ECONOMY, ENERGY AND FAIR WORK COMMITTEE

Debt Arrangement Scheme (Scotland) Amendment Regulations 2019

SUBMISSION FROM R3, ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS

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If you wish to request that your submission be published without your name, please contact the Clerks at the following email address: economyenergyandfairwork@parliament.scot

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Dear Sirs

Debt Arrangement Scheme ('DAS') (Scotland) Amendment Regulations 2019

About R3

1. R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession.

2. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.

3. The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession promotes economic regeneration, resolves financial distress for businesses and individuals, saves jobs, and creates the confidence and public trust which underpin trading, lending and investment.

Overview

4. We provided a response to the 'Building a Better Debt Arrangement Scheme - 2018 Consultation' on 24 January 2018 to the Accountant in Bankruptcy ('AiB'). A copy is attached at pages 3 to 5.

5. When comparing our response to the draft legislation, there are aspects that are cause for concern for our members, which will wish to bring to your attention.

Response

6. The legislation introduces an administration fee of 20% which must be charged by the Payment Distributor ('PD'). The Continuing Money Adviser ('CMA') is not prohibited from receiving monies from the administration fee payable to the PD. The existing fee structure is unchanged for Business DAS. The fee due is to be paid from a creditor distribution.

7. We welcome the AiB's attempt in seeking to increase the availability of DAS, which requires the schemes to be commercially attractive to the private sector. However, the restriction on how these fees can be taken, i.e. only by a PD, will deter participation. The banning of a CMA from charging fees directly would not encourage private sector participation. How can it be fair and right for a government department to ban a professional adviser from agreeing a fee with a private client?

8. Our members would welcome the opportunity to be able to offer payment distribution service; however, we do not understand the reason for a PD being the only professional to have the ability to charge a fee

for both distributing payments and providing money advice. There are CMAs who may not wish to or simply cannot undertake the PD role.

9. With regard to the statutory administration fee, we are not in favor of this. If fees are to be in effect paid by the creditors, the creditors should have a say on the level of the fee. Creditors are being asked to bear the full cost of the programme in the same way as they would in a trust deed or bankruptcy without recourse.

10. The legislation states that where a Payment Distributor ceases to act he/she/they must transfer the Debt Payment Programmes ('DPP') for which that distributor is responsible to a substitute distributor specified by the DAS administrator. The Regulations provide that, where the AiB, who acts as the DAS Administrator, is specified as a substitute PD, AiB may at any time transfer on to an alternative PD the DPPs for which AiB is responsible.

11. To reiterate we do not consider it to be appropriate for the AiB to offer a payment distribution service. Providing this kind of service is not a specialist area for the AiB and more importantly it will raise conflicts of interests in their primary role as a regulator. It is also anti-competitive and without justification in the public interest.

12. We would reiterate our position regarding variations to be submitted by the AiB on behalf of the debtor where the proposals would lead to a reduction of the DPP. Variation applications which are automatically approved should demonstrably be favourable to creditors and this should be a condition of automatic variation.

Yours faithfully

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Lisa Ledington-Park
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By email

24th January 2019

Dear Ms Ledington-Park,

Building a Better Debt Arrangement Scheme – 2018 Consultation

Please see below for the response of R3 to this consultation. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. The association's membership is made up of insolvency practitioners (IPs), insolvency lawyers and other professionals who work in the field of insolvency and corporate recovery. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) and a number of insolvency lawyers operating in Scotland are R3 members.

Question 1(a): Should the CMA role be extended to include payments distribution responsibility?

Yes (subject to comments below).

Question 1(b): Should AiB offer a payments distribution service?

No.

Question 1(c): If you answered 'yes' to Question 1(b) above, under which circumstances should AiB offer this service?

We consider that the CMA role should be extended to include payments distribution responsibility, but only if the CMA wishes to take on this role: all CMAs may not wish to take on this role, particularly if, as we believe may be the case, this function is not covered by the CMAs existing FCA authorisation and would therefore necessitate an extension of that authorisation at cost. We consider that the existing arrangements, although perhaps with fewer payments distributors, should be retained for public sector cases and CMAs who do not wish to take on this role. We do not consider it to be appropriate for AiB to offer a payment distribution service.

Question 2(a): In the event of the CMA role being extended to include payments distribution responsibility, at what level should the statutory administration fee be set?

See comment below.

Question 2(b): If you have answered 'no' to Q1(a) " Should the CMA role be extended to include payments distribution responsibility", should the CMA's administration-only fee be capped at the agreed administration fee rate detailed at 2(a) above, less than 8% (to cover PTD costs)?

See comment below.

Question 2(c): If you answered 'No' to 2(b) above, please comment below on how you believe this process should operate.

Our views on this section cannot properly be reflected by answering the set questions, and accordingly we are providing separate comments.

There was some concern over the proposal that the CMA's fees should in future be deducted from the sums due to creditors rather than remaining the responsibility of the debtor. While we accept that currently these fees reduce the debtor's surplus income for the purposes of contribution, thus extending the period of the DPP, if the DPP is nonetheless successfully completed, the return to creditors is not affected. This proposal would, however, result in a reduction in the sums received by creditors, albeit that the DPP would last for a shorter period. It would also result in a difference in the return to creditors depending on whether the debtor opts for free advice or paid advice through a CMA, which is a matter within the debtor's control and not that of the creditors. We appreciate, however, that creditors may be prepared to accept this change as ultimately the return to creditors in a DPP would still be greater than in insolvency solutions. If this approach is introduced, however, we would not be in favour of the introduction of a statutory administration fee. We consider that if fees are to be in effect paid by the creditors, the creditors should have a say on the level of the fee, albeit that this may in practice be achieved by default depending on the approach of creditor representatives. Furthermore, if, as we suggest in Part 1, the CMA assuming the role of payment distributor is optional, this would require to be reflected in the fee, which would be less if the CMA was not performing that role.

Question 3(a): Do you agree that automatic approval should be introduced for cases where the debt due to objecting creditors is less than a specified percentage of the total DPP debt?

Yes.

Question 3(b): If you have answered 'Yes' to Q3(a) above, what proportion of total debt owed to non-consenting creditors should trigger the requirement for a fair and reasonable test to be conducted?

10%

Question 3(c): Do you agree that deemed creditor consent should be introduced for variations?

Yes.

Question 3(d): Where variation proposals will lead to a reduction in the duration of the DPP, do you agree these should be approved automatically by the DAS administrator?

Yes.

Question 3(e): Should AiB be able to submit variations on behalf of the debtor in the circumstances outlined above?

Yes, subject to comments below.

With regard to question 3(d), we consider that it is important that variation applications which are automatically approved should demonstrably be favourable to creditors and this should be a condition of such automatic variation. With regard to question 3(e), we consider that the circumstances would need to be exceptional and so should be carefully defined, in particular, with regard to what constitutes a money advisor being unable to act.

Question 4(a): Should short-term crisis payment breaks be introduced to address periods of crisis?

Yes.

Question 4(b): If you have answered 'yes' to question 4(a) above, do you agree money advisors should be responsible for authorising the proposed short term crisis payment breaks without having to consult creditors?

Yes.

Question 4(c): How many short-term crisis ament breaks should be available per rolling year?

One.

We are generally in favour of the introduction of short-term crisis breaks, but consider that these should be subject to strict conditions. This is particularly important if such breaks are to be authorised by the money advisor, as the money advisor might not be seen as impartial. We consider that one break of no more than one month per rolling year is appropriate because if more frequent or longer breaks are required, it suggests that reconsideration of the situation and an application to vary is required. We also consider that any missed payments should be added on to the end of the plan.

Yours sincerely,

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R3 Scottish Technical Committee

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