



*Research and Documentation
Directorate*

RESEARCH NOTE

Rights of former directors of a company in liquidation to bring legal proceedings in the name of that company

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- Subject:
- Examination of the national legislation or case-law governing the circumstances in which former directors of a company in liquidation retain the capacity to bring legal proceedings in the name of that company, notwithstanding that a liquidator has been appointed to administer and manage the company throughout the liquidation.
 - Consideration of the right to challenge, in the name of the company, administrative acts which have led it to be placed in liquidation: is this a right of the liquidator alone or is it available to the former directors of the company?
 - Examination of the conditions which must be satisfied in order for former directors to be able to bring an action.

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[...]

SUMMARY

I. INTRODUCTION

1. This research note aims to describe the way in which national legal systems ¹ allocate powers as between the former directors of a company in liquidation, on the one hand, and its liquidator, on the other, with regard to the issue of which of them has the capacity to take part in legal proceedings in the name of the company.
2. The note seeks to answer the following three questions:
 - (1) Does national legislation or case-law regulate the circumstances in which former directors of a company in liquidation retain the capacity to bring legal proceedings in the name of that company, notwithstanding that a liquidator has been appointed to administer and manage the company throughout the liquidation?
 - (2) Is it only the liquidator who has the right to challenge, in the name of the company, administrative acts which have led to the company being placed in liquidation, or is that right available to the former directors of the company?
 - (3) What conditions must be satisfied in order for the former directors to bring legal proceedings?
3. For the purposes of this note, it will be necessary to analyse situations of conflict between the external liquidators and the former directors of a company. Such situations may arise, in particular, from the opening of insolvency proceedings or other proceedings relating to undertakings in difficulty, or from the opening of ordinary liquidation proceedings. Voluntary liquidation is also considered, where relevant. In the light of the factual and legal matrix of the dispute in the main proceedings, it may also be helpful to describe certain special regimes for the banking and insurance sectors.

¹ The legal systems of Germany, Spain, Estonia, France, Ireland, Poland and Sweden are examined.

4. This summary therefore addresses the issues arising in the context of ordinary liquidation (part II), of regimes relating to undertakings which are in financial difficulty or insolvent (part III) and of special regimes for the banking and insurance sectors (part IV).

II. ORDINARY LIQUIDATION

5. Ordinary liquidation giving rise to the appointment of external liquidators may take place for various different reasons. For example, it may be that the shareholders, or some of them, seek liquidation on the basis of a conflict of interests (**Germany, France, Sweden and Poland**); external liquidators may be appointed for a solvent company, inter alia, where it has achieved its objects (**Ireland**), following an administrative decision (**Germany and Sweden**) or following a judicial decision (**France, Ireland, Sweden and Poland**). In **Spain**, in the case of ordinary liquidation and subject to certain exceptions, relating in particular to the special regimes for the banking sectors, national law does not provide for the appointment of an external liquidator.
6. In principle, once the company has entered liquidation, it is the liquidator who has the capacity to take part in legal proceedings. That is the case in all the Member States under consideration.
7. **German** law provides, in general, that liquidators are authorised to bind the company vis-à-vis third parties and to represent it before the courts. The position is the same in **Polish** law, which provides that the liquidators have the right to manage the affairs of the company and to represent it. This same approach is taken, mutatis mutandis, in **Swedish** law, in relation to public limited companies in particular. In such a case, the liquidator is substituted for the board of directors and the Managing Director. As a result, they lose the capacity to take part in legal proceedings in the name of the company. In **Estonian** law, given that the directors' mandates expire when liquidation proceedings are opened, the former directors of a legal person in liquidation do not retain the capacity to take part in legal proceedings in the name of that legal person.

In **France**, only the liquidator has the capacity to bring and defend legal proceedings in the name of the company before all courts, and to seek all pertinent remedies in such proceedings. In **Ireland**, although national law provides that the directors may continue to exercise their powers with the express consent of the liquidator, the power to bring or defend legal actions in the name of the company lies solely with the liquidator.

8. In some of those legal systems, the former directors nevertheless retain the right to bring an action against the decision placing the company in liquidation. This situation is found in five Member States (**Poland, Sweden, Ireland, France and Estonia**).
9. Thus, in **Polish** and **Swedish** law, even though the liquidator replaces the directors, he or she cannot represent the company in the event of an action against the decision placing the company in compulsory liquidation. In those legal systems, the former directors retain the right to represent the company until such time as the decision to place it in liquidation has become final. According to **Irish** case-law, the directors retain certain residual powers such as the right to engage a lawyer to challenge the winding-up order. In **France**, in cases where the former directors have not been appointed as liquidators, they lose the capacity to take part in legal proceedings in the name of the company. It appears that they nevertheless retain a legally sufficient interest in bringing proceedings against orders of the president of the tribunal de commerce (Commercial Court, France), under general law.² In **Estonia**, the board of directors, as an organ of the company, has the capacity to challenge the winding-up order.
10. It is worth noting that, in some legal systems, former directors also retain the capacity to bring a challenge, in the name of the company, to the decision appointing an external liquidator. This is the case in **France**, in **Poland**, and, for limited liability companies, in **Germany**. Similarly, in **Ireland**, the decision to put the company into liquidation ('petition for winding-up') is made before the appointment of the

² Article 32 of the code de procédure civile (Civil Procedure Code) provides that an action may be brought by any person having a legitimate interest in the outcome of a claim, except where the law limits the right to bring proceedings to certain parties which it permits to advance or dispute a claim, or to defend a particular interest.

liquidator by order of the High Court (‘winding-up order’) and, as stated above, the former directors have capacity to challenge the first of those acts. The same is true in **Sweden** and **Estonia**, where the company is put into liquidation and the liquidator appointed by one and the same decision.

11. In some Member States, the liquidator’s right to take part in legal proceedings may extend, once the liquidation has commenced, to proceedings brought by the former directors (**Germany, Estonia, Poland, France, Ireland and Sweden**).
12. Thus, under **German** administrative case-law, the liquidator’s power to represent a company which has been placed in liquidation may extend to proceedings concerning a request for administrative authorisation made prior to the opening of the liquidation proceedings. Similarly, **Estonian, Polish, French** and **Swedish** law can be interpreted such that it is also for the liquidator to represent the company in any actions which have been brought by the former directors in the name of the company. In **Ireland**, the liquidator’s right to take part in legal proceedings in the name of the company extends, in principle, to proceedings commenced before the opening of the liquidation proceedings.³

III. PROCEEDINGS RELATING TO UNDERTAKINGS WHICH ARE IN FINANCIAL DIFFICULTY OR INSOLVENT

13. Given the particular features of liquidations of companies which are in financial difficulty or insolvent, this situation should be addressed separately. In this context, one aim of the national law is to create the conditions necessary to satisfy the company’s creditors. Whether it is for the former directors or the court-appointed liquidator to represent a company which is in financial difficulty or insolvent depends, in general, on whether or not the dispute relates to the assets of the company in liquidation. It should nevertheless be noted, at the outset, that in **France** and

³ It should be noted however that under s. 678 of the Companies Act 2014 (Ireland), as a general rule, any pending proceedings against a company which is placed in liquidation are stayed, subject to the power of the Court to grant leave to proceed. This statutory rule does not apply to proceedings which are pending before the Equality Tribunal.

Ireland there is, strictly speaking, no insolvency regime. In **France**, there are two separate regimes – voluntary and judicial liquidation – covering situations of insolvency.

14. As a general rule, liquidators have the capacity to take part in legal proceedings concerning the assets of the company in liquidation. Accordingly, the former directors retain the capacity to take part in legal proceedings which do not concern those assets. This rule appears to apply in all the Member States under consideration.
15. In **German, Spanish and Polish** law, the liquidator has the capacity to take part in legal proceedings concerning the assets of the company in liquidation. The object of the proceedings must be capable of being regarded in law as forming part of those assets. In **Swedish** law, an insolvent company has no control over its assets and has no capacity to enter into commitments which could be asserted against that pool of assets. Accordingly, the representatives of an insolvent company normally lose the capacity to take part in legal proceedings in its name. On the other hand, they remain representatives of the legal entity resulting from the opening of the insolvency proceedings, or in other words the insolvent company. In **French** law, as regards the exercise of rights not forming part of the liquidator's functions, the directors of a company in liquidation retain the capacity to bring an action. In **Irish** law, once a company has entered liquidation, it is for the liquidator to bring any action in the name of the company.
16. In **Estonian and Swedish** law, there is an exception to the above rule. As regards proceedings concerning the pool of assets of the company which are brought prior to the declaration of insolvency, the court-appointed liquidator may participate in the proceedings as a party (there can be no multiplicity of parties). However, if the liquidator decides not to participate in the dispute, the debtor entity may do so.
17. In any event, in all the Member States under consideration, the capacity to challenge the decision to open proceedings in relation to a company which is in difficulty or insolvent lies, in principle, with the debtor entity, represented by the former directors.

18. In that context, **Irish** law does not make express provision as to who is entitled to challenge a winding-up petition. According to case-law, the former directors may do so.

IV. SPECIAL REGIMES FOR THE BANKING AND INSURANCE SECTORS

19. For the purposes of this research note, specific consideration should also be given to special regimes for the banking and insurance sectors.
20. In this context, it should be pointed out that a decision to place the company in liquidation does not follow automatically from an administrative decision to withdraw a licence.
21. In **Germany** and **Poland**, an administrative decision may be required to place a company in liquidation. It should also be noted that, in **Sweden**, the authority responsible for company registration may be required to place an insurance company in liquidation where the approval required for it to carry on the activity in question expires or is withdrawn. In contrast, in **Estonia** and **France** a judicial decision is required to place a company in liquidation.
22. Under the special regimes for banking institutions or insurance undertakings, the general rule in all the Member States under consideration is that it is the liquidator who has the capacity to take part in legal proceedings.
23. Under **German** law, as regards an action against a decision to withdraw a banking licence, the capacity to bring the action lies with the credit institution represented, in principle, by the board of directors in the case of a legal person, or the partners in the case of a partnership. In contrast, once – following the withdrawal of the licence – liquidation takes effect, the general rules of the commercial code and the laws relating to the various forms of company apply. **Spanish** law provides that special administrators appointed by the Bank of Spain have the power to revoke mandates granted by the organs of the credit institution, which could be interpreted to mean that it is the special administrators who have the right to take part in legal proceedings. In

French law, the regimes applicable to banking undertakings and credit institutions are very similar. The power of the liquidator is limited to certain functions, namely verification of the debts and of the inventory of assets directly linked with liabilities. When the court places the company in liquidation, it also appoints a liquidator to be responsible for drawing up the inventory of other assets and the liquidation operations. In **Ireland** and **Estonia**, the liquidator retains the capacity to take part in legal proceedings, under the general rules on liquidation. Similarly, in **Sweden**, the special regimes for banks and insurance do not lay down rules differing from those of the general regime. The liquidator will have exclusive power to take part in legal proceedings in the name of the company in liquidation. In **Poland**, when a credit institution is placed in liquidation, the liquidator has all the powers that the organs of the bank would normally be acknowledged as having. In particular, the liquidator has the right to represent the bank in liquidation both in the context of court proceedings and otherwise.

24. Three categories of Member State⁴ can be distinguished with regard to the issue of who has the capacity to bring an action against an administrative act which has led to a company being placed in liquidation.
25. In **Germany**, there are no specific rules pertaining to actions against administrative acts leading to a company being placed in liquidation, which are governed by the general provisions (see paragraph 29 of the section on German law). In the absence of any clear statement of the position in recent case-law, all the indications are that it is the liquidator who has capacity to challenge an administrative decision withdrawing the licence under the general rules.
26. The situation is different in **France**, **Estonia** and **Poland**. In **France**, it appears that the directors retain the capacity to exercise rights not regarded as assets of the company, and thus the power to represent the credit institution for the purposes of exercising its rights with regard to the withdrawal of the banking licence. In the **Estonian** system, as the European Central Bank is the only institution empowered to withdraw a banking licence under Council Regulation No 1024/2013, national

⁴ (1) Germany, (2) France, Estonia and Poland, (3) Sweden, Ireland and Spain.

administrative law is not considered to apply to this situation. In **Poland**, having regard to the fact that the directors' mandates expire on the day the liquidator takes up his or her duties, national law expressly provides that the capacity to bring an action against a decision to withdraw banking approval lies with the supervisory board of the bank. A similar approach is taken to liquidations in the insurance sector.

27. No **Swedish, Irish** or **Spanish** case-law has been identified which would provide an explicit answer to the question whether former directors are entitled to bring a challenge, in the name of the company, to administrative acts which have led to the company being placed in liquidation. It is worth noting that in **Ireland**, under the Central Bank Act 1942, any 'affected person' may challenge an administrative decision to withdraw a licence. An 'affected person' is defined as 'a person whose interests are directly or indirectly affected by an appealable decision [of the Central Bank]' (s. 57G). The withdrawal of the licence constitutes such an appealable decision. Whether a person has capacity to challenge that decision thus depends on their interest in bringing proceedings and their standing, rather than their role.

V. CONCLUSION

28. The national legal systems under consideration incorporate the general principle that, following the opening of liquidation proceedings, it is the liquidator who has capacity to take part in legal proceedings in the name of the company.
29. However, in certain circumstances an exception applies, notably in relation to actions challenging the decision placing the company in liquidation (**France, Ireland, Poland, Sweden and Estonia**) or appointing an external liquidator (**Germany, France, Poland and Ireland**).⁵
30. In relation to the regimes for undertakings that are in financial difficulty or insolvent, the national legal systems under consideration provide that a court-appointed

⁵ It is worth noting that in **Sweden** and **Estonia**, it is one and the same decision that places the company in liquidation and appoints the liquidator.

liquidator has the capacity to take part in legal proceedings in the name of the company.⁶

31. However, as regards disputes which do not relate to the assets of the company in liquidation or to rights regarded as assets of the company, the former directors may retain the capacity to take part in legal proceedings. The same applies as regards actions against the decision opening insolvency proceedings or relating to undertakings in difficulty.
32. In relation to the special regimes for banking institutions or insurance undertakings, in **Germany, Spain, France, Ireland, Poland, Estonia and Sweden**, as a general rule, it is the liquidators who have the capacity to take part in legal proceedings.
33. In **Germany**, in the context of the special regimes, it appears that an action against the administrative acts which have led to the company being placed in liquidation is within the capacity of the liquidator.
34. In contrast, in **France** it appears that the former directors of a banking establishment retain the right to seek recourse in respect of the withdrawal of a banking licence. A particular approach is taken in **Poland**, where the power to take part in legal proceedings may be allocated not to the former directors or the liquidator, but to the supervisory board of a credit institution. In **Estonia**, given that the European Central Bank is regarded as the sole institution having the power to withdraw a banking licence, the issue of the right to represent the company in an action against the withdrawal of the licence is the subject of academic debate.
35. No **Swedish, Irish** or **Spanish** case-law could be identified that would provide an explicit answer to the question.

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⁶ It is worth noting that, in **Swedish** law, the liquidator is empowered to take part in legal proceedings in the name of the estate of the company in liquidation, as the insolvent company continues to exist alongside the estate, which constitutes a legal entity in itself.