

## Cross Border Insolvency Factsheet

<p>Can a non UK company be subject to UK insolvency proceedings?</p>	<p>Yes, providing that certain criteria are met.</p>	
<p>Centre of Main Interest Test</p>	<p>In accordance with the EU Regulation on Insolvency Proceedings 2000 (the 'Regulation') the principal factor is the location of the company's centre of main interests (COMI). Whilst the location of the company's registered office is presumed to be its COMI this presumption is rebuttable and has been rebutted in a number of reported cases.</p> <p>A company's COMI should correspond to the place where it conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. The Courts have made it clear that each decision will turn on its own facts although it seems fair to assume that the location of staff, assets,</p>	<p>economic activities and financial and management controls will be relevant factors.</p> <p>The objective perception of third parties (such as customers and creditors) with regard to these matters will also be relevant. The same principals are applied to individuals as well as companies.</p> <p>For example, if a company is incorporated in Italy with its registered office in Germany but, in fact, carries out most of its business finance and management activities within England and Wales, such that its COMI is deemed to be England and Wales, main insolvency proceedings, must be opened in England and Wales.</p>
<p>What are 'Insolvency Proceedings' within the meaning of the Regulations?</p>	<p>All personal and corporate insolvency procedures including Administrations, Compulsory Liquidation, Creditors' Voluntary Liquidation (but only if confirmation of the Court is sought) Company Voluntary Arrangements, Bankruptcy and Individual Voluntary Arrangements.</p>	<p>However, Members' Voluntary Liquidations, Administrative and other Receiverships and Creditors' Voluntary Liquidations (where the confirmation of the Court is not sought) are not insolvency proceedings within the meaning of the Regulation.</p>

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<p><b>What are secondary and territorial proceedings?</b></p>	<p>Main proceedings can only be opened in the EU country where the COMI is situated and only one set of main proceedings can be opened within the EU. Where the company has an 'establishment' in another EU country, satellite proceedings may be opened in that country. These will be 'secondary proceedings' if main proceedings have already been opened in another jurisdiction and 'territorial proceedings' if main proceedings have not been opened. An 'establishment' is defined as a 'any place of operations where the [company] carries out a non transitory economic activity with human means and goods'.</p> <p>It may not, in many cases, be necessary to open satellite proceedings, as the Regulations require insolvency proceedings opened in one member state to be automatically recognised in all other member states, without further formality and for the local Courts to recognise the office holder's authority.</p>	<p>The law applicable in the foreign jurisdiction will be the law applicable to the main proceedings, unless secondary proceedings are opened, in which case the law of the jurisdiction where secondary proceedings are opened will apply to those proceedings.</p> <p>The decision to open secondary proceedings or not, may therefore depend upon the nature, value and location of the overseas assets and the powers and remedies available under the local jurisdiction.</p>
<p><b>Do the Regulations apply to companies incorporated outside of the EU?</b></p>	<p>If the company's COMI is located within the UK, main insolvency proceedings may be opened in the UK under the Regulation, even if the company was incorporated outside of the EU.</p> <p>The Courts of England and Wales also have general jurisdiction, under the Insolvency Act 1986, to wind up an 'unregistered', company which would include a company registered outside of the UK or the EU although this jurisdiction is subordinate to the Regulation in the event of a conflict. In order for the Court to exercise this jurisdiction, it must be satisfied that there is a sufficient connection between the company and England and Wales, such as a place of business or assets being located in England and Wales.</p>	<p>Where a UK winding up order is made in relation to a company incorporated in a country which is not party to the Regulation, this would not usually be a bar to primary insolvency proceedings also being opened in respect of the same company in its country of incorporation if local law permits. This may be of less concern if creditors and assets are mostly situated within the UK but might prove problematic otherwise.</p>

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<p>Continued...</p>	<p>The United Nations Commission on International Trade Law Model Law on Cross Border Insolvency (the 'Model Law') provides a framework for co-operation between foreign Courts and office holders. It has been adopted and enacted by a number of countries including the UK and the US.</p>	<p>The operation of the Model Law is, however, generally confined to providing a framework within which foreign courts or representatives may request assistance or recognition from the courts of another jurisdiction in relation to insolvency proceedings.</p>
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