the above delegated powers in the Bill, the Committee wishes to highlight the flexibility available to the Scottish Ministers to make the regulations subject to the negative procedure for the first 6 months after Royal Assent. You may wish to consider whether the justification given by the UK Government for that flexibility – the need to respond quickly to the challenges that may be faced by registered social landlords in the current economic climate – is acceptable from a policy perspective.

In considering this matter, you may also wish to note the Scottish Government's commitment in the LCM to regularly review and report on those elements of the Bill which are made for Coronavirus-related purposes. This commitment would extend to regulations made under these powers, including those made under the negative procedure.

Clause 18 - Regulations to amend legislation: Great Britain

The Committee also draws your attention to the powers in clause 18 which are exercised by the UK Ministers, after consultation with the Scottish Ministers, to make provision within devolved competence. There would therefore be no formal means by which the Scottish Parliament could scrutinise such regulations, nor be notified that they had been laid before the UK Parliament. The Committee is of the view that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers which make provision within devolved competence.

No explanation is given in the LCM of why it is considered appropriate for the power to be conferred on the Secretary of State following consultation with the Scottish Ministers, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence. This is something you may wish to consider.

I hope you find this letter useful in your consideration of this Bill.

Yours sincerely,

Bill Bowman

Convener of the Delegated Powers and Law Reform Committee

