



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : Presidency

to : Council

No. Cion prop. : 17883/12 JUSTCIV 365 CODEC 3077 + ADD 1 (en) + ADD 2

Subject : Proposal for a Regulation of the European Parliament and of the Council
amending Council Regulation (EC) No 1346/2000 on insolvency proceedings
[First reading]
- Orientation debate

I. INTRODUCTION

A. General aspects

1. By letter of 13 December 2012, the Commission transmitted to the Council a proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "Insolvency Regulation").
2. In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of the proposed Regulation.

3. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
4. The proposed Regulation is subject to the ordinary legislative procedure. The time is not yet ripe for formal negotiations with the European Parliament with a view to reaching a first reading agreement, but informal contacts have been held for information purposes.
5. The European Economic and Social Committee adopted its opinion on the proposed Regulation on 22 May 2013.

B. Need for a revision of the Insolvency Regulation

6. The proposed Regulation aims at making cross-border insolvency proceedings more efficient and effective in view of ensuring a smooth functioning of the internal market and its resilience in economic crises. This objective is in line with the European Union's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out under the Europe 2020 strategy and to ensure a smooth development and the survival of businesses, as stated in the Small Business Act.
7. The proposed Regulation will also bring the current Insolvency Regulation in line with developments in national insolvency laws introduced since its entry into force in 2002.
8. As part of the overall "Justice for Growth" Programme, the proposed Regulation represents an important element of the broad European Union response to the significant economic difficulties being experienced by many companies and citizens throughout the Union.

9. The Presidency is of the view that the proposed Regulation can significantly contribute to making cross-border insolvency proceedings more efficient, benefiting debtors and creditors, both corporate and natural persons, throughout the European Union, facilitating the survival of businesses and presenting a second chance for entrepreneurs. The Presidency has put the examination of the proposed Regulation at the top of its agenda. This priority has been reflected in the scheduling of eight meeting days of the relevant Council Working Party during the first half of 2013.
10. The proposed Regulation has been very well received and widely acknowledged as a step in the right direction. The discussions so far in the Working Party on Civil Law Matters (Insolvency) have shown a general endorsement of its stated objective of modernising the Insolvency Regulation.
11. Good progress has been made in the Working Party on certain aspects, but the interlinked nature of the provisions contained in the proposed Regulation does not allow any final position to be taken at this stage. The Presidency is, however, of the opinion that it is opportune, in the light of the positive approach demonstrated at the Informal Council in Dublin on 18 January 2013, to ask the Council to establish broad political guidelines for future work, in order to pave the way for substantial progress to be made on the proposed Regulation.
12. These political guidelines may be adapted to take into account further discussions. All other aspects of the proposed Regulation remain open and remain subject to further discussion.

II. SUGGESTED GENERAL GUIDELINES FOR THE FUTURE WORK

A. *Scope*

13. One of the key objectives of the proposed Regulation is to move away from a traditional liquidation approach to insolvency to a "*second chance approach*" for viable businesses and "*honest*" entrepreneurs in financial difficulties when cross-border insolvency proceedings are involved.
14. In this regard, the proposed Regulation seeks to extend the scope of the Insolvency Regulation to include proceedings which promote the rescue of economically viable debtors. The revised scope of the Insolvency Regulation should notably cover proceedings which provide for the restructuring of a debtor at an early, pre-insolvency stage, or which may leave the existing management in place, as well as proceedings which provide for a debt discharge of natural persons.
15. The discussions so far in the Working Party have shown wide support for the approach to provide potentially viable debtors, whenever possible, with the appropriate tools to help rescue them from financial collapse. However, further discussions at technical level are still needed in order to clarify how these rescue-oriented proceedings will function in cross-border situations.
16. *The Presidency invites the Council to confirm the approach of continuing to work towards the appropriate broadening of the scope of the Insolvency Regulation, so as to include relevant proceedings aimed at providing a "second chance" for viable businesses and "honest" entrepreneurs in financial difficulties.*

B. Jurisdiction for opening insolvency proceedings

17. The proposed Regulation maintains the concept of centre of main interests ("COMI"), while also introducing a provision determining the COMI of individuals. The concept of COMI is further clarified, the modifications proposed being designed to ensure that the COMI test is consistent with the body of case law developed by the European Court of Justice since 2002 in regard to the operation of the Insolvency Regulation. The proposed Regulation provides that, in order to prevent abusive forum shopping, courts should, in accordance with their own proceedings, properly verify that the debtor's COMI is indeed located within their territory.
18. The Working Party have welcomed the broad clarifications introduced as regards the COMI. These amendments will provide useful guidance to all those concerned with insolvency proceedings and increase legal certainty. However, discussions in the Working Party revealed that it would need to be examined whether it would be necessary to provide for additional measures which could assist in preventing abusive forum shopping. These measures would need to be practical and cost effective.
19. *The Presidency therefore invites the Council to confirm the use of the concept of COMI, as clarified by the proposed Regulation, to determine which Member State has jurisdiction, subject to the examination of any additional and proportionate measures which can assist in preventing abusive forum shopping.*

C. Insolvency registers

20. In order to improve the provision of relevant and timely information to creditors and courts involved and to prevent the opening of parallel insolvency proceedings, the proposed Regulation includes a requirement for Member States to establish insolvency registers containing information on the debtor and the liquidator, as well as information relating to the insolvency proceedings. These national insolvency registers are to be interconnected and accessible via the European e-justice portal. Insolvency registers exist already in many Member States.

21. Certain issues with respect to data protection were considered. In his report and subsequent presentation to the Working Party on 25 April 2013, the European Data Protection Supervisor had the opportunity to present his opinion on the proposed Regulation and to make a number of practical suggestions which could ensure proper adherence to the relevant European rules on data protection. His recommendations have been welcomed by the Working Party and will be taken into account while examining the proposed Regulation.
22. However, further discussion at technical level is still needed, especially in order (i) to examine the issue of cost free access, (ii) to establish proper and effective data protection safeguards for situations in which personal data processing is envisaged and, (iii) to determine the deadlines for the future establishment of the national insolvency registers and for their interconnection via the European e-justice portal.
23. *The Presidency invites the Council to confirm in principle, taking into account the opinion of the European Data Protection Supervisor, the commitment to working towards the establishment of relevant insolvency registers at national level and the interconnection and accessibility of these insolvency registers via the European e-justice portal.*

D. Groups of companies

24. The current Insolvency Regulation does not contain specific rules dealing with the insolvency of multi-national groups of companies. This lack of a specific framework for group insolvency constitutes in certain cases an obstacle to the efficient administration of the insolvency of members of a group of companies and may hamper their individual rescue or that of the group as a whole, where such a viable proposition may exist.

25. When seeking to address the problems related to group insolvency situations, there would appear to be two options available: (1) to provide for a group-wide insolvency process where the many individual proceedings concerning the members of a group are reduced by consolidation into one single set of proceedings; or (2) the coordination of the insolvency proceedings relating to the group companies concerned with a view to avoiding frictions resulting from the conduct of the individual proceedings in an uncoordinated way and enhancing rescue prospects and/or maximising the potential return to creditors.
26. In its new chapter dealing with the insolvency of members of a group, the proposed Regulation retains the entity-by-entity approach to the insolvencies of group companies, but seeks to improve the coordination of efforts, by encouraging liquidators and courts in the various independent insolvency proceedings to better communicate and cooperate.
27. The new provisions should not prevent Member States from introducing additional instruments for the coordination of domestic proceedings, provided that such instruments do not impair the effectiveness of the provisions of the proposed Regulation.
28. The discussions so far in the Working Party have shown a wide support for the development of the Insolvency Regulation to include specific provisions dealing with difficulties relating to cross-border insolvency proceedings regarding members of groups of companies. It was also considered that this should take the form of cooperation between individual proceedings rather than consolidation of proceedings. However, further discussion will be needed, for example, to specify the framework and the limits of such a cooperation.
29. *The Presidency therefore invites the Council to confirm the approach of working towards developing the necessary provisions designed to improve cooperation in dealing with the insolvency of members of a group of companies.*

E. Need for a swift revision of the Insolvency Regulation

30. Given the importance of efficient cross-border insolvency proceedings for the European economy, the Presidency, in response to the European Council's call for a swift examination of the proposed Regulation, considers that every effort should be made to ensure that, after a thorough examination, the Council adopts its position on the proposed Regulation as expeditiously as possible.

III. CONCLUSION

31. The Council is invited to approve the guidelines set out in part II as general guidelines for the future work on the proposed Regulation.
