CROSS-BORDER INSOLVENCIES

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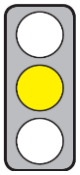
KEY ISSUES

Objective of the Regulation: The Commission revises the legal framework for cross-border insolvencies.

Parties affected: All citizens and companies.



Pro: (1) Duties of cooperation and communication between the liquidators and courts may reduce inefficiencies.

(2) An EU-wide electronic insolvency register significantly reduces the information costs.

Contra: (1) Legal clarity could be promoted by formally stipulating the application of the national insolvency rules of the company's registered office.

(2) The secondary insolvency proceedings should be abolished.

CONTENT

Title

Proposal COM(2012) 744 of 12 December 2012 for a **Regulation** of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on **insolvency proceedings**

Brief Summary

- **Background and Objectives**
  - The Regulation on Insolvency Proceedings [EuInsR, (EC) No. 1346/2000] governs cross-border insolvencies in the EU by means of rules on the conflict of laws. There should (preferably) be integrated insolvency proceedings by applying just one (national) insolvency regime in each case.
  - Although, according to the Commission, the EuInsR has essentially operated successfully in practice, there is need for revision. In particular, the EuInsR does not yet take account of the current trend in legal policy to consider the preservation of companies rather than just their supervised winding-up.
- **Area of Application**
  - The Regulation applies to all insolvency proceedings irrespective of whether (amended Art. 1 (1))
    - they are aimed at rescue, "adjustment of debt", reorganisation or liquidation,
    - the debtor is totally or partially (hybrid proceedings, e.g. debtor in possession) divested of his assets and a liquidator is appointed,
    - the assets and affairs of the debtor are subject to control or supervision by a court,
    - the respective measures are temporary in nature.
  - The Regulation applies to the national insolvency proceedings listed in full in Annex A (amended Art. 1 (1), Art. 45 (1) and (2); amended Recital No. 9). Their inclusion is triggered in two steps:
    - First, Member States notify the Commission of their national rules which they want to have included in Annex A (amended Art. 45 (2)).
    - The Commission then examines whether these proposals constitute insolvency proceedings within the scope of the regulation and, if so, includes the provisions in Annex A (amended Art. 45 (2)).
  - The Regulation does not include insurance companies, credit institutions, investment firms covered by Directive 2001/24/EC or undertakings for collective investment (UCITS) (amended Art. 1 (2)).
- **Main insolvency proceedings: Centre of main interest (COMI)**
  - The main insolvency proceedings must be opened in the country in which the debtor has its "centre of main interest" (COMI) (Art. 3 (1), paragraph 1).
  - The COMI is deemed to be
    - the place "where the debtor conducts the administration of his interests on a regular basis" and which is ascertainable as such by third parties (amended Art. 3 (1), paragraph 1);
    - in the case of companies, the place of the registered office in the absence of proof to the contrary (Art. 3 (1), paragraph 2); in order to prove this, a comprehensive assessment of all the relevant factors is required, taking particular account of the effective seat of management; the existence of assets alone is not sufficient (new Recital No. 13a);
    - in the case of freelance workers and the self-employed, the principal place of business (new Art. 3 (1), paragraph 3);
    - in the case of private individuals, the place of habitual residence (new Art. 3 (1), paragraph 3).
  - The insolvency law applicable is, in principle, that of the COMI State (Art. 4).
- **Secondary insolvency proceedings**
  - Secondary insolvency proceedings are any insolvency proceedings which are opened, after the main insolvency proceedings have been opened, in a Member State other than the COMI State (cf. Art. 3 (2) and (3), Art. 16 (2)).

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- Their effect is restricted to the assets of the debtor situated within the territory of this other Member State (Art. 3 (2), Art. 27).
- By contrast with the existing provisions (old Art. 3 (3)), the proceedings do not have to be liquidation proceedings any more.

– Secondary insolvency proceedings cannot be opened,
- if the debtor possesses no establishment in the other Member State on the date when the main insolvency proceedings are opened (new Art. 3 (3));
- if the opening of proceedings is "not necessary" to protect the creditors (new Art. 29a (2)), particularly where the liquidator in the main insolvency proceedings has given an undertaking to these creditors that the same distribution and priority rights will be respected in the main insolvency proceedings as would have applied in secondary insolvency proceedings (amended Art. 18 (1)).

– The insolvency law applicable is, in principle, that of the State of opening of proceedings (Art. 28).
– For the purpose of proper handling of the main and secondary insolvency proceedings, cooperation and exchange of information will take place between:
- the liquidators, with the aim of rescuing or restructuring the company (amended Art. 31),
- the courts, who may, inter alia, appoint a person or body acting on its instructions to effect cooperation (new Art. 31a), and
- the liquidators and the courts (new Art. 31b; cf. new Art. 29a (1) and (4)).

– The court which opens the secondary insolvency proceedings
- must stay proceedings at the request of the liquidator in the main insolvency proceedings, in whole or in part, for up to three months, unless the stay is "manifestly of no interest" to the creditors in the main insolvency proceedings;
- may, in this case, require the liquidator to take "any suitable measure" to guarantee the interests of the creditors in the secondary proceedings.

Renewal of the stay for "similar periods" is possible. (Art. 33 (1))

► **Legal protection**

– The court dealing with a request to open (main or secondary) insolvency proceedings (new Art. 3b (1))
- shall ex officio examine whether it has jurisdiction and
- must specify the grounds on which its jurisdiction is based, and, in particular, whether jurisdiction is based on
  - the COMI rules (in which case: main insolvency proceedings) or
  - the debtor's establishment in another Member State, after the main insolvency proceedings have been opened (in which case: secondary insolvency proceedings).

In the case of proceedings not involving a court decision, this applies to the liquidator (new Art. 3b (2)).

– Any creditor or "interested party" who has his habitual residence, domicile or registered office in a Member State other than the COMI State, shall have the right to challenge the decision to open main proceedings (new Art. 3b (3)).
– The court opening main proceedings, or the liquidator, shall inform the creditors, insofar as they are known, of the decision, in due time, so that they may challenge it (new Art. 3b (3)).

► **Related Actions**

– The courts of the Member State within the territory of which insolvency proceedings have been opened "in accordance with Art. 3" (i.e. main or secondary insolvency proceedings) have jurisdiction for any action which "derives directly from the insolvency proceedings and is closely linked with them" (new Art. 3a (1) and (3)), e.g. insolvency rescission.
– Where such an action is, for its part, related to a civil or commercial case against the same defendant, the liquidator may bring both actions in the court which has jurisdiction according to the "Brussels I"-Regulation [(EC) No. 44/2001] where the defendant is domiciled (new Art. 3a (2) and (3) Recital No. 13b).

► **Insolvency register and notification**

– The Member States have to establish, in their territory, registers which are available to the public on the internet free of charge, and in which is registered, inter alia, the decision to open insolvency proceedings (new Art. 20a).
– The court responsible for registration is the court which opens insolvency proceedings. Consumer insolvency is excluded. (new Art. 20d)
– The Commission will ensure interconnection of the insolvency registers of the Member States, with the European e-Justice Portal as the central access point, within 36 months after the Regulation comes into force. The search service will be available in all official languages of the EU. (new Art. 20b, Art. 45b (1) a)
– Until then, the liquidator can request that notification of material information is made elsewhere and published in the land register, trade register or another public register (amended Art. 21, 22).

► **Lodging of claims by foreign creditors**

– Any foreign creditor may lodge their claims by any means of communication accepted by the law of the State of opening of proceedings (amended Art. 39).
– The time limit for lodging claims is governed by the law of the State of opening of proceedings. It must be at least 45 days following the publication of the opening of proceedings in the insolvency register. (new Art. 41 (4))

– After insolvency proceedings have been opened, known foreign creditors will be individually informed immediately by the court with jurisdiction or by the appointed liquidator (Art. 40 (1) and (2)).
– The Commission will issue standard forms, within 24 months after the Regulation comes into force, for the purpose of lodging claims and for notification (new Art. 40 (3), Art. 41 (1), Art. 45b (1) b).
  - Every Member State must permit, in addition to its own official language(s), at least one other official EU language of its choice (new Art. 41 (3)).
  - Claims may, in principle, be lodged in any official language of the EU, but must, on request, be translated into the official language(s) of the State of opening of proceedings or into the other official EU language permitted there (new Art. 41 (3)).
  - Notice of proceedings takes place in one of the official languages of the State of opening of proceedings or in the other official EU language permitted there (new Art. 40 (3)).

► **Groups of companies**
– In the case of groups of companies, the appointed liquidators and the courts cooperate essentially in the same way as in the main and secondary insolvency proceedings and exchange information (new Art. 42a–42c; cf. Recital No. 20a).
– In this respect, the appointed liquidators can and should consider the possibility of restructuring or a rescue of the group of companies (cf. new Art. 42a (2) b, Art. 42d (1) c and d). They may grant one among them "additional powers" (new Art. 42a (2), paragraph 2).
– The court which opened proceedings must stay the proceedings against a member of the group of companies, in whole or in part, for up to three months if
  - the liquidator in insolvency proceedings against another member of the group so requests and
  - it is "proven" that it would be to the benefit of the creditors.
  The court may require the liquidator to take "any suitable measure" to guarantee the interests of the creditors. Renewal for "the same period" is possible. (new Art. 42d (1) b and (2))

Main Changes to the Status Quo

► New is the detailed definition of the COMI rules. Until now the definition of the COMI was governed essentially by the case law of the European Court (ECJ).

► New is that the secondary insolvency proceedings no longer have to be aimed at winding up the company but can also serve to maintain it.

► New is the possibility of promising creditors that the same priority rights will be respected in the main insolvency proceedings as would have applied in secondary insolvency proceedings.

► New is the EU legal obligation to set up insolvency registers and interconnecting them across the EU.

► New is the standardisation of the lodging of claims and of notification.

► New are the rules on the insolvency of groups of companies.

Statement on Subsidiarity by the Commission

The EuInsR cannot "by definition" be modified by the Member States. The creation of electronic insolvency registers could "in theory" be achieved by the Member States alone but their interconnection can only take place at EU level. (p. 10)

Policy Context

Along with the Regulation to amend the EuInsR, the Commission has published a Communication on the reform of business insolvency law in which it looks at harmonising national law [COM(2012) 742; see cep**PolicyBrief**]. Recently, the Commission proposed a special framework for the recovery and resolution of credit institutions and investment firms [Proposal for a Directive COM(2012) 280; see cep**PolicyBriefs**]. With respect to insurance companies, special rules are contained in the Directive on the reorganisation and winding-up of insurance undertakings (RL 2001/17/EC), which will be converted into the "Solvency II Directive" with effect from 1 January 2014 [RL 2009/138/EC, there Art. 267 et seqq.; see cep**PolicyBriefs**].

Legislative Procedure

12 December 2012	Adoption by the Commission
25 February 2014	First reading in the European Parliament (EP)
Open	Adoption by the EP and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice (leading)
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur Klaus-Heiner Lehne (EPP Group, D);
Federal Ministries:	Justice (leading)

Committees of the German Bundestag:	Legal Affairs (leading); EU Affairs
Decision mode in the Council:	Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 81 (1), (2) TFEU
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Transferring material elements of **the ECJ's COMI case law into the text of the Regulation promotes legal certainty** and reduces the likelihood of abuse. This is particularly true since in future the courts in the Member States will have to undertake the assessment of the COMI exclusively ex officio and will not be able to rely on information provided by the debtor. However, it does not solve the problem intrinsic to the COMI concept that a company can change its COMI by relocating and thus, de facto, to a certain extent designate the applicable insolvency rules, possibly abusively.

Closer **cooperation and communication between the courts and liquidators** involved in the main and secondary insolvency proceedings **is** basically **appropriate in order to arrange proceedings more efficiently** with the aim of increasing the estate. However, the possibility of exchanging information already exists, at least as regards the liquidators and, in any case, there is no conclusive indication as to how fruitful cooperation will be. In the absence of more detailed instructions on cooperation, it would also depend, to no small degree, upon the goodwill of the parties.

Separate insolvency proceedings for members of groups of companies may result in inefficiencies and additional costs. In particular, they may obstruct the efficient reorganisation of the group if liquidators in the various individual proceedings are following different strategies. **Duties of cooperation and communication may,** at least **partially, reduce these inefficiencies.** Here too, however, without stricter formalisation, success depends to no small degree upon the goodwill of the parties.

An EU-wide electronic insolvency register significantly reduces the search and **information costs** for courts, creditors and potential creditors. It allows all parties to make more efficient decisions. Thus, e.g. the parallel opening of several main insolvency proceedings against the same debtor can be reliably avoided at negligible cost.

Standard forms allow particularly smaller companies to lodge their claims at lower cost. The obligatory acceptance of standard forms in at least two official EU languages represents a justifiable compromise between cost and benefit. Even more effective economically would be to designate English as the standard second language across the EU.

Legal Assessment

Legislative competence

Unproblematic. The Regulation can be based on Art. 81 (1), (2) a, c and f TFEU.

Subsidiarity

Unproblematic. Rules on the conflict of laws for cross-border insolvency proceedings can only be efficiently established at EU level.

Proportionality

Unproblematic. The legal form of the directly applicable Regulation promotes legal certainty.

Alternative Approach

Legal clarity could be promoted by formally stipulating the application of the national insolvency rules of the company's registered office (or, in the case of private individuals, the residence). Differing national and entrepreneurial preferences could then still be taken into account. In addition, the company and insolvency law frameworks would be better synchronised. **This is especially true if secondary insolvency proceedings**, which are inefficient and open to abuse, **are** prospectively **abolished**. [For more details see H. Eidenmüller, European Business Organization Law Review (6) 2005, p. 423 et seqq.]

Conclusion

Transferring material elements of the ECJ's COMI case law into the text of the Regulation promotes legal certainty. Duties of cooperation and communication between the liquidators and courts may reduce inefficiencies. An EU-wide electronic insolvency register significantly reduces the information costs. Legal clarity could be promoted by formally stipulating the application of the national insolvency rules of the company's registered office. The secondary insolvency proceedings should be abolished.