Economy and Fair Work Committee
Wednesday 30 April 2025
13th Meeting, 2025 (Session 6)

Note by the Clerk on UK subordinate legislation: consideration of consent notification

Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to a proposed UK statutory instrument (SI): The Cross-Border Insolvency (Enterprise Group) Regulations 2025.

2. The process for Scottish Parliament consideration of consent notifications is set out in the SI Protocol. Further details of this process are set out in **Annexe A**.

The proposed cross-border insolvency (enterprise group) regulation 2025

3. On 14 March, the Minister for Public Finance wrote to the Committee giving notice of the Scottish Government's proposal to consent to this UK SI. The Scottish Government provided an SI notification and summary. These are set out in **Annexe B**. The UK Government intends to lay the UK SI mid-summer/autumn.

4. The Scottish Government has asked for a response to the consent notification by 12 May 2025.

5. The proposed regulations will introduce the Model Law on Enterprise Group Insolvency which was adopted by The United Nations Commission on International Trade Law (UNCITRAL) in July 2019. The notification states that the model law expands and further develops the structure provided by the original Insolvency Model Law in cases of group insolvencies. It aims to provide a legal structure to enable cross-border cooperation, in particular where members of the group are in different jurisdictions.

6. Under Section 2 (12) of the Private International Law (Implementation of Agreements) Act 2020, the Secretary of State cannot proceed with legislating on the devolved provision set out in the proposed SI unless the Scottish Ministers consent.

Next steps

7. If the Committee agrees to approve the Scottish Government's proposal to consent to the SI, this will be done by letter. When responding the Committee may set out any observations or concerns that it thinks are relevant.

8. If the Committee is not content with the Scottish Government's proposal to consent to this SI, it would have to recommend that the Scottish Government should instead take forward an alternative Scottish legislative solution.

Recommendation

9. The Committee is invited to agree the Scottish Government's proposal.

Clerks to the Committee
April 2025

Annexe A: Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

1. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.

2. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.

3. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought before the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.

4. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**

5. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.

6. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent. In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—

   - Agree. If so, the Scottish Ministers would then withhold their consent.

   - Not agree. If so, the Parliament will debate the issue.

7. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UK SI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

Annexe B: Information from Scottish Government

Letter from the Minister for Public Finance

14 March 2025

Dear Colin,

THE CROSS-BORDER INSOLVENCY (ENTERPRISE GROUP) REGULATIONS 2025 PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from the Private International Law (Implementation of Agreements) Act 2020.

That protocol, as agreed between the Scottish Government and the Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance and Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018. I attach a Type 1 notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI.

Please note, we are yet to have sight of the final SI and it is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

Ideally, it would be helpful to hear from you by 12 May 2025.

IVAN MCKEE

SI notification

Name of the SI(s) (if known) or a title describing the policy area

The Cross-Border Insolvency (Enterprise Group) Regulations 2025.

Is the notification Type 1 or Type 2

This is a Type 1 notification.

A brief overview of the SI (including reserved provision).

- The proposed Cross-Border Insolvency (Enterprise Group) Regulations 2025 ("the SI") will introduce the Model Law on Enterprise Group Insolvency (the "MLEG") which was adopted by The United Nations Commission on International Trade Law (UNCITRAL) in July 2019.

- The SI is intended to give effect to the MLEG in the UK, with modifications so that it will work alongside and complement existing UK legislation.

- The MLEG is designed to provide tools to manage and coordinate insolvencies within enterprise groups (i.e. two or more enterprises that are connected by control or significant ownership).

- The MLEG complements the UNCITRAL Model Law on Cross-Border Insolvency which was implemented by the Cross-Border Insolvency Regulations 2006 ('the 2006 Regulations'). MLEG includes provisions on coordination and cooperation between courts; seeks to develop group insolvency solutions for the whole or part of an enterprise group as well as provisions for the appointment of a representative to coordinate any such group solution.

- Unlike the Model Law implemented under the 2006 Regulations, which relates to insolvency proceedings regarding a single debtor, MLEG focusses on insolvency proceedings relating to multiple debtors that belong to the same enterprise group.

- MLEG can apply to enterprises regardless of their legal form although it is envisaged it will mainly be used for corporate entities dealt with under the Insolvency Act 1986 ("the 1986 Act").

- The primary legislation governing corporate insolvency in the UK and personal insolvency in England and Wales is the 1986 Act. Corporate insolvency is largely reserved although certain aspects are devolved to Scotland. Personal insolvency in Scotland is governed primarily by the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"), which is largely devolved.

- The detailed procedure for corporate insolvency proceedings in Scotland is set out in Rules made under the 1986 Act, namely the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018, which spans mixed competence,

and the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018, which is reserved.

- International relations is reserved although the implementation of international commitments in devolved areas is devolved. Implementing MLEG may affect both reserved and devolved matters in relation to insolvency.

- The SI therefore will relate to a mixture of reserved and devolved matters.

- The SI will modify existing UK insolvency legislation but only for the purposes of implementing the MLEG.

- The SI will extend to England, Wales, Scotland and Northern Ireland.

- The power to implement the UNCITRAL model laws is in section 2 of the Private International Law (Implementation of Agreements) Act 2020, and section 2(12) sets out that for the Secretary of State to be the appropriate national authority to implement for Scotland, they must have the consent of the Scottish Ministers.

- Below is some background on the UNCITRAL model laws.

Background

Model Law on Cross-Border Insolvency (the "Insolvency Model Law")

UNCITRAL was established in 1966 to "further the progressive harmonization and modernization of the law of international trade" through the development of legislative and non-legislative instruments in several key areas of commercial law. This has included insolvency law since 1995.

The UK adopted the first model law on recognition of insolvency proceedings in 2006-07 and the 2006 Regulations gave effect to the Insolvency Model Law in the UK.

The model law provided a grounding structure for international cooperation in respect of insolvency proceedings. It provided a template for the implementing states, with their separate legal systems, to subscribe to a common structure for the recognition and enforcement of foreign insolvency proceedings. Where there is a foreign insolvency, this structure makes the process of handling of assets located within the implementing state more predictable for the foreign insolvency practitioner. The aim was to encourage cooperation and coordination between countries to allow the insolvency to proceed as efficiently as possible and to be more cost effective, increasing the returns to creditors while promoting trade between nations.

Model Law on Enterprise Group Insolvency

MLEG both expands and further develops the structure provided by the original Insolvency Model Law, aiming to promote cooperation and coordination between the courts, insolvency practitioners and other bodies dealing with the insolvency of group members with a focus on the development of group proposals that will protect,

preserve, realise or enhance the overall combined value of the members. The original Insolvency Model Law allowed for recognition of insolvency proceedings relating to individual entities.

The tools offered by MLEG can be applied in an international context where the participating group members are distributed between two or more jurisdictions and to wholly domestic groups whose participating members are all present in one country. MLEG aims to provide:

- a legal structure to enable cross-border cooperation to manage the insolvency of enterprise groups, providing legal authority for insolvency practitioners, judges and others to work together towards a common outcome.

- the coordination of multiple insolvency proceedings affecting different group members through the development and implementation of an appropriate group plan.

- cross-border recognition of the group plan within each relevant jurisdiction.

- avoidance of unnecessary insolvency proceedings through the use of legally enforceable undertakings to creditors.

It therefore aims to make the process for dealing with related entities within a group more efficient and cost effective. It will enable an overall group plan to be developed which will enable proceedings to be coordinated and to deal with the business of the group as a whole, producing a greater return for all of the creditors involved than if each part of the group was handled separately. It will provide a route for insolvency practitioners to reach agreements with creditors without the requirement to open separate insolvency proceedings.

While the plan does not in itself affect the payment of creditors, the MLEG's provisions allow the insolvency practitioner responsible for a main insolvency proceeding, with the court's approval, to treat creditors according to the insolvency law of another jurisdiction – making payment to them as if they had opened an additional local insolvency proceeding but without actually requiring them to do so. As a result, where creditors could recover more money by making their claims in another jurisdiction against the assets there, this can be accommodated without the expense of opening a second insolvency proceeding. This improves efficiency and returns from the insolvency and enables it to be coordinated in one place.

MLEG also makes possible centralised management of the insolvency of a group member in the most convenient jurisdiction for the benefit of the creditors, and assists a single insolvency practitioner to manage the insolvencies of two or more group members which may be based in multiple countries in a single jurisdiction including where a foreign insolvency proceeding would have been a main proceeding.

Details of the provisions that Scottish Ministers are being asked to consent to.

The Scottish Ministers are being asked to consent to the Secretary of State making the SI insofar as it applies to Scotland in accordance with section 2(12) of the Private International Law (Implementation of Agreements) Act 2020. In terms of its application to Scotland, the SI will enable:

- the adoption of the MLEG, which will sit alongside and modify as necessary current insolvency legislation, including the 1986 Act, the 2016 Act and the corporate insolvency rules for Scotland, to enable its operation in the UK.

- amendments to the 2006 Regulations to incorporate MLEG definitions and to give effect to the MLEG in the UK.

Summary of the proposals

As set out above, the SI will implement the MLEG to sit alongside UK insolvency law expanding further and developing the structure provided by the original Insolvency Model Law.

In the short term the impact of MLEG in the UK will be limited. This is partly because it will require multiple jurisdictions to take the step of bringing the model law into their legislation before it is able to achieve its purpose of enhancing international cooperation.

However, implementation of the MLEG remains important. The UK's participation in systems of global cooperation on insolvency matters is believed to be widely beneficial, both to the UK and its international partners. Efficient insolvency proceedings strengthen economic activity, both within the UK and abroad. By facilitating group insolvency solutions, as opposed to insolvencies being dealt with piecemeal in each jurisdiction, the value that is present in a business as a going concern can be better preserved, and jobs and livelihoods maintained. Cooperation between jurisdictions helps to bolster international trade by setting clear expectations as to how matters will be handled in the event that one of the parties to a contract becomes insolvent.

The SI does not confer any new powers to legislate on UK or Scottish Ministers.

Does the SI relate to a common framework or other scheme?

The SI does not relate to a common framework.

EU alignment consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU. The MLEG was adopted by UNCITRAL prior to Brexit. Whilst the matter is within an area formerly within the competence of the EU, the implementation of the UNCITRAL Model Law is an international commitment separate to the EU. Implementing the MLEG within the UK does not affect or conflict with the SG policy of alignment.

Summary of stakeholder engagement/consultation

The UK Government undertook a consultation on the adoption of the MLEG and another model law on the enforcement of insolvency-related judgements between 7 July and 29 September 2022. The consultation sought responses from anyone with an interest in the UK's adoption of the two model laws, including insolvency practitioners, the legal profession, company directors, creditors, business and consumer groups, and in particular from individuals and organisations dealing with cross-border insolvency work.

Ten responses were received to the consultation. Four of these responses were from organisations with an interest in legal matters (including the Law Society for Scotland) and insolvency law (including a body dealing with financial law). Two responses were provided by organisations representing or authorising insolvency practitioners (including R3, the trade association for the UK's insolvency, restructuring, advisory and turnaround professionals). The remaining four responses were provided by a financial services firm and individuals, including academics.

During the consultation discussions were held with several of the respondents to explore their views on the approach to be taken, and with government officials dealing with relevant areas of policy and law.

Responses regarding MLEG noted that the majority of its provisions will be most useful when operating between jurisdictions that have both implemented them. Despite this, respondents to the consultation supported implementing the model law, even though other jurisdictions have yet to do so. The primary value of the MLEG is as an evolution of the internationally recognised regime for mutual cooperation between countries on insolvency matters. As an international text it will become familiar to practitioners based in other jurisdictions, and so enhance the clarity and predictability of the UK insolvency regime.

A note of other impact assessments (if available)

Analysis carried out by the UK Government found that the overall impact on business will likely be less than £5m per year and a full impact assessment has therefore not been prepared.

MLEG aims to bring about benefits relating to efficiency and reputation. The legislation will promote cooperation and coordination between the courts, insolvency practitioners and other bodies dealing with the insolvency of group members, with a focus on the development of group proposals that will protect, preserve, realise or enhance the overall combined value of the members. By implementing this law, the UK will demonstrate its leadership in developing insolvency structures and its commitment to following and encouraging international best practice.

The legislation does impact small or micro businesses in that both could qualify as an enterprise. The model law is not regulatory however, and where relevant small and micro businesses would be able to benefit from the greater efficiencies it seeks to introduce.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The SI is required to implement the MLEG so that it will work alongside and complement existing UK legislation. Scottish Ministers consented to the 2006 Regulations which gave effect to the first model law on recognition of insolvency proceedings and as noted above, the MLEG both expands and develops that original structure.

The primary legislation governing corporate insolvency in the UK and personal insolvency in England and Wales is the 1986 Act while for personal insolvency in Scotland it is the 2016 Act.

The SI will extend to England, Wales, Scotland and Northern Ireland.

While the MLEG may be used in personal insolvencies it is envisaged that it will mainly be used for corporate entities dealt with under the 1986 Act, which is largely reserved. This is an area of mixed competency where and to attempt to separate incorporation North and South of the border would be inevitably and extremely complex and would be very unlikely to lead to reader-friendly results. The Scottish Government therefore agrees that it is appropriate for the SI to implement the MLEG to be drafted on a UK basis, which is considered more straightforward for the end user and also consistent with the approach taken with similar SIs. Joint working in insolvency related areas is well-established and is of benefit to both administrations and it is considered sensible to continue with that approach on this occasion.

Intended laying date (if known) of instruments likely to arise

Whilst the laying date is not yet clear, the Scottish Government understands the UK Government are hoping to lay the SI by mid-summer/autumn. The SI will follow the draft affirmative procedure.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

N/A

Information about any time dependency associated with the proposal

The SI will make amendments to Schedule 3 (Procedural matters in Scotland) of the 2006 Regulations which necessitates amendments to court rules. Whilst finalisation of the court rules may not prevent the SI being laid, it is likely that it will result in a laying date no earlier than mid-summer 2025.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

There are no new governance arrangements.

Any significant financial implications?

The SI does not have any significant financial implications. Analysis carried out by the UK Government found that the overall impact on UK business will likely be less than £5m per year.

EFW/S6/25/13/3

Summary notification

Title of Instrument The Cross-Border Insolvency (Enterprise Group) Regulations 2025.
Proposed laying date at Westminster Whilst the laying date is not yet clear, the Scottish Government understands the UK Government are hoping to lay the SI by mid-summer/autumn.
Date by which Committee has been asked to respond 12 May 2025.
Power(s) under which SI is to be made This instrument is made in exercise of the powers conferred by section 2 of the Private International Law (Implementation of Agreements) Act 2020.
Categorisation under SI Protocol Type 1.
Purpose The SI will implement The Model Law on Enterprise Group Insolvency which was adopted by the United Nations Commission on International Trade Law in July 2019. This model law expands and further develops the structure provided by the original Insolvency Model Law, aiming to promote cooperation and coordination between the courts, insolvency practitioners and other bodies dealing with the insolvency of group members in different jurisdictions with a focus on the development of group proposals that will protect, preserve, realise or enhance the overall combined value of the members. The original Insolvency Model Law allowed for recognition of insolvency proceedings relating to single entities.
Other information N/A
SG Policy contact: David Farr, Accountant in Bankruptcy