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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

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1. INTRODUCTION

1.1. Background

Council Regulation (EC) No 1346/2000 on insolvency proceedings[1] (the "Regulation" or "EIR") came into force in May 2002. The Regulation established a European framework for cross-border insolvency proceedings. It applies whenever the debtor has assets or creditors in more than one Member State, irrespective of whether he is a natural or legal person. The Regulation determines which court has jurisdiction to open insolvency proceedings and ensures the recognition and enforcement of the ensuing decision throughout the Union. It also establishes uniform rules on applicable law and provides for the coordination of main and secondary proceedings.

The Regulation applies in all Member States with the exception of Denmark which has a special regime for judicial cooperation under the Treaty on the Functioning of the European Union.

This report has been prepared in accordance with Article 46 of the Regulation. It aims to present to the European Parliament, the Council and the European Economic and Social Committee an assessment of the application of the Regulation. This report has taken into account the following documents:

- 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 with the support of a network of national reporters[2];
- a study for an impact assessment of an amendment of the Regulation carried out by a consortium of GHK and Milieu[3];
- The results of a web-based public consultation which took place between March and June 2012[4]. The Commission received a total of 134 replies from all Member States except Bulgaria and Malta with the UK (21%), Romania (20%) and Italy (12%) representing more than 50% of all respondents. Replies were received from a wide

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1 OJ L 160, 30.6.2000, p.1.

2 Hess/Oberhammer/Pfeiffer, Study for an evaluation of Regulation (EC) No 1346/2000 on Insolvency Proceedings; published on the Europa site of DG JUSTICE at http://ec.europa.eu/justice/civil/document/index_en.htm

3 This study is published on the Europa site of DG JUSTICE at http://ec.europa.eu/justice/civil/document/index_en.htm.

4 A statistical overview of the replies received through the IPM tool has been published at http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=Insolvency. An analysis of all replies received has been prepared by GHK/Milieu and forms part of the impact assessment study referred to above.

range of stakeholders with academics, legal practitioners and public authorities providing the greatest number of replies.

The application of the Regulation was also discussed with the European Judicial Network in civil and commercial matters.

1.2. General Assessment of the application of the Regulation

Based on the evaluation, the Commission concludes 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 by the evaluation study and the public consultation. Therefore, the Commission considers that there is a need to bring forward necessary adaptations to meet the need for a modern and business-friendly environment. Essentially, problems have been identified in relation to the scope of the Regulation, the rules on jurisdiction, the relation between main and secondary proceedings, the publicity of insolvency-related decisions and the lodging of claims. In addition, the absence of specific rules for the insolvency of members of a group of companies has been criticised. These issues are described in more detail below.

2. SCOPE OF THE REGULATION

2.1. Proceedings covered by the Regulation

The primary objective of the Regulation is to ensure that a decision to opening insolvency proceedings and its effects, whether in relation to natural or legal persons, are recognised throughout the Union. **Article 1 (1)** that sets out the criteria which national proceedings have to fulfil to come under the scope of the Regulation reflects the traditional concept of insolvency proceedings, because it presupposes the debtor's insolvency and requires the divestment of the debtor and the appointment of a liquidator. However, 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.

2.1.1. Pre-insolvency and hybrid proceedings

At present, many national insolvency laws in Europe provide for pre-insolvency and hybrid proceedings. Pre-insolvency proceedings can be characterised as quasi-collective proceedings under the supervision of a court or an administrative authority which give a debtor in financial difficulties the opportunity to restructure at a pre-insolvency stage and to avoid the commencement of insolvency proceedings in the traditional sense. Hybrid proceedings are proceedings in which the debtor retains some control over its assets and affairs albeit subject to the control or supervision by a court or an insolvency practitioner.

The evaluation study concludes that 15 Member States have pre-insolvency or hybrid proceedings which are currently not listed in Annex A of the Regulation as set out in the table below.

Table: Pre-insolvency and hybrid proceedings not included in Annex A of the Regulation

Austria	- proceedings under the Business Reorganization Act of 1997 (*Reorganisationsverfahren*)
Belgium	- Commercial investigation (*Handelsonderzoek* / *enquête commercial*; Article 8 et seq. LCE (Loi relative à la continuation des entreprises) - Appointment of a mediator (Aanstelling ondernemingsbemiddelaar / Désignation d'un médiateur d'entreprise; Art. 13 LCE) - Appointment of a mandataire de justice (Aanstelling gerechtsmandataris / Désignation d'un mandataire de justice; Art. 14 LCE) - Out-of-court agreement (*Minnelijk akkoord* / *Accord amiable*; Art. 15 LCE) - Judicial reorganisation by way of individual agreement (Gerechtelijke reorganisatie door een minnelijk akkoord / Réorganisation judiciaire par accord amiable; Art. 43 LCE) - Appointment of a provisional administrator (Aanstelling voorlopig bestuurder / Désignation d'un administrateur provisoire; Art. 28 LCE)
Estonia	- Reorganisation proceedings for legal entities (Estonian Reorganisation Act) - debt adjustment proceedings for natural persons (Debt Restructuring and Debt Protection Act)
France	- *mandat ad hoc* (L 611-3 Code de commerce) - *conciliation proceedings* (L 611-4 et seq. Code de commerce) - sauvegarde financière accélérée (SFA)
Germany	- protective shield proceedings (*Schutzschirmverfahren*, Section 270b InsO)[5]
Greece	- Procedure of reorganization (diadikasia eksigiansis, διαδικασία εξυγίανσης; Articles 99 et seq. of the Greek Bankruptcy Code, as amended by Article 234 of the recent law no. 4072/2012)
Italy	- *accordo di ristrutturazione dei debiti* (Art. 182 bis of the Italian Insolvency Act)

[5] The current situation is unclear: As Annex A generally refers to proceedings of the Insolvency Act, the protection shield proceedings seem to be included. However, there is still an uncertainty whether these proceedings correspond to the definition of Article 1 (1) EIR.

	- piano di risanamento attestato
Latvia	- out-of court legal protection proceedings (provided in the Insolvency Law of 26 July 2010)
Malta	- Statutory scheme of compromise or arrangement (*Rikostruzzjonijiet ta' Kumpaniji*) - Company Recovery Procedure
Netherlands	- *Schuldsaneringsregeling* which applies to natural persons, Article 287a of the Dutch Bankruptcy Act
Poland	- rehabilitation proceeding (*Postępowanie naprawcze*; Art. 492-521 of the Bankruptcy and Rehabilitation Law)
Romania	- *mandat ad-hoc* (*mandatul ad-hoc*; Art. 7 et seq. Law No. 381/2009) - concordat préventif (concordatul preventiv; Art. 13 et seq. Law No. 381/2009)
Spain	- *homologación de los acuerdos de refinanciación* (4th Additional Provision of the Law No. 38/2011 amending the Spanish Insolvency Act)
Sweden	- Debt relief proceedings (*skuldsanering*; Section 4 of the Law on debt relief) applicable to private individuals
UK	- schemes of arrangement (Part 26 of the Companies Act 2006)

The main problem resulting from the fact that a substantial number of pre-insolvency and hybrid proceedings are currently not covered by the Regulation is that their effects are not recognised throughout the EU. As a consequence, dissenting creditors may seek to enforce their claims against assets of the debtor located in another Member State, which can thwart the efforts to rescue the company (so-called "holding-out" problem). Moreover, opportunities to rescue companies may be foregone because parties are unwilling to engage in the relevant procedures if their cross-border recognition is not ensured. It has therefore been recommended to address these problems in the revision of the Regulation. This view is shared by a majority of respondents to the public consultation (59%) which considered that the Regulation should cover pre-insolvency and hybrid proceedings. Views were mixed, however, on exactly which proceedings should be covered and in particularly where court oversight should be required.

In addition, the evaluation study has identified problems in relation to the discrepancies between the procedures listed in the Annexes and the conditions laid down in Article 1 (1). These problems are illustrated by two references for preliminary rulings which are currently pending at the CJEU. The first case raises the question whether the Regulation applies to a national insolvency procedure which is not listed in the Annexes, but which corresponds to the definition of Article 1(1).[6] The second case concerns the issue whether the Regulation applies to national procedures which are listed in the Annex, but do not correspond to the

[6] CJEU, case C-461/11, *Ulf Kaziemierz Radziejewski.*

definition of Article 1(1).[7] These cases show that there is currently some legal uncertainty as to which procedures are actually covered by the scope.

A third problem identified relates to situations where national procedures which are listed in the Annexes are changed by the Member States without any notification of the modifications to the Commission. In these situations it is unclear whether the amended or new procedures of the Member States correspond to the definition of Article 1(1).

2.1.2. The insolvency of private individuals and self-employed persons

The Regulation applies to national proceedings, regardless of whether they concern a natural or a legal person, a trader or an individual[8]. The evaluation study revealed that while many Member States have notified their personal insolvency procedures to be included in the Annexes[9], a considerable number of personal insolvency procedures are currently not covered by the Regulation[10]. This situation is partly because the proceedings do not match the Regulation's definition in Article 1(1), were only recently introduced or are not considered to fall within the scope of the Regulation by the respective Member State[11]. The latter contrasts with the results from the public consultation, in which a majority of respondents (59%) agreed that the Regulation should apply to private individuals and self-employed.

The diversity of national laws adds to complexity: Some Member States have no personal insolvency schemes at all. Other Member States have personal insolvency schemes that apply both to self-employed or sole traders and consumers. A third group has special schemes only for consumers and include self-employed and sole traders in company insolvencies, whereas a fourth group has separate schemes for consumers, self-employed and sole traders.

The Commission finds that the status quo is a problem because it can result in debtors remaining liable to foreign creditors. In particular, an honest entrepreneur, who has been discharged from its debts in one Member State, may be prevented from starting a new business or trading with another Member State. The problem can also discourage debtors who have benefitted from a debt discharge at home to live or seek employment in another Member State.

2.2. Proceedings excluded from the scope, Article 1(2)

The Regulation does not apply to insurance undertakings, credit institutions, investment undertakings, which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. These debtors are excluded from the scope because they are subject to special arrangements and, to some extent the national supervisory authorities have extremely wide-ranging powers of intervention[12]. Cross-border insolvency proceedings concerning insurance undertakings and credit institutions are governed by other

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7 CJEU, case C-116/11, *Bank Handlowy*.

8 Recital 9 of the Regulation.

9 AT, BE, CZ, CY, DE, LV, ML, NL, PL and – partly – FR, SI and UK. In eastern France (Bas-Rhin, Haut Rhin, Modeslle), the general insolvency law also applies to over-indebted private individuals. In the UK, some of the procedures open to over-indebted natural persons are covered by the Regulation (bankruptcy, individual voluntary arrangement, trust deeds, sequestration), while others (debt relief orders, debt management plans) are not.

10 EE, EL, FI, FR, LT, LU, SI, SE, UK.

11 FR, LU.

12 Cf. Recital 9.

instruments of Union law[13]. Like the Regulation, these instruments provide for rules on the international jurisdiction over the adoption of reorganisation measures or the commencement of winding up proceedings, the applicable law and the recognition of the proceedings.

It has been noted in academic writing that the absence of Union instrument governing cross-border insolvencies for collective investment undertakings and investment firms leaves an undesirable gap in Union law. However, with respect to investment firms, that gap is likely to be closed soon for the major part of these firms when the amendments of Directive 2001/24/EC foreseen in the recent proposal for a Directive on bank recovery and resolution[14] are adopted. As to collective investment undertakings, stakeholders reported that the current situation had not created problems in practice since insolvencies of collective investment undertakings were quite rare.

2.3. Recognition of insolvency proceedings opened outside the EU or coordination between proceedings inside and outside the EU

The Regulation applies to insolvency proceedings of debtors with their COMI (Centre Of Main Interest) in a Member State. Insolvency proceedings in which the COMI of the debtor lies outside the EU are outside its scope. Even where the COMI is within the EU, limitations of the scope exist with regard to assets, creditors or establishments located abroad. In such situations, the Regulation applies only partially, to the actors and assets located in a Member State. Issues outside the Regulation's scope are covered by national law.

The impact assessment study notes that several Member States have enacted laws to govern aspects of cross-border insolvencies that involve states outside the EU since the Regulation was enacted. Romania, Poland, the UK, Slovenia and Greece adopted laws based on the 1997 UNCITRAL Model Law. Belgium, Germany and Spain introduced laws on international insolvency that do not follow the UNCITRAL approach but generally cover similar topics. France and Italy have no specific laws in this area but their courts apply general principles of private international law.

While the effects of the international dimension of insolvency therefore vary depending on which Member States are concerned, the Commission, on the basis of the evaluation study, concludes that the lack of harmonised provisions for the recognition of non-EU insolvency proceedings or the coordination between proceedings inside and outside the EU has not caused any significant problems in practice. Views of the respondents to the public consultation were divided on whether the lack of provisions for the recognition or coordination of extra-EU insolvency proceedings had created problems with 44% agreeing and 37% disagreeing. Some problems with the recognition of EU judgments or the powers of an EU liquidator in non-Member States such as Switzerland were reported. Such problems can, however, not be solved by a Union instrument but only by an international treaty. In this respect, it is worth noting that Switzerland has informally expressed an interest in elaborating a bilateral agreement with the EU on insolvency.

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[13] Directive 2009/138/EC on the taking up and pursuit of the business of insurance and re-insurance (Solvency II), OJ L 335, 17.12.2009, p. 1; Directive 2001/24/EC on the reorganisation and winding- up of credit institutions, OJ L 125, 5.5.2001, p. 15.

[14] Proposal of 6 June 2012 for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM (2012) 280 final.

3. JURISDICTION FOR OPENING INSOLVENCY PROCEEDINGS

3.1. Definition and determination of the debtor's centre of main interests (COMI)

The concept of COMI is of paramount importance for the application of the Regulation. The Commission notes that there is general support of the concept of COMI as interpreted by the CJEU. This is in line with the results of the public consultation where a significant majority of respondents (77%) approved of the use of the COMI to locate the main proceedings. However 51% considered that the interpretation of the term COMI caused practical problems. Nevertheless, some felt clarifications given by the CJEU have been very helpful to achieve a more uniform application of the term.

The case-law of the CJEU clarified the concept of COMI in its decision Eurofood[15] and Interedil[16]. The determination of COMI requires a comprehensive assessment of the circumstances of each individual case; according to the objective approach of the ECJ the COMI must be identified by reference to criteria ascertainable by third parties. In general, these criteria are fulfilled at the place where the debtor performs his business activities or where his main administration is located.

For companies and other legal persons, **Article 3 (1)** provides a rebuttable presumption in favour of the place of registration. The case-law of the CJEU clarified the circumstances under which this presumption may be rebutted in a manner that is overall considered to be appropriate. However, it has been reported that in many Member States (AT, BE, CZ, FR, DE, GR, IT, LU, NL, PL, RO, ES, SE, UK) the presumption was sometimes rebutted without carrying out the comprehensive analysis required by the CJEU. It is unclear whether this is due to a lack of awareness of the courts of the CJEU case-law or to the difficulties of the factual approach it requires.

Although the Regulation covers the insolvency of natural persons irrespective of whether they are a trader or a consumer, the present wording of Article 3 (1) does not expressly address the COMI of individuals. In this respect, the evaluation study revealed inconsistencies in the practice of Member States. Some courts applied a presumption in favour of the domicile of the debtor whereas other courts simply applied national concepts to the COMI of individuals.

The determination of COMI is most difficult in cases where the debtor relocated its domicile prior to the application for insolvency. According to the CJEU case-law[17], the decisive moment for determining the existence of the COMI is the filing of the application for opening main proceedings. If the debtor moves his COMI to another Member State afterwards, the requested court retains jurisdiction. This case-law is largely respected by the courts. Problems can arise if the debtor transfers his COMI to another Member State prior to the application. The evaluation study revealed cases of evident abusive (temporary) relocation of COMI of individuals for the sole purpose to obtain discharge of residual debts. The issue which is sometimes terms as "bankruptcy tourism" is limited to a few regions in the Union with eastern France, the UK and Latvia attracting debtors from other countries. Especially German and Irish debtors tried to take advantage of the discharge opportunities of English law which provides for a debt release within only one year.

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15 CJEU, case C-341/04, *Eurofood.*

16 CJEU, case C-396/09, *Interedil.*

17 CJEU, case C-1/04 , *Staubitz-Schreiber.*

There have also been cases where companies have relocated to another Member State than that of their registered office in order to benefit from more sophisticated restructuring mechanisms there. However, such relocations cannot per se be regarded as abusive or illegitimate. First, COMI moves of companies have been accepted by the CJEU as a legitimate exercise of the freedom of establishment. Thus, the Court clarified in its Centros decision that doing business in a Member State through a company incorporated in another Member State is covered by the freedom of establishment even if the company's registered seat was chosen to avoid the minimum capital requirement of the Member State of the company's real seat. Moreover, COMI relocation often benefits creditors rather than disadvantaging them. Often, relocations are even driven by the (senior) creditors in an attempt to rescue or restructure the company. There are several cases where COMI relocation to the UK allowed the successful restructuring of a company because of the flexibility which English insolvency law grants companies in this respect.

3.2. Procedural framework for examining jurisdiction

The evaluation study highlights several significant problems with regard to the procedural framework for examining the jurisdiction of the court opening insolvency proceedings. At present, the Regulation does not expressly address this issue which is dealt with by the procedural laws of the Member States and general principles of efficiency and non-discrimination. However, the approaches of national courts to determining jurisdiction under Article 3 vary considerably throughout the Union. It does not seem to be clear for all courts that they are under an obligation to examine their jurisdiction ex officio and to expressly note the jurisdictional basis of their decision to open the proceedings in the decision opening the proceedings. This is problematic because the principle of mutual trust among the Member States being a cornerstone of the Regulation requires that the courts of the Member States carefully assess the COMI of the debtor since the decisions opening insolvency proceedings are recognized in other Member States without any power to scrutinise the court's decision.

With respect to the procedural framework, it has also been criticised that foreign creditors do not always have a right to challenge the decision opening insolvency proceedings and that, even where they are formally entitled to do so, they are not informed of the decision in sufficient time to effectively exercise their right to challenge it.

3.3. Insolvency-derived actions

The delimitation between the Brussels I Regulation[18] and the Regulation is one of the most controversial issues relating to cross-border insolvencies. The dispute concerns the international jurisdiction (Article 3) and the recognition of foreign decisions (Article 25).

According to the case-law of the CJEU, judgments on civil actions are to be qualified as insolvency-specific when they derive directly from insolvency proceedings and are closely linked to them (*vis attractiva concursus*). However, this principle is codified only with respect to recognition (Article 25 EIR). The delimitation formula was established by the CJEU in 1979[19] in relation to the Brussels Convention[20] and reiterated by the CJEU in *DekoMarty*[21]

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18 Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 12, 16.1.2001, p.1.

19 CJEU, case 133/78, *Gourdain v. Nadler.*

20 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (consolidated version in OJ C 27, 26.1.1998, p.1).

21 Case C-339/07, *Deko Marty.*

with respect to jurisdiction under the Regulation. The CJEU held that the court opening insolvency proceedings had jurisdiction for avoidance actions brought by the liquidator against a third party such as an action seeking to invalidate a transfer of shares effected in the context of insolvency proceedings[22] and that such actions were excluded from the scope of The Brussels I Regulation.[23] By contrast, the Court held that an action brought by a vendor on the basis of a reservation title against an insolvent purchaser[24] and *actio Pauliana* based on a claim against third parties assigned by the liquidator to the sole creditor[25] cannot be qualified as closely linked to the insolvency proceedings.

44% of respondents to the public consultation reported no problems with the interaction between the Regulation and the Brussels I Regulation which have not been satisfactorily solved by case-law. Nevertheless, the Commission concludes that the absence of an express rule on jurisdiction for insolvency-derived action gives rise to uncertainty for legal practitioners not well versed in the CJEU's case law. In addition, the fact that a liquidator cannot cumulate an insolvency-related action with an action covered by the Brussels I Regulation has been criticised.

4. APPLICABLE LAW

4.1. Scope of the general rule (*Lex fori concursus)*

A majority of respondents to the public consultation (55%) agreed to the Regulation's provisions on applicable law are satisfactory while 32% disagreed.

According to the evaluation study the general choice of law provision (*lex fori concursus*) in **Article 4(1)** of the Regulation is in line with general and well recognized principles of private international law according to which insolvency proceedings are governed by the law of the State of opening. The Commission concludes that there is no need for any changes or amendments with regard to this provision.

The evaluation study refers to questions arising with regard to qualification or characterization but considers that answering such questions is part of the responsibilities of the national court systems or, if necessary, the CJEU.

4.2. Exceptions to the *lex fori* principle

A majority of respondents to the public consultation (56%) agreed that the exceptions to the general rule on applicable law are justified to protect legitimate expectations and legal certainty.

Article 5 provides that third parties' rights in rem are not "affected" by the opening of insolvency proceedings. Almost half of the respondents to the public consultation (49%) stated that the provision on rights in rem operates satisfactorily in practice while 26% felt that it does not. The evaluation study states that the application of Articles 5 and 7 have led to very little case law but identifies the following problems:

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22 Case C-111/08, *SCT Industri* .
23 Case C-111/08, *SCT Industri.*
24 Case C-292/08, *German Graphics.*
25 Case C-213/10, *F-Tex.*

- The main issue in this context is the basic understanding of Article 5. In the overwhelming majority of Member States these provisions are interpreted as "substantive restriction rules" which means that the concerned rights in rem or reservation of title cannot be affected by the insolvency provisions neither of the opening State nor of the State where the assets are situated unless secondary proceedings are opened in the latter Member State. This problem also exists with respect to **Article 7** (reservation of title). With respect to Article 5, practical problems have arisen where claims secured by rights in rem are adjusted in reorganisation proceedings. It is questionable whether such an adjustment of the secured claim "affects" the accessory security and is therefore prohibited in the context of Article 5 EIR.

- The localisation of intangible assets such as intellectual property rights and bank accounts caused difficulties in practice. Especially concerning bank accounts hold with a local branch of a foreign bank it is questionable whether they are situated in the Member State of the bank's branch or in the Member State where the bank has its central office and his COMI (Article 2(g)).

- The respective scopes of Article 5 and Article 4 (2) (i) are uncertain regarding the distribution of the proceeds in cases where assets underlying rights in rem are alienated or where the liquidator has negligently violated the rights of a secured creditor. In this context, also the applicable law to an eventual claim for damages against the liquidator is unclear.

Concerning **Article 6** (set-off), it is unclear whether this provision also applies if the "law applicable to the insolvent debtor's claim" is the law of a non-Member State. A majority of National Reports in the context of the evaluation study confirmed the applicability of Article 6 to such cases, but this issue is unclear in a significant number of Member States. It has also been criticised that the application of Article 6 to netting agreements is unclear and that the protection of netting agreements under Union law currently differs depending on whether the debtor's insolvency is governed by the Regulation or by the Directives on the reorganisation and winding-up of credit-institutions and insurance undertakings.

The evaluation study does not identify any specific problems with regard to **Article 9** (payment systems and financial markets).

Concerning **Article 10** (contracts of employment), there have been a few complaints about the interplay between labour law and insolvency law, in particular concerning approval requirements for terminating or modifying employment contracts. In addition, the evaluation study states that different labour law standards may hinder an insolvency administrator to take the same actions with regard to employees located in several Member States and that this situation may complicate the restructuring of a company. However, this situation is inherent in the policy choice underlying Article 10 which the evaluation study does not call into question. A harmonization of certain aspects of labour law could mitigate this problem but would be difficult to achieve since labour law is deeply rooted in national traditions and, at any rate, go beyond the scope of the revision of the Regulation. The study further addresses the question of the interplay between insolvency law and guarantee institutions under Directive 2008/94/EC[26] and concludes that any problems arising in this context would best be

[26] Directive 2008/94/EC of the European Parliament and the Council on the protection of employees in the event of the insolvency of their employer, OJ 283, 28.10.2008, p. 36.

dealt with by changes to the national laws governing these institutions or to national insolvency laws.

The evaluation study did not detect an urgent need for any amendments to **Article 12** (Community patents and trade-marks) which seems to be either of limited practical use or to work satisfactorily.

Concerning **Article 13** (detrimental acts), some administrators complained about the complexity to take into account several legal systems in order to determine whether a claim can be set aside. However, the evaluation study finds that this complexity is necessary in order to achieve appropriate results with regards to the legitimate expectations of the parties. Alternative solutions proposed in legal literature, such as a mere protection against a change in COMI, would not address the issue in a satisfactory manner. Views regarding the provision on detrimental acts were rather closely divided. One third of respondents stated they operate satisfactorily, while 37% said they do not.

Article 15 (effects of insolvency proceedings on lawsuits pending) causes no serious problems. It seems that most or all Member State laws have a rule or tendency to provide for a priority of insolvency proceedings over individual litigation or proceedings. However, some uncertainty exists concerning the applicability of Article 15 to arbitration proceedings.

While the Commission takes note of the findings of the evaluation study as regards the exceptions to the *lex fori* principle, it considers that the main applicable law rules of the Regulation apply satisfactorily and do not require changes at this stage.

5. RECOGNITION OF JUDGMENTS OPENING INSOLVENCY PROCEEDINGS

The evaluation study finds that in most cases, courts of the Member States respected the prior opening of main proceedings in another Member State. There are, however, a few examples where courts did not comply with this obligation. It is not always clear when the opening of the proceedings "became effective"; in particular, this is true with respect to the appointment of a German *"vorläufiger Insolvenzverwalter"* which most, but not all courts of the Member States accepted as an "opening" of insolvency proceedings under the Regulation.

The application of the public policy reservation under **Article 26** of the Regulation did not cause major problems; nevertheless, there are a few cases where courts of Member States referred to public policy considering not recognizing foreign main proceedings.

Half of the respondents to the public consultation (51%) agreed that the definition of the decision 'opening insolvency proceedings' should be amended to take into account national legal regimes where there is not an actual court opening the proceedings.

6. COORDINATION OF MAIN AND SECONDARY PROCEEDINGS

According to the evaluation study, secondary proceedings did not turn out to be the tool for the main liquidator described in **Recital 19** of the Regulation – i.e. in cases "where the estate of the debtor is too complex to administer as a unit or 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 opening". There seems to be only a relatively small number of cases where it was the main liquidator who actually applied for the opening of secondary

proceedings. Rather, they were used (and abused) for different reasons, in particular, as a tool for the protection of local interests and as an instrument in jurisdictional conflicts where the opening of secondary proceedings was regarded as the second-best solution to the opening of main proceedings in a specific Member State. The evaluation study estimates that disadvantages of secondary proceedings are more significant than their advantages. This is already true where the secondary liquidator acts in a cooperative fashion, but is even more obvious where this is not the case. Views of the respondents to the public consultation on the benefits of secondary proceedings were divided with 36% feeling that the division between main and secondary proceedings was helpful with 37% disagreeing.

The following problems were noted in the evaluation study:

The fact that secondary proceedings must be winding-up proceedings is an impediment to flexible and effective restructuring measures.

The absence of specific rules on the procedure for the opening of secondary proceedings is problematic. There is no provision allowing the competent court to refuse the opening of secondary proceedings in circumstances where such opening would not be in the interests of local creditors. There is also no express provision requiring the main liquidator to be heard before opening the proceedings.

Moreover, it is unclear whether liquidators in all Member States can enter into undertakings guaranteeing the creditors who might apply for secondary proceedings that they will respect all preferential rights such creditors would enjoy in secondary proceedings in order to prevent them from actually applying for such secondary proceedings (or to prevent the court for opening them). English courts and practitioners have developed such an approach, but it is unclear whether liquidators in all other member states have the power to make such offers under their respective national insolvency law.

The duties to cooperate and communicate information under **Article 31** of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings.

Article 33(1) which allows the main liquidator to request a stay of liquidation in the secondary proceedings is not sufficiently clear and broad with respect to the range of measures the main liquidator's application can refer to. The standard of Art 33(2) concerning the termination of the stay is not consistent with the one under Art 33(1).

7. GROUP OF COMPANIES

Although a large number of cross-border insolvencies involve group of companies, the Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group. 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. There is no compulsory coordination of the independent proceedings opened for a parent company and its subsidiaries with a view of facilitating the reorganization of these companies or – where this is not possible – to coordinate their liquidation. Neither the liquidators nor the courts involved in the different proceedings

concerning members of the same group of companies are under a duty to cooperate and communicate. While liquidators may cooperate on a voluntary basis, judges are, in many Member States, prevented from cooperating with each other in the absence of a legal basis expressly authorizing them to do so.

Case-law tried different ways to overcome the lack of specific provisions on group insolvency in practice:

In the first years after the entry into force of the Regulation, some national courts interpreted the Regulation's rules on jurisdiction broadly so as to bring insolvency proceedings for all members of the group, including those located in another Member State, before the court at the parent company's registered office. The courts concerned generally justified such a consolidation of insolvency proceedings on the grounds that the subsidiaries' commercial decisions were controlled by the parent company[27].

The 2006 CJEU's *Eurofood* decision considerably reduced the scope of application of the possibility for such procedural consolidation and reinforced the rule that each legal entity should be treated separately[28]. According to the Court, control of corporate direction alone does not suffice to locate the centre of economic interest of a subsidiary with its parent company, rather than at its own registered address. After *Eurofood* – and the subsequent decision in the case *Interedil* which reflects a more flexible approach - it is still possible to open insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office, but only if the factors showing that the subsidiary's COMI is located at the seat of the parent company are objective and ascertainable by third parties. This means in practice that courts have to examine a complex bundle of factors, including whether the financing of a subsidiary is taken care of by the parent company, whether the parent company controlled the operational business (e.g. by approving purchases above a certain threshold) and the hiring of staff, whether certain functions (e.g. the management of the IT equipment or the visual/business identity) were centralised[29]. Essentially, these conditions will only be fulfilled in the case of very integrated companies.

Another approach taken in practice is the appointment of the same insolvency practitioner in the proceedings of all members of the group involved, or of insolvency practitioners who have previously worked together successfully on group insolvencies[30]. However, this possibility currently depends on the willingness of the respective insolvency practitioners and judges to cooperate.

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[31]. This assessment is supported by the results of the public consultation: Almost half of the respondents to the public consultation considered that the Regulation does not work efficiently for the insolvency of a multinational group with more than two thirds of judges and academics taking that view.

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27 This approach began in England and was adopted by courts in Member States such as France, Germany, Hungary and Italy.

28 Case C-341/04 *Eurofood*, at para 30.

29 See e.g. the decision of the High Court in *Daisytek*, 16.5.2003.

30 E.g. Nortel.

31 For details see the Impact Assessment accompanying the proposal for a Regulation amending the Insolvency Regulation.

8. PUBLICATION OF AND INFORMATION ON INSOLVENCY PROCEEDINGS

The Regulation contains provisions to help ensure the publicity and awareness of insolvency proceedings. **Articles 21 and 22** of the Regulation provide that the liquidator may request that the decisions opening insolvency proceedings and appointing him be published in another Member State and registered in that State's public registers. Member States can make such publication and registration mandatory but they remain essentially discretionary measures.

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. Three quarters of respondents to the public consultation (75%) consider that the absence of mandatory publication and registration of the decision opening insolvency is a problem.

The impact assessment study notes that a range of problems exists even if publication and registration were made mandatory. While insolvency proceedings of legal entities are registered in every Member State, insolvencies of individuals are only registered in some of them. Only 14 Member States publish decisions in an insolvency register accessible online to the public[32]. In 9 other Member States, some information on insolvency is available in an electronic database, e.g. a company register or an electronic version of the official bulletin. Four Member States do not have information on insolvency proceedings available in electronic form at all, which makes access to that information from abroad particularly difficult. Even where electronic registers exist, it is not feasible for foreign creditors and courts to check each Member States' register on a regular basis. As one of the measures implementing the E-Justice Action Plan of 2009, the Commission has set up a pilot project for the interconnection of electronic insolvency registers. However, this pilot project covers to date only seven Member States. A majority of the respondents to the public consultation considered that Member States should be required to register the opening judgment in an insolvency register and that national insolvency registers should be interconnected.

9. LODGMENT 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. **Articles 39 to 42** of the Regulation only provide for minimum rules enabling foreign creditors the lodging of their claims, but do not set a comprehensive procedural framework.

Pursuant to **Article 42 (2)** of the Regulation, the creditor may be required to provide a translation into the official language(s) of the State of the opening of proceedings. The evaluation study revealed that in some Member States requiring the translation has become the rule rather than the exception, thereby entailing additional costs and delays.

This issue is related to the problem of procedural costs. National reporters generally criticized high translation costs for lodging a claim. Moreover, some Member States require the retaining of a local lawyer for lodging the claim. The average cost of lodging a claim for a

[32] AT, CZ, FI, DE, HU, LV, NL, PL, PT, RO, SI, SK, SE and – partly – the UK.

foreign creditor has been estimated at about € 2000 in a cross-border situation. Due to high costs, creditors may choose to forgo a debt, especially when it involves a small amount of money. This problem mainly affects small and medium-sized businesses as well as private individuals.

The evaluation study further notes difficulties resulting from the application of the law of the opening of proceedings, in particular regarding deadlines, the proof of claims, the specific procedures of lodging claims. Cases have been reported where foreign creditors were time-barred from lodging a claim because deadlines under local law are comparatively short and the liquidator had not informed the creditors prior to the expiry of that deadline.

Almost half of the respondents to the public consultation (46%) expressed the view that there were problems with the lodging of claims under the Regulation. This issue is of particular concern for SMEs.

10. CONCLUSIONS

On the basis of the results of the evaluation referred to above, the Commission finds that, in general, the Regulation functions in sound and satisfactory manner. It has well implemented the principle of mutual recognition for the cross-border insolvency proceedings, and has improved the coordination of such cases.

Nevertheless, there are certain issues that will benefit from adaptations to the Regulation: The main amendments to be proposed by the Commission concern, first, the scope of application. 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.

Regarding the jurisdiction, the Regulation should maintain the concept of COMI as interpreted by the Court of Justice of the European Union but the 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 and the procedural framework for examining the jurisdiction should be improved to limit the potential for wrongful forum shopping.

The Commission proposes improving the publication of insolvency proceedings in two ways: by making publication of decisions in another Member State mandatory; and 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.

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.

Finally, the Commission addresses the issue of group insolvency: 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 in the Regulation specific provisions concerning the recognition of and coordination with insolvency proceedings opened outside the EU. As referred above, 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. The Commission 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.