

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

1999/0806(CNS) - 05/07/1999 - Legislative proposal

PURPOSE: improvement to and speeding up of insolvency proceedings with cross-border implications.

CONTENT: This proposed Regulation falls within the scope of judicial cooperation in civil matters within the meaning of Art. 65 of the Treaty. Because business undertakings are involved in more and more cross-border transactions and the failure of businesses also affects the functioning of the internal market, there is a need for a Community act which permits coordination of the measures to be taken regarding an insolvent debtor's assets. The proposal seeks to ensure that there are no incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position ('forum shopping'). As these objectives cannot be achieved to a sufficient degree at national level, action at Community level is justified. In line with the principle of proportionality, the Regulation is confined to provisions governing jurisdiction for opening insolvency proceedings and for judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. The Regulation also contains provisions regarding the recognition of these judgments and the law applicable, which also satisfy that principle. The proposed Regulation would apply equally to all proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. In solvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are excluded from the scope of the Regulation because they are subject to special rules. The Regulation acknowledges the fact that as a result of widely differing laws on property it is scarcely possible to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. Furthermore, the preferential claims made by individual creditors in the insolvency proceedings are also, in some cases, completely different. The Regulation tries to take account of this in two different ways. On the one hand, provision is made for special references in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening are also allowed alongside main insolvency proceedings with universal scope. A parallelism between main insolvency proceedings - recognised in other Member States - enabling creditors in another Member State to invoke a local instrument in order to safeguard their interests - avoids over-rigid centralisation. Mandatory rules of coordination with the main proceedings guarantee the needs for unity in the Community. Insolvency proceedings may be opened in the Member States where the debtor has the centre of his main interests. Main insolvency proceedings have universal scope, they aim at encompassing all the debtor's assets on a worldwide basis and at affecting all creditors, wherever located. The centre of main interests is taken as meaning a place with which a debtor regularly has very close contacts, in which his manifold commercial interests are concentrated and in which the bulk of his assets is, for the most part, situated. The rules of jurisdiction set out in this Regulation establish only international jurisdiction; territorial jurisdiction within a Member State must be established by the national law. The rule on international jurisdiction enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. Cases may arise where the estate of the debtor is too complex to administer as a unit, where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason, the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires. Every creditor, wherever

domiciled in the Community, has the right to assert his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This also applies to tax and social insurance authorities. The Regulation provides for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition therefore means that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The Regulation sets out, for the matters covered by it, uniform rules on the conflict of laws which replace - within their scope of application - national rules of private international law. Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, the Regulation provides for a number of exceptions to the general rule (Arts. 5-15). There is a need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. There is also need for special protection in the case of payment systems and financial markets. The provision in this regard is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on to the regulated financial markets of the Member States being altered in the case of the insolvency of a business partner. In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on the conflict of law. This Regulation does not apply to Denmark, Ireland and the U.K.