Sewel Memorandum

The Enterprise Bill

Motion

"That the Parliament accepts the need for a modern and workable company rescue regime throughout the UK and agrees that those provisions in the Enterprise Bill which restrict the use of administrative receivership (receivership in Scotland is devolved) and integrate its machinery into the streamlined company administration procedures set out in the Bill should be considered by the UK Parliament."

1. The aim of the Enterprise Bill is to improve productivity and competitiveness through reform of the UK's competition, insolvency and consumer protection regimes.

2. The Bill is a UK measure covering in the main matters which are reserved such as competition, corporate insolvency, abolition of Crown Preference and modernisation of the financial regime of the Insolvency Service. The Bill aims in particular to: modernise the framework of the law of corporate insolvency; facilitate the rescue of viable companies and where that is not possible to achieve a better result for the company's creditors as a whole; and provide certainty and fairness to creditors and other stakeholders. The Bill also seeks to address the fear of failure and reduce the stigma of personal bankruptcy by reforming the framework of law. Personal bankruptcy is wholly devolved and the Executive is studying carefully the provisions. Any legislation to modernise the law in this area would be a matter for the Scottish Parliament at a later date.

Background

3. The Enterprise Bill implements a pledge in the UK Government's 2001 election manifesto to give more independence to the competition authorities, to reform the bankruptcy laws and to tackle rogue traders. The White Paper *"Productivity in the UK: Enterprise and the Productivity Challenge"*, published in June 2001, set out the UK Government's intention to focus on enterprise and productivity as the cornerstone of its economic reforms in this Parliament. The specific measures in this Bill were foreshadowed by three White Papers: *"Productivity and Enterprise: A World Class Competition Regime"* and *"Productivity and Enterprise: Insolvency - A Second Chance"* published in July 2001, and *"Modern Markets: Confident Consumers "*, published in July 1999.

Content of the Bill

4. The Bill is divided into nine parts and has 268 clauses and 25 Schedules **[UPDATE].**

- Part 1: establishes the Office of Fair Trading (OFT).
- Part 2: establishes the Competition Appeal Tribunal, and provides for its constitution and rules.

- Part 3: provides for a new merger regime, covering the definition of a qualifying merger, the duty of the OFT to make references to the Competition Commission (CC); how references are determined; the procedures that relate to certain public interest cases and other special cases; powers of enforcement; undertakings and orders; and various supplementary matters, such as information and publicity requirements and powers to require information.

- Part 4: makes provision for new market investigations arrangements. It sets out the power of the OFT and the Secretary of State to make references to the CC, and how the CC should report on the references. It provides for particular arrangements to apply in public interest cases, and also covers powers of enforcement and various supplementary matters.

- Part 5: deals with a number of miscellaneous competition provisions. These include rules of procedure and other procedural changes for the CC; the creation of a cartel offence; powers to disqualify directors who engage in serious competition breaches; arrangements for making super-complaints

- Part 6: deals with new procedures for enforcing certain consumer legislation, and miscellaneous related matters.

- Part 7: provides for rules to govern the disclosure of certain consumer and competition information held by a public authority, covering the circumstances in which it is permissible to disclose the information, and various related matters.

- Part 8: changes insolvency law by providing for a new regime for company administration; abolishing Crown preference; establishing a new regime for the insolvency of individuals; and making changes to the operation of the Insolvency Services Account.

- Part 9: contains a number of supplementary provisions, such as commencement, short title and territorial extent.

5. A set of Explanatory Notes setting out the provisions of the Bill is attached to this Memorandum.

Proposal

6. Specific corporate insolvency objectives in the Enterprise Bill are 1) to streamline the administration procedure and 2) to abolish administrative receivership (except for limited cases). An "Administrative Receiver" is the name given as regards England and Wales in section 29 (2) of the Insolvency Act 1986 to a Receiver, in cases where all or substantially all of a company's assets are covered by the charge; which is invariably the case. The term is also applicable to Scotland by section 251 of the Act, which defines an "Administrative Receiver" to include a receiver appointed in Scotland under section 51, in cases where all or substantially all of a company's assets are covered by the floating charge. Administration is reserved but receivership is devolved.

7. In the Enterprise Bill the term "Administrative Receiver" includes a receiver appointed in Scotland.

8. In the Bill, changes to the existing corporate insolvency regime focus on restricting the use of administrative receivership and streamlining administration. The White Paper *'Productivity and Enterprise: Insolvency - A Second Chance'* recognised that the administration procedure introduced by the Insolvency Act 1986 was seen as an important tool in providing companies in financial difficulties with a breathing space in which to put a rescue plan to creditors. However, it also recognised that the procedure could be improved.

9. The existing provisions contained in Part II of the Insolvency Act 1986 allow the court to make an administration order in respect of a company that is in financial difficulties. Broadly speaking, the effect of such an order is to afford the company protection from its creditors whilst attempts are made to save the company or achieve a better result for creditors than would be achieved in a winding-up. However, in practice, in many cases where a company gets into financial difficulties, this will lead to the appointment of an administrative receiver by those providing financial support for the company (typically the company's bank), since they usually will have taken floating and fixed charges over all the company's assets. The reason for the appointment of administrative receivers, rather than the making of administration orders, in these cases is that a person who has the power to appoint an administrative receiver has an effective veto over administration. Such a person must be given notice of any application for an administration order, and if s/he appoints an administrative receiver, the court must dismiss the application unless the appointor of the administrative receiver consents to the making of an administration order (section 9(2)(a) and section 9(3) of the Insolvency Act 1986).

Insolvency Clauses

10. The insolvency clauses fall into four main sections: corporate insolvency; the abolition of Crown preference; individual insolvency and the financial arrangements relating to the Insolvency Service. The clauses seek to alter the above provisions in the following way. First, subject to certain exceptions, principally in relation to existing arrangements and those relating to the financial markets, the Bill seeks to require the use of the administration procedure by those creditors who would previously have been entitled to appoint an administrative receiver. Second, the administration process has been amended in such a way that seeks to strike a fair balance between the interests of all creditors and to ensure that all reasonably practicable options are considered without prejudicing the interests of those creditors who would previously have been entitled to appoint an administrative receiver. It was recognised that the administration procedure as it currently stands is to a degree cumbersome. In the light of this, a number of measures will be taken to streamline the process both in the provisions of the Bill and the Rules made under section 411 of the Insolvency Act 1986 that seek to give effect to the provisions of the Bill. Perhaps the most obvious of the measures that seeks to streamline the procedure is the introduction of the non-court routes into administration.

<u>Clause 237, Schedule 14: Replacement of Part II of Insolvency Act 1986</u>

11. In order to provide for the streamlining of administration, clause 237 replaces Part II of the Insolvency Act 1986 with a new Schedule B 1 - as set out in Schedule 14 of the Bill - which codifies the new administration regime. This will be inserted after Schedule Al to the Insolvency Act 1986.

Clause 239

12. Under clause 239 of the Enterprise Bill (which extends to Scotland) a new Chapter IV is inserted into Part III of the Insolvency Act 1986. New clause 72A prohibits the holder of a "qualifying floating charge" from appointing an administrative receiver. A "qualifying floating charge" is one created after an appointed date after the Enterprise Bill becomes law, and in terms of paragraph 12 (3) of new Schedule BI to the Insolvency Act 1986 it would cover a Scottish debenture (a term used to cover a lending instrument only in this context) or debentures secured over the whole or substantially the whole of a company's property.

13. There are 6 types of financial set ups where the restriction does not apply ranging from certain public/private finance vehicles to utilities. These exceptions are set out in new sections 72B to 72G of the Insolvency Act 1986.

Conclusion

14. Under Schedule 5 to the Scotland Act 1998, procedures giving protection from creditors (administrations) are reserved but receivership is devolved. The proposed restriction of receivership forms part of a wider package of rules aimed at promoting and streamlining the law on administrations. The Scottish Executive believes that, although it would have been possible for the Scottish Parliament to legislate to restrict receivership, because of the need for the changes to dovetail with the new administration regime the simplest, most effective route is to legislate through the Enterprise Bill.