CORPORATE INSOLVENCY AND GOVERNANCE BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM BY THE DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

The government tabled amendments to the Corporate Insolvency and Governance Bill for Report Stage in the House of Lords. These amendments include new delegated powers. This supplementary memorandum explains why these powers have been taken and the reason for the procedure selected. The amendment number refers to the number as shown in the Marshalled list of amendments for Report stage in the House of Lords.

Amendment 20

Clause 1 and A49A: Power to make provision in connection with pension schemes

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution procedure

Context and purpose
This power enables the Secretary of State to make regulations that apply where a company enters into a moratorium under the provisions of clause 1 of the Bill and is an employer in respect of a pension scheme, that is eligible for entry into the Pension Protection Fund during a moratorium and where the trustees or managers of such a scheme are creditors. Such regulations may provide that the Pension Protection Fund can exercise certain creditor rights (subsection (1)). The rights are in relation to qualifying decision procedures upon the question of the extension of the term of the moratorium and where the court orders a qualifying decision procedure following an application being made to court to challenge the directors' actions (subsection (2)). The rights may be exercised by the Pension Protection Fund to the exclusion of or in addition to the trustees or managers of the pension scheme (subsection (3).

The Pension Protection Fund may have an interest as the ultimate "guarantor" of member's benefits under the pension scheme and therefore, it is appropriate that the PPF should have the ability to take part in the voting process in prescribed circumstances.

The regulations may set out the conditions that must be met before any of these rights are exercised by the Pension Protection Fund (subsection 4). This is to ensure that the rights and interests of the pension scheme trustees and members of the scheme are appropriately accounted for and balanced against the interests of the Pension Protection Fund.

Regulations will also provide for the rights to be exercised for a specified period and make provision for when such rights cease to be exercisable by the Pension Protection Fund (subsection (4)).

The power does not allow for primary legislation to be amended by secondary legislation.

Justification for taking the power

It is important to balance the interest of the trustees and manager of a pensions scheme, who are the custodians of it for the benefit of the members, and the interests of the Pension Protection Fund as ultimate “guarantor” of the members’ benefits. This is in circumstances where the purpose of the moratorium is to assist the rescue of the employer as a going concern, in which case, the pension scheme would not enter the Pension Protection Fund.

Regulations made under the Pensions Act 2004 set out the circumstances in which a pension scheme is or is not eligible for entry into the Pension Protection Fund including defining the “employer” for these purposes of entry into the Pension Protection Fund. The regulations already in place may be amended under the power by which they were first brought into force. In due course the scheme will be assessed as to whether it can enter the Pension Protection Fund. Until it is clear that the Pensions Protection Fund will have to assume liability for the pension scheme, the trustees and managers are charged with protecting the interests of members of the scheme. Therefore, consideration has to be given as to the circumstances in which, and the manner in which, those rights are exercised by the Pension Protection Fund rather than the trustees or managers, given that voting rights cannot be exercised by two creditors in respect of one debt.

Pensions legislation often utilises regulations to set out the detail of the pensions framework as this allows for the law to develop to reflect the emerging market.

Not every company that is the subject of moratorium will be an employer in relation to a pension scheme. Therefore, it is appropriate for the particular circumstances of these special cases to be dealt with in separate regulations.

Justification for the procedure

The Regulations are subject to the affirmative resolution procedure (subsection (5)).

However, it is essential to ensure that there is little delay between the commencement of the Bill and coming into force of the regulations needed for the purposes of protecting the Pension Protection Fund’s position should a company that is an employer in relation to a pension scheme use the moratorium procedure soon after Royal Assent. For that reason, the made-affirmative resolution procedure is available for a period of 6 months (under an amendment to clause 41).

Amendment 33

Clause 4 and 13HAA: Power to make provision in connection with pension schemes

Power conferred on: Northern Ireland Department

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution procedure

Context and purpose
This provision confers the same power to make regulations in Northern Ireland under the new section 13HAA of the Insolvency (Northern Ireland) Order 1989 (inserted by clause 4 of the Bill) as is provided for under the new section A49A of the Insolvency Act 1986 (inserted by clause 1 of the Bill). This is a power to make regulations that apply where a company enters into a moratorium under clause 4 of the Bill and is an employer in respect of a pension scheme, that is eligible for entry into the Pension Protection Fund, during the moratorium and where the trustees or managers of such a scheme are creditors. It provides for regulations to set out the conditions on which creditor rights in relation to decisions of creditors in the moratorium will be exercisable by the Pension Protection Fund.

Amendment 80: new subsection (3A) of new section 174A of the Insolvency Act 1986, inserted by paragraph 13 of Schedule 3 to the Bill: power to change the definitions of "moratorium debt" or "priority pre-moratorium debt" in new section 174A.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose:
New section 174A of the Insolvency Act 1986 deals with the treatment of unpaid moratorium debts and certain unpaid pre-moratorium debts in the event that the company in a moratorium enters liquidation within 12 weeks of the end of the moratorium. There are similar provisions in respect of administration (see new paragraph 64A of Schedule B1 to the Insolvency Act 1986, inserted by paragraph 31 of Schedule 3 to the Bill), company voluntary arrangements (CVAs) (see the amendment made to section 4 of the Insolvency Act 1986 by paragraph 4 of Schedule 3 to the Bill), schemes of arrangement (see new section 899A to the Companies Act 2006, inserted by paragraph 35 of Schedule 9 to the Bill) and the new restructuring plan (see new section 901H to the Companies Act 2006, inserted by paragraph 1 of Schedule 9 to the Bill). The effect of these provisions is that unpaid moratorium debts and certain unpaid pre-moratorium debts (known as "priority pre-moratorium debts") will receive super priority in the subsequent administration or liquidation within the 12 week period, meaning that they would be paid before other creditors and expenses of the liquidation or administration (other

than fixed charge creditors). In a CVA, scheme of arrangement or restructuring plan within the 12 week period, the effect will be that such debts are protected from being compromised without the relevant creditor’s consent.

An amendment is being made to these sections so that pre-moratorium debts that arise under financial services contracts that are accelerated for payment (or terminated and replaced) after the proposed monitor has given their view on the rescuability of the company, or during the moratorium, will not benefit from the super priority or protection mentioned above. Affording super priority to accelerated debts risked incentivising financial services firms to accelerate their debts in order to benefit from super priority or protection in a subsequent insolvency procedure, which would have had the effect of jeopardising the rescue of the company in the moratorium as well as reducing the assets available to unsecured creditors.

As part of the amendment, a power is being taken to be able to change the definitions of “moratorium debt” and “priority pre-moratorium debt” in section 174A. These definitions flow through to the super priority provisions in administration and the protection provisions in a CVA, scheme of arrangement and restructuring plan.

Justification for the power:
The amendment is being made in order to prevent financial services firms from “gaming” the super priority and protection provisions mentioned above. The purpose of the power is to allow the government to be equipped to respond quickly to other, novel ways that might be found to game the system in the future, since these are behaviours that are hard to predict.

Justification for the procedure:
The power enables the Secretary of State to amend definitions that will be contained in the Insolvency Act 1986 by secondary legislation. As a change to the definitions of “moratorium debt” and “priority pre-moratorium debt” in section 174A Insolvency Act 1986 would result in a change to the way in which the super priority and protection provisions operate, it is right that Parliament should have the opportunity to debate that change and so, in line with usual practice, the regulations are subject to affirmative procedure.

Amendment 91: new subsection (3A) of new Article 148A of the Insolvency (Northern Ireland) Order 1989, inserted by paragraph 17 of Schedule 7 to the Bill: power to change the definitions of “moratorium debt” or “priority pre-moratorium debt” in new Article 148A.

Subsection (3A) of new Article 148A confers the same power to make regulations in Northern Ireland for the purpose of changing the definitions of “moratorium debt” and “priority pre-moratorium debt” as subsection (3A) of new section 174A confers in Great Britain.

Amendment 99

Schedule 9 Paragraph 901HA: Power to make provision in connection with pension schemes

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution procedure

Context and purpose
This section enables the Secretary of State to make regulations setting out additional provisions that apply where a proposal is made for an arrangement and reconstruction under the new Part 26A of the Companies Act 2006 (under clause 7 and schedule 9 of the Bill) in respect of a company that is an employer in respect of a pension scheme that is eligible for entry into the Pension Protection Fund, and where the trustees or managers of such a scheme are creditors. Regulations will set out the circumstances in which the Pension Protection Fund can exercise certain creditor rights (subsection (3)), which may be to the exclusion of, or in addition to the pension scheme trustees or managers (subsection (4)). Such creditor rights may include, for example, the ability to attend meetings convened for the purposes of Part 26A, to vote at such meetings, to make representations to the court and to receive notices.

The Pension Protection Fund may have an interest as the ultimate “guarantor” of member’s benefits under the pension scheme and therefore, in certain circumstances, the PPF should have the ability to take part in the restructuring plan process. The regulations may set out the conditions that must be met before any of these rights are excised by the Pension Protection Fund (subsection (5)). This is to ensure that the rights and interests of the pension scheme trustees and members of the scheme, are appropriately accounted for.

Regulations will also provide for the rights to be exercised for a specified period and provide for what happens when the rights cease to be exercisable by the Pension Protection Fund thereafter (subsection (5)).

The power does not allow for primary legislation to be amended by secondary legislation.

Justification for taking the power
It is important to balance the interests of the trustees and manager of a pensions scheme, who are the custodians of it for the benefit of the members, and the interests of the Pension Protection Fund as ultimate “guarantor” of the members’ benefits if an employer company fails, whilst also recognising that the provisions of Part 26A allow for a company to restructure and continue as a going concern. Regulations made under the Pensions Act 2004 set out the circumstances in which a pension scheme is or is not eligible for entry into the Pension Protection Fund

including defining the “employer” for the purposes of entry into the Pension Protection Fund. The regulations already in place may be amended under the power by which they were first brought into force. In due course the scheme will be assessed as to whether it can enter the Pension Protection Fund. Until it is clear that the Pensions Protection Fund will have to assume liability for a pension scheme, the trustees and managers are charged with protecting the interests of members of the scheme.

Therefore, consideration has to be given as to the circumstances in which, and the manner in which, each and any of creditor rights are to be exercised by the Pension Protection Fund rather than the trustees or managers and whether both can participate in some way. For example, voting rights cannot be exercised by two creditors in respect of one debt. The balance between the interests of the trustees and managers and the Pension Protection Fund may be achieved in different ways depending on the circumstances and the creditor right in question.

Provisions made under the power in the Bill can be quickly amended as jurisprudence relating to the new procedure in Part 26A emerges and as the regulations made under the Pensions Act 2004 and other pensions legislation is amended from time to time, to ensure they remain fit for purpose.

Not every company that is the subject of an application under Part 26A will be an employer in relation to a pension scheme. Therefore, it is appropriate for the particular circumstances of these special cases to be dealt with in separate regulations.

Pensions legislation often utilises regulations to set out the detail of the pensions framework as this allows for the law to develop to reflect the emerging market.

Justification for the procedure

The Regulations are subject to the affirmative resolution procedure (subsection (6)). However, it is essential to ensure that there is little delay between the commencement of the Bill and coming into force of the regulations needed for the purposes of protecting the Pension Protection Fund’s position should a company that is an employer in relation to a pension scheme use the Part 26 procedure soon after Royal Assent. For that reason, the made-affirmative resolution procedure is available for a period of 6 months (subsection (7)). This is by virtue of it being “subject to approval after being made”.

The procedure to be adopted is set out in section 1291 of the Companies Act 2006 which is amended to provide for approval of each House within 40 days (subsection (8)). This is so that regulations laid under the Companies Act 2006 and the Insolvency Act 1986, using a modified procedure (see also clause 41 of the Bill) relating to the rights of the Pension Protection Fund can be laid in one set of regulations to which the same procedure will apply.