

Judicial cooperation in civil matters: undertakings, insolvency proceedings with cross- border implications

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In accordance with the requirements of Council Regulation (EC) No 1346/2000 on insolvency proceedings, the Commission presents a report on the application of the Regulation. The report takes account of a number of documents, including a comparative legal study on the evaluation of the Regulation in 26 Member States, which was carried out by the Universities of Heidelberg and Vienna.

General assessment: based on the evaluation, the Commission considers that the Regulation is **generally regarded as a successful instrument** for the coordination of cross-border insolvency proceedings in the Union. Its fundamental choices and underlying policies are largely supported by stakeholders. The case-law of the Court of Justice of the European Union (CJEU) clarified the Regulation's interpretation on a number of issues, thereby contributing to the uniform interpretation of the Regulation by national courts. This assessment is supported by the results of the public consultation where a majority of respondents considered that the Regulation operates efficiently, with legal practitioners, public authorities and academics expressing the most positive views.

However, a **number of shortcomings of the Regulation** have been identified. Therefore, the Commission considers that there is a need to bring forward adaptations to meet the need for a modern and business-friendly environment. Essentially, problems have been identified in relation to the following:

Scope of the Regulation: due to new trends and approaches in the Member States, the current scope of the Regulation no longer covers a wide range of national proceedings aiming at resolving the indebtedness of companies and individuals, particularly pre-insolvency and hybrid proceedings.

The Commission **suggests extending the scope of the Regulation** by revising the definition of insolvency proceedings in order to include hybrid and pre-insolvency proceedings and insolvency proceedings for individuals, which are currently excluded.

The rules on jurisdiction: the report discusses difficulties with the definition and determination of the **debtor's centre of main interests (COMI)**. The evaluation study also highlights several significant problems with regard to the procedural framework for examining the jurisdiction of the court opening insolvency proceedings.

The Commission considers that the Regulation should maintain the concept of COMI as interpreted by the Court of Justice of the European Union but the Commission proposes a revision adding language to clarify its meaning. It also clarifies the application of the COMI rule for individuals. The proposed revision inserts a rule on jurisdiction for related actions. Furthermore, the procedural framework for examining jurisdiction should be improved to limit the potential for wrongful forum shopping.

Publication of insolvency-related decisions: there is widespread support for the conclusion that the failure to publish the opening of proceedings in a public register reduces considerably the ability of creditors to know of insolvency proceedings opened in another Member State. The lack of information on existing proceedings has also resulted in unnecessary concurrent proceedings being launched in different Member States.

The Commission proposes improving the publication of insolvency proceedings in two ways: (a) by making publication of decisions in another Member State mandatory; and (b) by requiring that the decisions opening and closing insolvency proceedings and certain other decisions be published in an electronic register, publicly accessible on the internet. The electronic insolvency registers should address cross-border insolvency needs but will obviously also serve domestic users.

Lodging of claims: the evaluation study notes practical problems relating to certain aspects of the lodging claims in cross-border situations, in particular language barriers, costs, time-limits for lodging claims and a lack of information on the opening decision, the liquidator and the formalities of the *lex fori concursus* for the lodging of claims.

The proposal to bring in **new standard forms** for the notice of proceedings and the lodging of claims will make it easier for foreign creditors to make claims. In addition, the deadlines for lodging claims must be long enough to allow them to lodge an effective claim.

Group insolvency: the report recalls that the basic premise of the current Regulation is that insolvency proceedings relate to a single legal entity and that, in principle, separate proceedings must be opened for each individual member of the group. Overall, the Commission shares the finding of the evaluation study that the 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

The Commission proposes including **specific rules** in the Regulation to make handling the insolvency of members of a multi-national group of companies more efficient. Smoother cooperation between liquidators in different Member States should aid the rescue of the companies and maximise the value of their assets.

Further matters for which certain problems were identified in the evaluation, such as the questions of **extension of the scope outside EU** and of the **applicable law**, were also considered. However, the Commission does not find it desirable to introduce specific provisions concerning the recognition of and coordination with insolvency proceedings opened outside the EU. The main reason is that such provisions would be binding only in the territory of Member States and not in non-EU countries. Therefore, a possible elaboration of a draft international convention would better achieve these objectives, and also ensure the Union's interests in reciprocal negotiations with the third countries.

Moreover, the Commission does not propose amendments to the provisions of the Regulation concerning applicable law. It finds that existing provisions apply sufficiently smoothly within the EU and the respective fields of the *lex fori* and the *lex situ* strike the right balance. Accordingly it is considered preferable to **keep the current conflict of law rules**, until the effects of possible changes on domestic insolvency law, company law and social law are further examined.