

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

UK GOVERNMENT AMENDMENT TO THE ENTERPRISE AND REGULATORY REFORM BILL

1. The draft motion, which will be lodged by the Minister for Energy, Enterprise and Tourism, is:

“That the Parliament agrees that the relevant provisions of the amendment to the UK Enterprise and Regulatory Reform Bill, tabled in the House of Lords on 25 February 2013, relating to the power to add to supplies protected under the Insolvency Act 1986, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

2. This is the second supplementary LCM for the Enterprise and Regulatory Reform Bill (“the Bill”). A previous LCM was passed for the Green Investment Bank provisions of the Bill on 18 September 2012 and a supplementary LCM was passed for the midata provisions on 19 February 2013.

Background

3. This memorandum has been lodged by Fergus Ewing MSP, Minister for Energy, Enterprise and Tourism, under Rule 9.B.3.1(c)(i) of the Parliament’s standing orders. The amendment was tabled in the House of Lords on Monday, 25 February 2013. The amendment can be found at:

<http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0083/amend/su083-ib.htm>

The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>

4. The Bill will make provision on various issues including: the UK Green Investment Bank (GIB); employment law; establishment of the Competition and Markets Authority and abolition of the Competition Commission and the Office of Fair Trading; amendment of the Competition Act 1998 and the Enterprise Act 2002; the reduction of legislative burdens; copyright and rights in performances; to make provision about payments to company directors; and for connected purposes.

5. The amendment will give the Secretary of State the power to make an Order that:

(1) amends sections 233 and (2) section 372 of the Insolvency Act 1986 - by extending the list of suppliers to which the sections apply (to all suppliers of the utilities listed in s.233(3) and s.372(4)) and to include the supply of goods and services relating to electronic means (“IT supplies”) on the list. These sections currently allow for certain providers of services, such as gas or electricity, to seek a personal guarantee from an insolvency practitioner before continuing to supply an

insolvent business and prevent such suppliers from demanding that pre-insolvency arrears are cleared as a condition of continuing supply. The demand for clearing debts before continuing supply can hamper the operation of a business in insolvency; and

Provisions which relate to Scotland

6. Point (1) concerns section 233 which extends to the whole of Great Britain. Any change to section 233 affects all insolvency proceedings, including receiverships - which are devolved. If the power (or the ancillary power to make incidental, supplementary, consequential, transitional or saving provision) is exercised, then companies entering receivership in Scotland would have their IT services protected under the 1986 Act, along with their gas, electricity and other supplies – provision that, ordinarily, would fall within the legislative competence of the Scottish Parliament.

7. Point (2) concerns Section 372 which does not extend to Scotland and the amendment to this section will have the same extent. The other insolvency proceedings - administration and company voluntary arrangements are reserved and the changes to liquidation fall within the partial reservation on liquidation because the changes only affect the legal effect of winding up (which is reserved) rather than the process itself (which is devolved).

9. Changes already introduced by the Enterprise Act 2002 contain provisions to appoint administrators rather than receivers, with limited exceptions, the effect of this being that receiverships are being phased out and continue to reduce year on year. In practice, the effect of the change is likely to be narrow.

10. It may be helpful for Parliament to know that during the financial year 2011/12, there were only 35 receiverships in Scotland, for the three quarters reported for financial year 2012/13 there have been 24 receiverships.

Reasons for seeking a Legislative Consent Motion

11. Westminster's reserved powers, to make changes in insolvency proceedings, do not extend to receiverships which fall within the legislative competence of the Scottish Parliament. However, any change to section 233 of the Insolvency Act 1986 affects all insolvency proceedings, including receivership which is devolved. Therefore, the legislative consent of the Scottish Parliament is required to allow the provision, which these changes to section 233 will make for receiverships, to extend to Scotland.

12. The Scottish Government has considered the UK Government's proposed change, and has concluded that in this case the change sits in the law of corporate insolvency better as a single consistent change introduced as part of the UK provision. The Scottish Government is also of the view that it is in the interest of stakeholders to make this change by way of UK legislation.

Financial/Resource Implications

13. There are no financial or resource implications.

Consultation

14. The UK Government has not consulted on this provision because of the short time frame within which the decision to take the policy forward was made, although the Scottish Government understands that the matter has been discussed with the main insolvency practitioners' body, R3, and that a full consultation and impact assessment will be carried out before the power is used.

Conclusion

15. Extending the amendment to apply in Scotland will ensure that companies entering receivership in Scotland would be able to have the same rights of continuity of supply and service of IT services as those in the rest of the UK.

16. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions, as outlined above, which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

SCOTTISH GOVERNMENT
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