

The recast Insolvency Regulation (EU 2015/848)

The EU Regulation 2015/848 (the recast Regulation) comes into force, in part, on 26 June 2017. The recast Regulation, which deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU, replaces EC Regulation (1346/2000) (the original Regulation) making changes to existing provisions and introducing areas of new policy.

The recast Regulation has direct effect in the UK but we have made the Insolvency Amendment (EU 2015/848) Regulations 2017 (the implementing Regulations) to facilitate the smooth operation of the recast Regulation in different parts of the UK. The implementing regulations introduce procedural requirements which practitioners dealing with certain types of cross-border insolvencies will need to be aware of in addition to the provisions of the recast Regulation. We have noted below some of the key changes in the recast Regulation and the implementing Regulations.

It should be noted that, due to the timing of the general election and the dissolution of the previous Parliament, it was not possible to lay the implementing Regulations before Parliament 21 days before commencement, as is convention.

It may also be noted that the implementing Regulations make changes to insolvency law in Northern Ireland and to devolved areas of corporate insolvency law in Scotland. The administration in Northern Ireland and the Scottish Government has agreed this approach.

Scope

The recast Regulation's scope is broader than the original Regulation. Article 1 brings into scope interim proceedings, based on laws relating to insolvency, which have the purpose of rescue, adjustment of debt, reorganisation or liquidation. Annex A contains an exhaustive list of such procedures for each Member State. It should be noted that schemes of arrangement are not included in the list of procedures covered by the recast Regulation.

The recast Regulation also features a significant change in that secondary proceedings are no longer restricted to terminal procedures and may now take the form of any procedure listed in Annex A. As such, Annex B of the original Regulation has disappeared. The implementing regulations therefore make changes to facilitate wider conversion of insolvency proceedings from one type of proceedings into another in cross-border cases.

Jurisdiction

The recast Regulation makes a number of subtle but important changes to jurisdiction, including a definition of centre of main interests (COMI).

Article 3 of the recast Regulation introduces 'look back periods' where the general presumption that a debtor's COMI is located in the place of the registered office does not apply if the registered office has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings.

Similar provisions also apply to individuals. The presumption, in the case of an individual carrying on business, that COMI is located in the principal place of business, will not apply if this has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings. In the case of individuals not carrying on business, the

presumption that COMI is located in the place of habitual residence will not apply if this has been moved to another Member State within the 6 month period prior to the request for the opening of proceedings.

Article 4 of the Regulation introduces an explicit obligation on the court opening proceedings to examine whether it has jurisdiction [and on which grounds in Article 3]. This requirement may be entrusted to insolvency practitioners (as defined in Article 2(5)) in cases where proceedings are not opened by a court. The implementing Regulations make changes to procedural rules so that applications for provisional liquidations and interim receiverships must contain the same declaration as to jurisdiction currently required for other types of insolvency applications, in order to signpost the court's obligation to consider the issue. In addition, a nominee will be required to examine jurisdiction, making a declaration in their invitation to creditors to consider a CVA proposal or in their report under section 256A in respect of an IVA proposal.

Practitioners should also note the amended definition of 'establishment' in Article 2(10).

Undertakings

Article 36 provides that, in order to avoid secondary proceedings being opened in another Member State, an insolvency practitioner may offer an undertaking in respect of the assets located in that jurisdiction, that the insolvency practitioner will comply with the distribution and priority rights under the laws of that Member State when dealing with those assets. This may be viewed, to an extent, as the codification of what has been common practice in the UK for several years.

It is important to note that the procedural rules to be applied by an insolvency practitioner when offering an undertaking to creditors in another Member State are those of the local jurisdiction (i.e. the Member State in which secondary proceedings will not be opened if the undertaking is approved, subject to Article 38). The implementing Regulations therefore set out the procedure that a member State liquidator must comply with in offering and obtaining the approval of UK creditors to an undertaking. It should be noted that the required majority for approving an undertaking is the same as that required for approving a CVA.

Where an office-holder in proceedings in England and Wales, or in Scotland in respect of proceedings relating to a company, proposes to offer an undertaking to creditors in another Member State, as well as complying with local procedural rules in the Member State concerned, the implementing Regulations require additional procedures to be followed. An office-holder must (in addition to the requirements of Article 36 itself) inform *all* creditors of a decision to reject the proposed undertaking, or, where approved: send a copy to *all* creditors with a notice informing them of the approval of the undertaking and of its effect; deliver a copy to Companies House in the case of companies; or file the undertaking on the court file or bankruptcy file in the case of an individual. The office-holder may also choose to advertise the undertaking in the relevant Member State but this is a discretionary matter.

Group coordination

Chapter V of the recast Regulation introduces a range of new provisions aimed at ensuring the efficient administration of insolvency proceedings relating to different companies forming part of a group.

As well as requirements for insolvency practitioners to cooperate and communicate with counterparts in other proceedings and courts in other Member States (which build on enhanced provisions elsewhere in the recast Regulation), a new group coordination procedure is set out in Section 2 of Chapter V.

The implementing Regulations set out procedural rules for making an application to the court for the opening of group coordination proceedings in England and Wales (procedural rules for court applications in Scotland are the responsibility of the Lord President's Office). In addition to the information required by Article 61, applicants must ensure they have provided details identifying relevant insolvency practitioners and proceedings.

Where an order is made opening coordination proceedings, the applicant must deliver a copy of the order to office-holders in England and Wales, their equivalents in proceedings in other parts of the UK, and to member State liquidators. The equivalent provisions apply in Scotland. Office-holders in England and Wales and their equivalents in Scotland must then deliver a copy of the group coordination order to Companies House.

Practitioners should note that, when acting as office-holders, creditor approval is not required in respect of the decision to participate or not in a group coordination, even though Article 64 gives Member States the ability to impose such a requirement if they so choose. The fact that the implementing Regulations do not impose such a requirement does not prohibit an office-holder from seeking approval or consulting creditors if they consider it appropriate, but this is at the office-holder's discretion.

As the group coordination is a voluntary process, office-holders who have not objected to inclusion in group coordination, are not subject to the coordinator's recommendations or the coordination plan. However, where an office-holder does not follow these, they must give reasons for doing so under Article 70. The implementing Regulations require such reasons to be given to creditors as soon as reasonably practicable.

Dissolution

Article 48 prevents a company subject to insolvency proceedings from being dissolved until all proceedings in respect of that company have been closed or the member State liquidators acting in respect of those proceedings have consented to dissolution.

In cases where there are parallel proceedings open in at least one other Member State, the office-holder is required by the implementing Regulations to deliver to Companies House additional information when delivering an account and statement under section 106(3) or section 146(4) or a notice under paragraph 84(1) of Schedule B1. The information required is: confirmation of other open proceedings; details identifying those proceedings and the details of the member State liquidator(s); and confirmation as to whether or not the member State liquidator(s) has consented to dissolution of the company. This notice must be delivered at the same time as delivering the above notices but practitioners should note it is only required where there are other proceedings open in another Member State.

The implementing Regulations make further provision, amending the dissolution provisions contained in the Insolvency Act 1986, to prevent dissolution in contravention of Article 48.

Priority of costs

The implementing Regulations make clear where in the order of priority, costs fall which are incurred under Articles 30 (costs of publication in another Member State and registration in public registers of another Member State) and 59 (costs of cooperation and communication in proceedings concerning members of a group of companies).

Standard forms

The recast Regulation makes provision (Article 88) for the creation of a number a few standard forms for use across all Member States. These comprise:

- Request for access to information (Article 27(4) – requesting access to certain information relating to ‘consumer’ debtors in national insolvency registers where access to such information is conditional). Use of this form is mandatory.¹
- Notice of insolvency proceedings (Article 54 – informing known foreign creditors of the opening of proceedings). Use of this form is mandatory.
- Lodgement of claims (Article 55 – permits foreign creditors to file their claim using the standard form, instead of in accordance with prescriptive rules in the local law of the Member State in which proceedings have been opened). Use of this form is optional.
- Objection with regard to group coordination proceedings (Article 64(2) – to object to inclusion in group coordination proceedings or to the person proposed as coordinator). Use of this form is optional.

The forms will be available on the European e-Justice Portal: <https://e-justice.europa.eu/home.do?plang=en&action=home>

Drafting approach in the implementing regulations

Practitioners may notice the continued use of the term ‘member State liquidator’ in the implementing Regulations even though the recast Regulation uses the new term of ‘insolvency practitioner’. The existing term has been retained for the sake of familiarity. The same approach has been used in relation to specifying jurisdiction in that the existing references to ‘main’, ‘secondary’ and ‘territorial’ are retained in preference to references to Article 3 of the recast Regulation.

In respect of Scotland, the implementing Regulations introduce a new concept of “office-holder” and also of ‘identification’ of a company debtor, insolvency proceedings and ‘office-holder’ that do not currently exist in the Insolvency (Scotland) Rules 1986. This approach follows the identification provisions contained in the new Insolvency (England and Wales) Rules 2016² in order to achieve greater consistency in Great Britain. It also reflects the current intention to use this approach in the modernised Scottish Rules when they are made, though this is subject to further agreement and consultation.

Practitioners should note that the implementing Regulations do not apply to limited liability partnerships (LLPs).

Any enquiries regarding this article should be sent Policy.Unit@insolvency.gsi.gov.uk

¹ Provisions relating to insolvency registers and the interconnection of insolvency registers do not come into force until 2018 and 2019.

² See rule 1.6.

EC Insolvency Regulation: filing with Companies House

On 26th June the Insolvency Amendment (EU 2015/848) Regulations 2017 deliver new filing requirements to the registrar for England & Wales, Scotland and Northern Ireland. Forms will be made available on GOV.UK.

Where there are insolvency proceedings in another member state and an undertaking is approved by creditors, you must give notice to the registrar by filing:

England & Wales	Scotland	Northern Ireland	Form title
IE01	IE01(Scot)	IE01(NI)	Notice of approval of an undertaking by an office holder in respect of assets in another member state
IE02	IE02(Scot)	IE02(NI)	Notice of approval of an undertaking proposed by the member state liquidator to local creditors in the UK

Where companies are subject to an order opening group co-ordination proceedings, you must give notice to the registrar by filing

England & Wales	Scotland	Northern Ireland	Form title
IE03	IE03(Scot)	IE03(NI)	Notice of an order opening group co-ordination proceedings

Where there are insolvency proceedings in another member state, you must notify the registrar whether there is consent to the dissolution of a company by a member state liquidator, or whether those proceedings have ceased. You must do this at the same time as sending the notice of final account prior to dissolution or early dissolution, and moving from administration to dissolution, which must be accompanied by either of the following forms:

England & Wales	Scotland	Northern Ireland	Form title
IE04	IE04(Scot)	IE04(NI)	Statement of insolvency proceedings in another member state with consent to dissolution
IE05	IE05(Scot)	IE05(NI)	Statement of insolvency proceedings in another member state without consent to dissolution

If you have any queries, please contact:

Lynne Cross
lcross@companieshouse.gov.uk
Insolvency Policy Advisor
Companies House