

# LEGISLATIVE CONSENT MEMORANDUM

## CORPORATE INSOLVENCY AND GOVERNANCE BILL

### Draft legislative Consent Motion

1. The draft motion, which will be tabled by the Minister for the Economy is:

***“That this Assembly agrees to amendments to Northern Ireland’s insolvency and companies legislation to assist companies and mutuals in financial difficulties, as a result of the coronavirus pandemic, being included in the Corporate Insolvency and Governance Bill as introduced in the House of Commons”***

### Background

2. This memorandum has been laid before the Assembly by the Minister for the Economy under Standing Order 42A (2). The Corporate Governance and Insolvency 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>

### Summary of the Bill and its policy objectives

3. The policy objectives are twofold. They are
  - i. to put measures in place to help ensure the survival of companies and mutual societies which are experiencing financial difficulties because of the coronavirus pandemic; and
  - ii. to enable companies and mutuals to comply with governance requirements in ways which are compatible with the restrictions on movement and gatherings introduced to curb the spread of coronavirus.
4. The measures to assist companies and mutuals in financial difficulties consist of amendments to insolvency and company legislation applying in GB and Northern Ireland. The measures relating to insolvency are, in summary, as follows:
  - It will not be possible to petition to have companies wound up where the statutory demand was served during a specified period beginning on 1 March 2020.
  - The court’s right to make winding up orders will be suspended for a time in cases where a company’s inability to pay its debts is a consequence of the coronavirus.

- Directors will have immunity from being held personally liable for wrongful trading where deterioration in a company's finances during a specified period is attributable to the virus.
  - Companies will be given the opportunity of a moratorium, free from creditor pressure, in which to assess what would be their best rescue or restructuring option.
  - There will be provision to ensure that companies continue to have access to the services and supplies they need, if they are being kept open during a moratorium or insolvency procedure.
  - There will be a new power to amend corporate insolvency or governance legislation to address problems caused by increases in the numbers of companies entering insolvency proceedings.
5. The proposed amendments to company law will include:
- provision of a new rescue and restructuring procedure; and
  - measures to ensure those companies required by law to hold Annual General Meetings (AGMs) will be able to do so safely, consistent with the restrictions on movement and gatherings introduced to address the spread of coronavirus.
6. Whilst the amendments to company legislation do not require inclusion in this LCM, it is considered that mutuals (credit unions, co-operatives and community benefit societies) should benefit from the same easements that are being proposed for companies as regards meetings.

### **Provisions which deal with a Devolution Matter**

7. Legislation dealing with insolvency and mutuals is a devolved matter in Northern Ireland. Legislative consent is therefore required for the following provisions:

#### Clause 4 Moratoriums in Northern Ireland

8. This clause inserts new Part 1A containing Articles 13A to 13HE into the Insolvency (Northern Ireland) Order 1989. A moratorium, which had been available to companies considering entry into a voluntary arrangement with their creditors, is now replaced by a new free-standing moratorium.
9. The new moratorium will give companies a breathing space during which, free from the threat of creditor action, they will be able to explore the full range of rescue and restructuring options available to them. It will last for an initial period of 20 business days and it will be possible for this period to be extended.
10. The moratorium will be overseen by an insolvency practitioner acting as a monitor, although the directors will remain in charge of running the company. Anyone doing business with the company will have to be informed that it is subject to a moratorium and there will be restrictions on

the company taking credit or disposing of property. Creditors, directors, company members and anyone else affected by the moratorium will have the right to apply to the High Court if they are aggrieved by any aspect of the monitor's performance.

11. Clause 4 also introduces Schedules 5 and 6 which respectively insert,
  - a new Schedule ZA1 into the Insolvency (Northern Ireland) Order 1989 which establishes conditions for eligibility for the new moratorium;
  - a new schedule ZA2 making provision about contracts involving financial service

#### Clause 5 and Schedule 7. Moratoriums in Northern Ireland: further amendments and transition

12. Clause 5 and schedule 7 make amendments to legislation which are consequential on the new moratorium.

Clause 6 and Schedule 8 Moratoriums in Northern Ireland: temporary modifications

13. Clause 6 and Schedule 8 make temporary amendments to Part 1A to apply for a period during the Coronavirus crisis.

#### Clause 7 and Schedule 9 Arrangements and reconstructions for companies in financial difficulty

14. Clause 7 and Schedule 9 insert a new Part 26A into the Companies Act 2006 which will allow the High Court to sanction a plan that binds creditors to a restructuring plan if it is fair and equitable and in the interests of creditors. Creditors vote on the plan, but the Court can impose it on dissenting creditors ('cram down').

#### Clause 9 and Schedule 11 Winding-up petitions: Northern Ireland

15. Clause 9 and Schedule 11 provide a temporary measure linked to the Coronavirus pandemic and prevent the presentation of petitions to have companies wound up on foot of statutory demands made during the period 1 March to 30 June 2020. The Court is also forbidden from making winding-up orders on foot of petitions presented during what is known as the restricted period unless that insolvency is for reasons not connected with the coronavirus.

#### Clause 11 Suspension of liability for wrongful trading: Northern Ireland

16. Clause 11 is a temporary measure which provides that any deterioration in a company's financial position between 1 March and 30 June 2020 is not to be taken into account by the High Court in determining to what extent a company director is to be held personally liable under Article 178 of the Insolvency (Northern Ireland) Order 1989 for wrongful trading. It will be

possible for the Department to alter the end date of this period by regulations.

#### Clause 14 Protection of supplies of electricity, gas, water etc: Northern Ireland

17. Clause 14 amends Article 197 of the Insolvency (Northern Ireland) Order 1989. The existing Article prevents utility suppliers demanding payment of outstanding charges as a condition of continuing supply to companies subject to insolvency proceedings where the insolvency office-holder requests this. The supplier can insist that the office-holder personally guarantees payment of charges for supplies made while the insolvency procedure is underway. The amendments are to apply Article 197 to new categories of electricity provider and to suppliers of IT goods and services, and to cover cases where utility supplies are made by a landlord.

#### Clause 15 Further protection of essential supplies: Northern Ireland

18. Clause 15 inserts a new Article 197A into the Insolvency (Northern Ireland) Order 1989. Article 197A will apply to the same range of utility supplies as Article 197 and will prevent the supplier relying on any clause in a contract which would entitle the supplier to terminate the contract or the supply, or do anything else (such as raising the price) where the customer enters administration or a company voluntary arrangement.

#### Clause 16 Protection of supplies of goods and services: Northern Ireland

19. Clause 16 inserts new Article 197B into the Insolvency (Northern Ireland) Order 1989. Article 197B applies in the case of contracts for goods and services other than utility supplies. It will prevent the supplier relying on any clause in a contract which would entitle the supplier to terminate the contract or the supply, or do anything else (such as raising the price) where the customer avails of a moratorium under new Part 1A of the Insolvency (Northern Ireland) Order 1989 or becomes subject to a corporate insolvency procedure.
20. The supplier will also be forbidden from insisting on being paid for supplies made prior to the company's entry into insolvency proceedings as a condition of continuing the supply at the request of the insolvency office-holder.
21. Clause 16 also introduces Schedule 13 which inserts Schedule 2ZZA into the Insolvency (Northern Ireland) Order 1989. Schedule 2ZZ provides for exclusions from the operation of Article 197B.
22. Clause 16 also inserts new Article 197C into the Insolvency (Northern Ireland) Order 1989 to give the Department power to amend Article 197B and Schedule 2ZZA by regulations.

#### Clause 17 Temporary exclusion for small suppliers: Northern Ireland

23. Clause 17 is a temporary provision, It provides that during “the relevant period” Article 197B is not to apply in the case of suppliers which are small entities. Small entities are defined as businesses which meet two out of three of the following requirements; their annual turnover does not exceed £10.2 million, their balance sheet total does not exceed £5.1 million or they do not have more than 50 employees.

#### Clause 26 Regulations to amend legislation: Northern Ireland

24. Clause 26 gives the Department, or the Secretary of State for Business, Energy and Industrial Strategy, the power to make regulations which amend corporate insolvency or governance legislation so as to change-
- the conditions that have to be met before businesses can enter a corporate insolvency or restructuring procedure;
  - the way in which corporate or restructuring procedures apply to entities; or
  - duties of persons with corporate responsibility or the liability of those persons to any sanction.

#### Clause 27 Purposes

25. Regulations under clause 26 can only be made for reasons connected to the coronavirus.

#### Clause 28 Restrictions

26. Clause 28 places limits on the Secretary of State’s or the Department’s power to make regulations under clause 26.

#### Clause 29 Time-limited effect

27. Clause 29 provides for regulations made under clause 26 to apply for a maximum of six months at a time.

#### Clause 30 Expiry

28. Clause 30 provides for the Secretary of State and the Department’s power to make regulations under clause 26 to expire on 30 April 2021, although the Secretary of State and the Department will have power to renew that power for periods of up to one year.

#### Clause 31 Consequential provision

29. Clause 31 enables the Department or the Secretary of State to make regulations needed as a consequence of regulations made under clause 26.

#### Clause 32 Procedure for regulations made by the Department

30. Clause 32 establishes what Assembly control is in place where the Department makes regulations under clauses 26. 30 and 31.

### Clause 33 Procedure for regulations made by the Secretary of State

31. Clause 33 sets out requirements for laying regulations made under clauses 26, 30 and 31 before Parliament where the regulations are made by the Secretary of State.

### Clause 34 Interpretation

32. Clause 34 is the interpretation provision for clauses 26 to 33.

### Clause 35 Meetings of companies and other bodies

33. Clause 35 introduces temporary relaxations to enable mutuals to hold meetings in a manner that is consistent with not only their constitutional arrangements but their legal obligations. During the temporary period in which these measures are in force, mutuals will be given greater flexibility as to the manner in which such meetings are held. For example, they will be able to hold meetings, and allow votes to be cast, by electronic or other means and they will be free from restrictions to hold a meeting at a particular location. The measures also make temporary provision to extend the period within which mutuals must hold an AGM in order to offer further flexibility if required.
34. These measures will only apply in respect of meetings due to take place between a temporary period, which begins on 26 March 2020, and runs until the end of September. Although the clause grants the Department the power to extend that period by up to three months at a time, but not beyond April 2012.
35. Clause 35 also gives the Department power to make further provisions in relation to meetings if necessary.

### Clause 40 Power to change duration of temporary provisions: Northern Ireland

36. Clause 40 enables the Department to make regulations altering the time period for which temporary provisions included in the Bill are to apply.

### **Offences created by the Bill**

37. Where appropriate the Bill will create new offences in Northern Ireland, in line with elsewhere in the UK, which are primarily to ensure that the measures being introduced to assist companies are not abused. Officials will notify the Department of Justice of the new offences when time permits.

### **Position in the other devolved Administration**

38. Corporate insolvency is not a devolved matter in Wales. A Legislative Consent Motion will be sought from the Scottish Parliament for some of the corporate insolvency measures. Company legislation is made on a UK wide basis but a Legislative Consent Motion will be needed from the Scottish Parliament to enable some of the amendments to it made by the Bill to apply to Charitable Incorporated Organisations (CIOs).

## **Reasons for making the Provisions**

39. If the provisions as outlined are agreed by the Assembly, it will mean that Northern Ireland companies will have access to the same support and protection measures to assist with rescue and restructuring at the same time as their GB counterparts.
40. The social restrictions that have been placed on individuals to reduce the spread of the Coronavirus is having a devastating effect on businesses across the world. Local businesses, with their heavy dependence on the travel, tourism and hospitality sectors, are likely to encounter significant difficulties as a consequence of the measures being taken to curb the spread of the Coronavirus.
41. By giving companies an opportunity to restructure, reorganise and recover, the amendments to insolvency legislation will assist in reducing the number of companies forced into liquidation in Northern Ireland as a result of the lockdown and social distancing measures. This will help safeguard employment and maintain the social fabric and avoid the adverse effects which the closure of those companies would have on the local economy.

## **Reasons for utilizing the Bill rather than an Act of the Assembly**

42. It would take considerably longer to pass an Act of the Assembly to introduce these measures into law in Northern Ireland. During that time, local businesses would not be able to avail of the same support and relief as is proposed for struggling companies in Great Britain.
43. The only way to have the necessary amendments to Northern Ireland insolvency legislation made immediately, when they are most needed by companies in Northern Ireland, is to allow them to be included in the Westminster Corporate Insolvency and Governance Bill.
44. In addition to the measures for which Legislative Consent is needed, the Bill will include a new restructuring plan. This will take the form of amendments to the Companies Act 2006, not insolvency legislation. There will also be measures relating to easements in the requirements for the filing of annual returns and holding of annual general meetings. The Legislative Consent Motion does not need to cover these amendments as the Companies Act 2006 applies on a UK wide basis.
45. However, it is considered that mutuals (credit unions, co-operatives and community benefit societies) should benefit from the same easements that are being proposed for companies as regards meetings.

## **Consultation**

46. It was not possible to carry out consultation in Northern Ireland in time to allow the amendments to Northern Ireland insolvency legislation to be included in the Corporate Insolvency and Governance Bill. However, BEIS

carried out consultation on two of the issues, the moratorium and suspension of contract clauses, in a previous consultation. Local practitioners and other stakeholders would have been aware of the issues during that consultation. Full details of the consultation and the government's response can be found at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/736163/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf)

### **Human Rights and Equality**

47. The UK government considers that the Bill is compatible with the European Convention on Human Rights. There are no equality issues; none of the measures will have any differential impact on any of the section 75 groups.

### **Financial implications**

48. The measures do not necessitate any cost to the public purse.

### **Regulatory impact**

49. Due to the time constraints a regulatory impact assessment has not been prepared for Northern Ireland. However, it is considered that the planned changes to insolvency legislation will have a positive impact on Northern Ireland business as they are to help companies stave off liquidation.

### **Engagement to date with the Committee for the Economy**

50. A letter, providing the Economy Committee with information on the intention to introduce these measures in Northern Ireland and the need for a Legislative Consent Motion, issued on 21 April 2020.

### **Conclusion**

51. The view of the Minister for the Economy is that, in the interests of providing support to businesses in financial difficulty in Northern Ireland and ensuring that they have access to the same range of measures as are being taken to assist companies affected by the coronavirus in the rest of the UK, that the measures set out in the Corporate Insolvency and Governance Bill, should be legislated for by the UK Parliament.

**Department for the Economy**

**21 May 2020**