

European Insolvency Regulation – Publication and Registration Requirements

Q1. What are the publication procedures in your jurisdiction for notice of the opening of insolvency proceedings

For corporate entities in Scotland, there are three distinct insolvency or quasi-insolvency regimes. The publication procedures of each regime will be discussed in turn.

References to ‘sections’ and ‘paragraphs’ relate to the Insolvency Act 1986 (as amended) (“the Act”) and references to ‘rule(s)’ relate to the Insolvency (Scotland) Rules 1986.

1. Liquidations

a. Voluntary Liquidation

Members Voluntary Liquidation (solvent liquidation) and Creditors Voluntary Liquidation (insolvent liquidation)

A copy of the members’ resolution resolving to wind-up the company should be sent to the Registrar of Companies within 15 days (section 84) and a copy of the same resolution should be published in the *Edinburgh Gazette* within 14 days of the passing of the resolution. (section 85).

In a solvent winding up, the directors of the company must make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company’s affairs and have formed the opinion that the company will be able to pay its debts in full together with interest at the official rate within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration and shall deliver the declaration to the Registrar of Companies within 15 days of the passing of the resolution (section 89).

The liquidator must within 14 days after his appointment publish in the *Edinburgh Gazette* and deliver to the Registrar of Companies for registration a notice of his appointment using Forms 600 and 600s set out in Schedule 2, Part II to the Companies (Forms) (Amendment) Regulations 1987 (SI 1987/752) (section 109).

b. Involuntary Liquidation (Winding Up by the Court)

On the making of the winding-up order, a copy of the court order must be forwarded by the company (or otherwise as may be prescribed) to the Registrar of Companies who shall enter it in the records relating to the company (section 130).

The Liquidator requires to intimate his appointment in accordance with Section 109 as set out in the preceding section.

2. Administration

a. Appointment of Administrator by Court

Notice of the petition to the court for an administration order should be given to any holder of a qualifying floating charge and to the following persons (rule 2.3):

- i. an administrative receiver (if appointed);
- ii. a member state liquidator, if one has been appointed in main proceedings in relation to the company;
- iii. any petitioner for a winding up order of the company which has been presented but not yet made;
- iv. a provisional liquidator;
- v. any proposed administrator (including the person proposed as administrator in the Petition) ;
- vi. the Registrar of Companies;
- vii. the Keeper of the Register of Inhibitions and Adjudications for recording in that register;
- viii. the company, if the application is made by anyone other than the company; and
- ix. any other person(s) to whom the court directs that intimation to be made.

If the court rejects the petition then all of the applicable persons listed at i-ix above should be sent a notice of the court's order dismissing the petition (rule 2.8).

b. Appointment of administrator by Holder of Floating Charge

A holder of a floating charge over the company may not appoint an administrator unless he has given at least 2 business days' written notice to the holder of any prior floating charge holder (paragraph 15) of Schedule B1 of the Act.

The administrator is appointed when the floating charge holder successfully files Form 2.5B(Scot) (or Form 2.6B(Scot) if lodging the form at court out of office hours) in accordance with paragraph 18 of Schedule B1 of the Act (paragraph 19).

c. Appointment of administrator by Company or Directors of the Company

A company or directors who propose to make an appointment must give at least 5 written days' notice to (paragraph 26):

- i. any person who is or may be entitled to appoint an administrative receiver of the company; and
- ii. any floating charge holder entitled to appoint an administrator

The administrator is appointed when the company (or directors) successfully files a Form 2.9B(Scot) in accordance with paragraph 27 of Schedule B1 of the Act (paragraph 28)

d. Administrator Appointed

The administrator shall send a notice of his appointment (using a Form 2.11B(Scot)) to the Registrar of Companies within seven days from:

- i. where appointed by an administration order, the date of the order; or
- ii. by a floating charge holder, the company itself or the directors, the date on which he receives notice of his appointment (paragraph 46).

As soon as it is reasonably practicable, the administrator shall advertise his appointment once in the *Edinburgh Gazette* (using a Form 2.10B(Scot)) and once in a newspaper circulating in the area where the company has its principal place of business or in such newspaper as he thinks appropriate for ensuring that the order comes to the notice of the company's creditors (rule 2.19).

The administrator shall at the same time give notice of his appointment to the following persons (rule 2.19):

- i. a receiver, if appointed;
- ii. a petitioner in a petition for the winding up of the company, if that petition is pending;
- iii. any provisional liquidator of the company, if appointed;
- iv. any supervisor of a voluntary arrangement under Part 1 of the Act; and
- v. the Keeper of the Register of Inhibitions and Adjudications for recording in that register

As soon as reasonably practicable after the appointment of the administrator, the administrator shall obtain a list of the company's creditors and send a notice of his appointment (using a Form 2.11B(Scot)) to each creditor of whose claim and address he is aware (paragraph 46).

3. Receivership

Although strictly a method of enforcing security rather than an insolvency process, it may be convenient to deal with receivership provisions also, as enforcement frequently occurs because a company is insolvent. Note also that floating charges granted after 15 September 2003 do not entitle the holder to appoint a receiver (except in certain limited circumstances) and the method of enforcement is administration.

a. Appointment by Floating Charge Holder

A certified copy of the validly executed instrument of appointment of a receiver by a holder of the floating charge shall be sent by or on behalf of the holder of the floating charge to the Registrar of Companies for registration within 7 days of its execution and shall be accompanied by a notice contained in a Form 1(Scot). Upon receipt, the particulars of the appointment will be recorded in the Register of Charges.

b. Appointment by Court

It is also competent in Scotland to ask the court to appoint a receiver (section 51(2)). The petition to the court by the floating charge holder shall also be served on the company. If the court grants the order appointing the receiver, a copy of the order certified by the clerk of the court shall be sent by or on behalf of the holder of the floating charge to the Registrar of Companies for registration within 7 days of the order and shall be accompanied by a notice contained in a Form 2(Scot). Upon receipt, the particulars of the appointment will be recorded in the Register of Charges (section 54).

2. What should a liquidator from another Member State do in practice to arrange publication in your jurisdiction of notice under Art 21(1)

No legislation has been enacted to require mandatory publication in terms of Article 21(2). The member state liquidator may request publication in terms of Article 21(1), and in such a case the steps outlined above would require to be taken. No forms have been prescribed and registration might be problematical unless the entity to which the liquidator had been appointed was a Scottish registered company; qualified as an "overseas company"; or was registered as a branch under the Eleventh Company Law Directive in terms of Section 690 et seq. Companies Act 1985. Advertisement in the *Edinburgh Gazette* and local newspapers would appear likely to be less problematical.

3. If a debtor has an establishment in your jurisdiction, is it mandatory to publish there notice of the opening of insolvency proceedings in another member state, in accordance with Art 21(2), and if so do the procedures vary from those described in 1) and 2) above?

No. Where the liquidator requests such information be published, the ordinary procedures stated above should be followed as closely as possible.

4. In what public registers (e.g., land register, trade register) in your jurisdiction may a judgement opening main insolvency proceedings be registered?

For administrations, receiverships and liquidations, the main insolvency proceedings should be registered in the following register:

For Scottish registered companies

Register of Companies
Companies House
37 Castle Terrace
Edinburgh
EH1 2EB

For liquidations and receiverships the main insolvency proceedings should also be registered in the following register:

Register of Insolvencies
Accountant in Bankruptcy
1 Pennyburn Road
Kilwinning
Ayrshire
KA13 6SA

5. What should a liquidator from another Member State do in practice to register in your jurisdiction a judgement opening main insolvency proceedings under Art 22(1)

No legislation has been enacted to deal with this point and some uncertainty will exist as to how closely in practice a member state liquidator will be able to replicate the publication requirements unless the company to which he has been appointed is a Scottish registered company or otherwise registered in some form at Companies House.

6. If a debtor has an establishment in your jurisdiction, is it mandatory to register there notice of the opening of main insolvency proceedings in another Member State, in accordance with Art 22(2), and if so do the procedures vary from those described in 4) and 5) above?

No. Where the liquidator requests such information, the ordinary procedures stated above should be followed.