

IMPLEMENTING THE CREDIT INSTITUTIONS REORGANISATION AND WINDING UP DIRECTIVE: A TRANSPOSITION NOTE

The Directive

Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions.

The purpose of the Directive is to establish, for the proper functioning of the internal market and the protection of creditors:

- Coordination rules to ensure that the reorganisation measures adopted by the administrative or judicial authorities of the home Member State in order to preserve or restore the financial soundness of a credit institution, as well as the measures adopted by persons or bodies appointed by those authorities to administer the reorganisation measures, are recognised and implemented throughout the Community; and
- Coordination rules for winding up proceedings in order to ensure that these proceedings commenced in the home Member State are recognised and have full effects throughout the Community, in accordance with the principles of unity and universality.

The Directive is being implemented in the UK through Regulations (SI ^{***}/2004) made by HM Treasury. The Regulations implement the Directive throughout the UK and make the necessary amendments to Scottish and Northern Ireland legislation.

Transposition Notes

This note only describes the transposition of the main elements of the Directive.

Article	Purpose	Implementation
Title II	Reorganisation Measures	
A	Credit institutions having their head offices within the Community	
3	Adoption of reorganisation measures – Applicable Law (1) Only the administrative or judicial authorities in the home Member State shall be entitled to decide on the implementation of reorganisation measures.	Regulation 3 prohibits a UK court from initiating or approving a reorganisation measure or winding-up proceedings with respect to a credit institution based in another Member State.

	(2) Reorganisation measures will be effective throughout the Community without further formalities.	Regulation 5(1) requires any insolvency measure (whether a reorganisation or winding up proceedings) by another Member State to have effect as if it were part of general UK insolvency law.
4	Information for the competent authorities of the host Member State	Regulation 9 requires the court to inform the FSA (as the competent authority in the UK) of any decision to open reorganisation measures or winding up proceedings. Regulation 10 requires the FSA, to inform the competent authorities in other Member States of any decision in the UK to open reorganisation measures or winding up proceedings.
5	Information for the supervisory authorities of the home Member State	Article 5 requires the administrative or judicial authorities of a host Member State to inform the competent authorities of the home Member State where they deem that reorganisation measures are necessary in the host Member State in respect of a credit institution. In the UK, the administrative or judicial authority is the court. There are no practical circumstances under which the UK court would be able to come to such a conclusion as regulation 3 (which implements Article 3) prohibits the court from deciding on reorganisation measures in respect of a credit institution based in another Member State. In the UK, it is more likely that the FSA would receive such information. Therefore this Article has been implemented by imposing the relevant obligation on the FSA.
6	Publication	Regulation 12 requires publication in the <i>Official Journal of the European Communities</i> and 2 national newspapers in each Member State in which the UK credit institution has a branch of summary information concerning reorganisation measures

		and winding up proceedings opened in the UK.
7	Duty to inform known creditors and right to lodge claims	Existing UK law does not require claims to be formally lodged in order to receive payments. No action is, therefore, needed to implement this Article of the Directive as it does not impact on existing legislation.
B	Credit institutions having their head offices outside the Community	
8	Branches of third-country credit institutions	Part 5 of the Regulations implements this Article (regulations 36-38). Where branches of third country credit institutions can be subject to reorganisation measures in the UK, the provisions of regulations 9 and 10 on notification to the FSA and, through the FSA, to other Member States' competent authorities will apply.
Title III	Winding Up Proceedings	
A	Credit institutions having their head offices within the Community	
9	<p>Opening of winding up proceedings – information to be communicated to other competent authorities</p> <p>(1) Only administrative or judicial authorities in the home Member State shall be entitled to decide the opening of winding up proceedings.</p> <p>Winding up measures shall be recognised throughout the Community without further formalities.</p> <p>(2) Administrative or judicial authorities to be informed.</p>	<p>See regulation 3 above.</p> <p>See regulation 5(1) above.</p> <p>See regulations 9 and 10 above.</p>
10	Law applicable	Regulation 22 implements this Article by stating that winding up

		proceedings within the UK, and the particular matters addressed by Article 10, will be conducted in accordance with the general law of insolvency of the UK.
11	Consultation of competent authorities before voluntary winding up	Regulation 8 requires the FSA to be notified of any intention to serve a notice of a meeting at which a resolution to wind up a credit institution voluntarily is proposed.
12	Withdrawal of a credit institution's authorisation	Regulation 11 implements this Article by requiring the FSA to exercise its power under section 45 of the Financial Services and Markets Act 2000 (FSMA) to vary or cancel the credit institution's permission under Part 4 of FSMA.
13	Publication	See Article 6 and regulation 12 above.
14	Provision of information to known creditors	Regulation 14(1) requires all known creditors to be informed in writing as soon as reasonably practicable that winding up proceedings have been commenced, together with other relevant information.
15	Honouring of obligations	Regulation 13 implements this Article.
16	Right to lodge claims	Creditors, wherever domiciled already have a right to lodge claims under UK law. No further provision is necessary to implement this Article.
17	Languages (1) Information provided for in Articles 13 and 14 to be in the official language (or one of the official languages) of the home Member State. A prescribed form should be used. (2) Creditors may submit claims in an official language of the Member State in which they reside. Creditors may be required to provide a translation of the claim	Regulations 12(12) and 14(6) implement this Article. Regulation 15 implements this Article.

	or observations into the language of the home Member State.	
18	Regular provision of information to creditors	Regulation 16 requires a liquidator or administrator to send a report to creditors once every twelve months. This does not prevent a court from providing for reports to be sent more frequently.
B	Credit institutions the head offices of which are outside the Community	
19	Branches of third-country credit institutions	Part 5 of the Regulations implements this Article (regulations 36-38). Where branches of third country credit institutions can be subject to winding up proceedings in the UK, the provisions of regulations 9 and 10 on notification to the FSA and, through the FSA, to other Member States' competent authorities will apply.
Title IV	Provisions common to reorganisation measures and winding up proceedings	
20	Effects on certain contracts and rights	See regulations 23 to 25.
21	Third parties' rights in rem	See regulation 26.
22	Reservation of title	See regulation 27.
23	Set-off	See regulation 28.
24	Lex rei sitae	See regulation 33.
25	Netting agreements	See regulation 34.
26	Repurchase agreements	See regulation 35.
27	Regulated markets	See regulation 29.
28	Proof of liquidators' appointment (1) Appointment to be evidenced by a copy of the original decision appointing him. Recognition in other Member States must be recognised without further formality (although a translation of the appointment order can be required). (2) Administrators and	See regulation 5(3). See regulation 5(2).

	<p>liquidators shall be entitled to exercise within the territory of all Member States the powers which they can exercise in their home Member State.</p> <p>(3) In exercising powers in accordance with home Member State legislation the administrator or liquidator shall comply with the law of the Member State within whose territory he wishes to take action.</p>	See regulation 5(4).
29	Registration in a public register	UK insolvency law already allows certain reorganisation measures and winding up proceedings to be registered in certain registers, such as at Companies House. Where UK law does not have an appropriate register, Article 29 does not require the creation of a register. Therefore no specific provision needs to be made for the implementation of Article 29.
30	Detrimental acts	See regulation 30.
31	Protection of third parties	See regulation 31.
32	Lawsuits pending	See regulation 32.
33	Professional secrecy	Regulations 18 and 38 apply existing legislation concerning confidential information to information disclosed in connection with the provisions of this Directive.