



## Cross-border insolvency law in the EU

Insolvency law concerns the balancing of several potentially conflicting interests: those of the creditors of an insolvent company, its shareholders and its customers, as well as the general economic interest in avoiding the winding down of companies which are still potentially viable. Currently, insolvency law is not harmonised at EU level. However, the [Insolvency Regulation](#) lays down the rules on jurisdiction, recognition and applicable law in the field in respect of cross-border insolvency. The Commission has recently proposed its reform.

### Background

Cross-border insolvency occurs whenever a debtor's assets or liabilities are located in more than one state, or if the debtor is subject to the jurisdiction of courts from two or more states. In the EU, there are around 200 000 corporate bankruptcies filed yearly. There is also a growing number of consumer bankruptcies of private individuals in those Member States (MS) which allow for such a procedure. For example in 2010, 162 000 consumers filed for bankruptcy in the UK, 140 000 in Germany and 44 000 in France.

Insolvency laws vary significantly between MS. For instance, English insolvency law is considered to be predictable, flexible and to prioritise reorganisation, whereas continental insolvency laws are considered to be more punitive of the debtor. Another divergence concerns workers' rights: German and Austrian laws provide for state funding of salaries during the first months of insolvency, whilst French insolvency law gives preference to workers' salary claims before all other claims. Within procedural law, the respective roles of courts and creditors vary: in France, the insolvency court is mainly in charge, in England the role of the creditors is dominant, while Germany takes an intermediate approach.

### The Insolvency Regulation

The EU [Insolvency Regulation](#), adopted in 2000, neither unifies nor harmonises insolvency law but regulates conflicts of law and jurisdiction within the MS (with the exception

of Denmark). Its scope does not extend to the effects of proceedings opened in non-EU countries nor to the effects of EU proceedings outside the Union. It also does not apply to the insolvency of financial institutions (which is regulated in Directives [2001/17](#) and [2001/24](#)).

The Regulation defines insolvency proceedings narrowly, including only those which have a collective character and entail the removal of a debtor's assets ('divestment') and the appointment of a liquidator. The Regulation does not, therefore, cover less far-reaching procedures, such as adjustment of debt or reorganisation.

### Principle of universality

The Regulation is based on the principle of universality, whereby only one main insolvency proceeding is opened against one debtor. The jurisdiction and applicable law depends on where the debtor has their 'centre of main interests'. Court decisions rendered in the main proceedings are automatically recognised across the EU.

This principle of universality is, however, combined with elements of territoriality, whereby a territorial (secondary) proceeding may be opened in an MS in which the debtor has an establishment. Secondary proceedings are concerned only with the assets located in the MS where they are conducted, and are governed by the law of that MS.

### Applicable law

The law applicable to the effects of insolvency proceedings is essentially that of the MS in which such proceedings are opened. This applies in particular to the rank and priority of claims. However, there are a number of exceptions. These include situations when third-party property rights (such as collateral) which form part of the debtor's assets are located in another MS as well as 'reservation of title' (when transfer of ownership of objects sold is delayed). In those cases the applicable law is decided by the location of the assets.

## Controversial issues

### Centre of main interests (COMI)

The notion of COMI, which is decisive for determining both the jurisdiction and applicable law, is a new and open-ended concept, phrased in broad terms. It has been criticised for being 'fuzzy' and 'unpredictable'. Even after the clarifications provided in Court of Justice of the EU (CJEU) case-law this notion is still not applied uniformly by national courts.

In the case of legal persons there is a presumption that COMI corresponds to the registered office, however evidence may be adduced to refute that presumption. The CJEU [held](#) that in order to reverse this presumption, it is necessary to prove that the actual centre of management and supervision, as perceived by third parties, is located elsewhere.

A particularly controversial problem is the COMI of companies which are part of multi-national groups. The Regulation does not contain any specific rules for them and national courts have taken different approaches.

### Forum shopping

Another controversial issue is [forum shopping](#) which the Regulation was meant to prevent but which has actually increased since its entry into force. Sometimes companies even change their registered offices and/or relocate their actual business activity to opt for a system of insolvency law which they consider better.

Forum shopping also occurs in consumer bankruptcies. A consumer simply needs to move to another MS to live and work there for their COMI to change. However, according to the [CJEU](#), the COMI cannot be changed after insolvency proceedings have been opened.

Some scholars [argue](#) that forum shopping should not be combated as it contributes to economic efficiency and is compatible with the free movement in the Internal Market.

### Other issues

The CJEU has been called upon to clarify controversies regarding the [temporal effects](#) of

the Regulation in connection with the accession of new MS, the [borderline](#) between the Insolvency Regulation and [Regulation 44/2001](#) on judicial cooperation in civil and commercial matters, and the powers of the court conducting the main proceedings to [set aside](#) transactions made by the debtor with third parties.

An issue which remains unresolved under the Regulation is the ranking of public-law claims (tax, social security) from other MS. Although such claims have to be recognised, it is not clear what priority they should be given.

There are also practical problems in cooperation between national courts and the flow of information between them.

## Commission's proposal

In December 2012, the Commission published a [proposal](#) to amend the Regulation. It is now before the [Legal Affairs Committee](#) (rapporteur Klaus-Heiner Lehne, EPP, Germany). The main changes would include:

### What about harmonisation?

According to a 2010 [study](#), certain areas of substantive insolvency law should be harmonised at EU level. These could include a common test of insolvency, formalities regarding lodging claims, certain aspects of reorganisation plans, rules regarding detrimental acts, the relationship between contractual rights of termination and insolvency, as well as directors' responsibilities.

- enlargement of the scope of proceedings also to cover debt adjustment and reorganisation, even when the debtor is not divested of its assets;
- new, more precise definition of COMI;
- duty of the court where an insolvency case was brought to check, on its own motion, whether it has jurisdiction (with the possibility for creditors to challenge this finding)
- creation of on-line insolvency registers by MS, interconnected via the [e-Justice](#) portal;
- detailed rules on cooperation between courts and liquidators acting in the main and secondary proceedings;
- new set of rules regarding the insolvency of companies which are members of a group of companies; a coordinated restructuring plan for the whole group would be favoured and all courts and liquidators concerned would have a duty to exchange information and cooperate closely.