

# ALLEN & OVERY

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## The Recast European Insolvency Regulation

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### Background

The substantive provisions of the EU Regulation on Insolvency Proceedings 2015<sup>1</sup> (the **Recast Regulation**) came into force on 26 June 2017. The previous European insolvency regulation - the EC Regulation on Insolvency Proceedings 2000 (the **Original Regulation**) - was possibly the most significant piece of European legislation in the insolvency arena in recent times and its scope has now been expanded by the Recast Regulation.

By way of background, the Original Regulation was not a harmonisation of Member States' insolvency laws; it was concerned with regulating (as between Member States) jurisdiction to open insolvency proceedings, determining the applicable law in those proceedings and providing automatic recognition of those proceedings throughout the EU. The Recast Regulation retains these core parameters and does not make any attempt to harmonise domestic insolvency regimes (although there are moves afoot in Europe to try to do just that) – but the expansion to cover pre-insolvency procedures and the introduction of new and enhanced cooperation and coordination tools means the Recast Regulation has a, potentially, greater (or deeper) reach when it comes to cross-border restructurings and insolvencies throughout Europe. Whether, in practice, it will have a dramatic effect (or dramatically different effect to its predecessor) on creditor/debtor decision-making in, or the course of, cross-border restructurings and insolvencies, only time will tell.

### So, what has changed in the Recast Regulation?

See below a brief summary of some of the key changes.

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**When does it apply?**

The Recast Regulation applies to all proceedings opened on or after 26 June 2017 and repeals and replaces the Original Regulation in this regard. The Original Regulation will continue to apply to proceedings commenced before 26 June 2017.

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**What proceedings are within scope?**

Pre-insolvency “rescue” proceedings are now within scope. This has resulted in approximately 19 new proceedings being listed in Annex A to the Recast Regulation (including the new Spanish homologacion). The UK did not list any additional procedures in Annex A; a scheme of arrangement under Part 26 of the Companies Act 2006, which is often used as a composition tool in financial restructurings and has been incredibly popular in recent years for English and overseas companies, is still excluded from scope.

The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to winding up proceedings. Secondary proceedings remain limited to the assets located within the relevant Member State in which the secondary proceedings are commenced.

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**Are the key concepts of “centre of main interests” and “establishment” still the same?**

Substantially the same but with some tweaks. The Recast Regulation now describes “centre of main interests” (CoMI) in Article 3(1) and provides further guidance in recitals (28) and (30). This is essentially a codification of previous case law on CoMI. The definition of “establishment” has also been amended slightly. The Recast Regulation also introduces provisions designed to prevent abusive forum shopping whilst still retaining the flexibility to allow lawful CoMI shifts to occur – albeit with greater scrutiny in the future.

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<sup>1</sup> Regulation (EU) 2015/848

<b>What about the choice of law exceptions (third parties' rights in rem, set-off arrangements and detrimental acts, in particular)?</b>	Secured creditors and counterparties to set-off arrangements will be comforted to know that the terms of these important exceptions <sup>2</sup> are substantially the same. However, for the purposes of the third parties' rights in rem exception in particular, please note that the definition of "the Member State in which assets are situated" has changed in some important respects. The new, and substantially longer, definition is in Article 2(9) – in particular, the change to the location of cash in bank accounts and book entry securities should be noted.
<b>Have the automatic recognition provisions changed?</b>	No, but be aware that due to the extended scope of the Recast Regulation now capturing pre-insolvency rescue procedures, these procedures also benefit from automatic EU-wide recognition.
<b>Synthetic secondary proceedings</b>	This is a new concept designed to avoid the increased costs and complexities often caused by secondary proceedings in another Member State. In brief, under Article 36 of the Recast Regulation, the insolvency officeholder in main proceedings can give a unilateral undertaking (which known local creditors need to approve) to comply with local distribution and priority rules when distributing assets, or the proceeds of realisation of assets, located in the Member State where secondary proceedings could have been opened.
<b>Group insolvencies (ie where there are two or more members of the same corporate group subject to separate insolvency proceedings under the Recast Regulation)</b>	There are two new frameworks here (a lot of uncertainty as to how these might operate in practice and query how much the latter will be used in practice): <ul style="list-style-type: none"> <li>• A new mandatory framework for communication and cooperation between officeholders/courts.</li> <li>• A voluntary framework for formal "group coordination proceedings" involving the appointment of an independent group coordinator. Such appointment will not, however, terminate the insolvency proceedings in each Member State or displace the officeholders appointed in those proceedings. Any group member can object to its inclusion in the group coordination proceedings and stay outside the process entirely (with the option to later opt-in).</li> </ul>

Finally, although the Recast Regulation has direct effect in each Member State (except Denmark which has opted out), it is expected that each Member State has passed, or soon will be passing, legislation making consequential amendments to its domestic insolvency legislation<sup>3</sup>. These amendments are likely to be procedural in nature – for example (i) updating references to the Recast Regulation and removing references to the Original Regulation; (ii) confirming the creditor approval threshold needed to approve an Article 36 undertaking (in relation to synthetic secondary proceedings, see the table above); and (iii) setting out the procedure for making an application to open group coordination proceedings to the local court in that Member State. It remains to be seen what will happen to the cross-border effects of the Recast Regulation following Brexit.

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<sup>2</sup> Articles 5 (Third Parties' rights in rem), 6 (Set-off) and 13 (Detrimental acts) in the Original Regulation and Articles 8 (Third parties' rights in rem), 9 (Set-off) and 16 (Detrimental acts) respectively in the Recast Regulation.

<sup>3</sup> In the United Kingdom, see The Insolvency Amendment (EU 2015/848) Regulations 2017 (SI 2017/702) which came into force on 26 June 2017.