IIC the newsletter

2014 November

DBB DEMOULIN • BRULARD • BARTHELEMY

IIC newsletter founded by yves Brulard

Revised Regulation on Insolvency Proceedings:

Changes presented in the Council's "General Approach" of 6th June and its updated text of 19th September 2014

This is the 5th guideline which follows the revisionary process the Regulation (EC) No. 1346/2000, and will very likely be the final update before the Regulation's publication expected in December, as a final agreement appears imminent.

On 5 and 6 June 2014, the Council ("Justice and Home Affairs"), in accordance with Article 294 TFUE, has adopted at first reading a "general approach" on the normative section of Regulation (EC) No. 1346/2000. The President has invited Member States to inform the Council Secretariat of possible modifications to the revised Annexes.

The "Working Party on Civil Law Matters" (Insolvency) has examined the text.

The objective of this 5th guideline is to examine the main amendments proposed by the text of 19 September 2014.
It is important to emphasize that the original Regulation did not concern groups of companies, but only individuals (whether a natural person or a legal person), since (EC) No 1346/2000 was the result of a compromise between universalist theory and territorialist theory.

This guideline will highlight additions and amendments to the Regulation in summary form, as a more detailed commentary will provided after the publication of the final text.

Proceedings subject to the Regulation

A fundamental question facing the original Regulation was whether it applied to all discussions between a debtor and creditor(s) – including those outside the insolvency context, as provided under French and Belgian law – or, at the other end of the spectrum, whether it could only apply only in cases of adjudicated insolvency.

In order to clarify the proceedings to which it would apply, Regulation (EC) No. 1346/2000 utilized a definitions section similar to prior Annexes that allowed for easy modification by Member states. However, this system – as commented on in our prior newsletter – suffered many abuses. The most clear example of this abuse was allowing Member States to add additional proceedings or modify the very content of the rule. This resulted in the Regulation being applied to proceedings with had little or nothing to do with insolvency, and resulted in substantial uncertainty and inequality in the application of the Regulation among the Member States.

The Commission's goal in this revision – as noted in our second guideline – was two-fold. First, itwanted to allow for greater flexibility in applying provisions and definitions of the Regulation to pre-insolvency proceedings, so as to increase the chances of success in the event of a company's reorganization. At the same time, the Comission sought to control the content of these procedures by ensuring that it was the sole competent authority able to modify the provisions and thereby avoid abuses by Member States.

1.
The Council has amended the Commission's text, stating that the Regulation shall apply *only* to **public proceedings.**

The new Recital 9(c) mentions this point, but the Resolution requests that an additional Recital be included to define "public proceedings," in which publicity is required to ensure the collective nature of the proceedings and give creditors an opportunity to contest the court's jurisdiction and identify the assets under dispute.

In sum, the revised text removes confidential proceedings from the Regulation's field of application. Thus, even if a court is subsequently notified of the outcome of a confidential proceeding, the Regulation's provisions will not apply without proper publicity.

However, the Council's text still refers to **«provisional» proceedings** as stated in the Commission's text. The Commission considered these «pre-insolvency» proceedings as the starting point for the application of the new Regulation. This could begin after a court's decision to open an insolvency proceeding, after the confirmation of the opening of insolvency proceedings, or upon the appointment a provisional liquidator. The Council has requested a Recital to define the content of these proceedings, which could start at a certain time before the court's confirmation or ultimately transform into formal proceedings.

The Council also requests a definition of the term «**collective proceedings**» in Article 2(2) with the provision of new Recital 9(d). The definition should clarify that "collective proceedings" include "all or a significant part of the creditors to whom the debtor owes all or a substantial proportion of his outstanding debts, provided that the claims of those creditors who are not involved in such proceedings remain unaffected." This is a substantial modification to the original text of the Commission, and the Council requests two additional recitals to better define these concepts.The Council requests a Recital that more clearly distinguishes between debtors wbo are subject to insolvency law and those who are subject only to general company law. It also requests a Recital to clarify the concept of «**adjustment of debt**» in the Commission's text.

Recital 9(a) again integrated the text of Recital 3, which provided that the Regulation should apply to proceedings which promote «the rescue of economically viable…but distressed businesses».

Recital 9(g) demands that the Regulation be applied not only to situations in which the debtor faces financial difficulties, but also to "*situations in which the debtor faces non-financial difficulties, provided however, that these difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay his debts as they fall due*."

2.
The Regulation still applies only in proceedings where the debtor has been totally or partially divested of control of the assets by the designation of an insolvency professional, or in the event that the debtor remains in possession, but his assets and business affairs are subject to the control and supervision of the court.

Accordingly, the Council introduced in Article 2(4) a definition of “debtor in possesion,” as «*a debtor in respect of whom insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where therefore the debtor remains totally or at least partially in control of his assets and affairs».*

It should be noted that Commission decided to change the word “Liquidator” to “insolvency practitioner” throughout the text of the Regulation

In light of the restrictions placed on formal proceedings, the Council proposes to introduce a third situation in which the Regulation would apply. This would be in the case of procedures which grant a temporary moratorium on enforcement actions brought by individual creditors, in order to allow for negotiations between the debtor and his creditors, so long as these actions are based on appropriate measures which protect both the general interest and the creditors’ interests. This specifically contemplates preliminary procedures in which there is no agreement reached by the creditors.

Insolvency professionals

The Commission also discusses the term «liquidator».

1.
The concept of «insolvency practitioner» replaces the concept of «liquidator» in previous texts.

2.
The vocabulary modification, defined in Recital 10(a) – which refers to the list in Annex C – is indeed a substantial one. An insolvency practitioner can be designated for temporary proceedings, and his powers are directly derived from the Article 4(b), which states that the practitioner should verify and admit claims submitted in insolvency proceedings, represent the collective interest of the creditors, administer – either in full or in part – assets of which the debtor has been divested, and – as in the Commission's version – liquidate the assets or supervise the administration of the debtor’s affairs.

3.
Article 18 specifies that the powers of the insolvency professional may not include coercive measures, unless explicitly ordered by a court of that Member State.

Main Insolvency Proceeding: a revisitation of the «Centre of Main Interests»?

A debtor can carry on activities in several Member States, even if he resides or is registered in only one State. The question which then arises as to which court is competent.

Regulation (EC) 46/2000 allowed for the opening of main insolvency proceedings (which has a universal effect on all Member States) in the Member State in which is situated the debtor's “centre of main interests.” Parallel secondary proceedings may also be opened in the different Member States where the debtor has an establishment.
Since the ruling in the *Paradât* case, a single court is not allowed to open multiple main proceedings for multiple debtors, even if the court in question has jurisdiction of one of the debtors’ centre of main interests, and even when an identical liquidator is named for each main proceeding.

This judicial treatment of groups was possible only when each group member had the same COMI. Practice demonstrates that company groups would movie the COMI of entities they wished to be considered as “consolidated.” This was possible because the concept of COMI was broadly defined and interpreted among courts.
As mentioned in our second guideline, the text proposed by the Commission had not yet revisited the COMI concept, but did consider measures to allow for more control.

The 3rd guideline talked about the position of the Parliament, which wished to reinforce the strict control of the COMI concept by the courts in order to avoid abuses among Member States.

1.
Firstly, the Council proposes several amendments to Article 3 as it applies to individuals:
The Council stated that the COMI of an individual exercising an independent business or professional activity « *shall be presumed to be that individual's principal place of business in the absence of proof to the contrary.* »

The Council has further added that, in the case of any other individual, « *the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within a period of 6 months prior to the request for the opening of insolvency proceedings* ».

It must be emphasized that the Council has introduced this "COMI transfer validity period" only for this specific category of debtors. Furthermore, the Council has requested a Recital to explain that, in order to determine the
habitual residence, courts should make a general estimation of the particular circumstances of the individual (such as the duration and regularity of the individual's presence in the Member State, and the conditions and reasons for that presence). Recital 12(b) lists the material criteria that should be taken into account in order to overcome this presumption, such as the location of the majority of assets or the specific reasons for its relocation.

2.

The Council reinforces Article 3(x) concerning the verification by the court of its own jurisdiction, already agreed upon by the Commission. Recitals 12(b) and 12(d) stress that the court must take special care to provide creditors with clear reasons as to its determination of the debtor's COMI. This is especially important when the COMI has been recently moved, bringing special attention to the commercial address provided to creditors and the way in which the relocation was brought to public light so as to be ascertained by third parties.
Recital 12(c) stresses that the Regulation should employ several safeguards in order to prevent fraudulent or abusive forum shopping, which in principle could include the change of the COMI.
According to Recital 12(d), it is necessary that courts take into account all relevant information and establish how the COMI could have been verified by third parties. The same Recital provides the parameters to consider, including more precise terms such as "centre of management and supervision" or "management of its interests".
Recital 12(f) adds that, in the event that there is some doubt as to the COMI, the court should require the debtor to submit additional evidence and, when the national law authorizes it, to give the debtor's creditors the opportunity to present their points of view. If the court claiming jurisdiction finds that the COMI is not located on its territory, it should refuse to open the proceeding, as stated in Recital 12(g).
This decision can be contested by each creditor but also by the debtor, as well as any other party allowed to bring an action in this case under national law. This provision was not included in the Commission's text.
These new revisions lead us to conclude that there will be fewer situations in which the same court could open multiple main proceedings concerning different debtors of a group.

Opening or refusal to open secondary proceeding

The compromise of Regulation No. 1346/2000 between the universalist theory and territorialist theory attempted to deal with debtors who possessed assets and liabilities outside the jurisdiction of the main insolvency proceeding.
This compromise was put into effect by allowing for the opening of a local liquidation proceeding for the subsidiary entity (of the same debtor, but located in a separate Member State) where the local creditor's rights should have been addressed by local law. The definition of the notion of « establishment », which allows for a similar opening, has also been discussed in terms of both its material and its temporal aspects.

The Commission has been driven by its goal to promote the reorganization and the rescue of entities whose activities are carried out in multiple Member States, having particular regard to the asset value nature of the secondary proceeding and to the limits of cooperation between proceedings subjected to local competition rules.
It has included the concept of secondary proceedings and reinforced the main liquidator's rights in in order to guarantee the continuity of the secondary proceeding.

1.
The Council proposes to modify paragraph 4 of old Article 3, a change not included by the Commission.

The Council has added a case in which a territorial insolvency proceeding provided by the paragraph 2 can be opened before the opening of a main insolvency proceeding: « *a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings ».*This proceeding becomes secondary once the main proceeding is opened.
Recital 17 limits this possibibility to the cases when it is absolutely necessary.

2.
The Council has also reconsidered the notion of "establishment." It is « *any place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets* »
Thus, the three-month term is clearly spelled out in the new Revision.

3.
Recital 12 stresses that when the main proceeding has been opened in a Member State different from the one where the head office of the interested company is located, the Regulation allows the opening of a secondary proceeding in the State of the head office, on condition that the debtor exercises economic activity in this State. Although this is not an addition to the prior Regulation, this clarification will serve to guide judges in addressing disputes regarding the true location of the COMI. If the management of main interests is located in a State different from the one of the assets and debts, or of an essential part of them, the opening of a secondary proceeding would be fatal to the attempted relocation of the COMI.

4.
The Council has confirmed, through the modification of Article 27, how proceedings affected by the Regulation may not necessarily be insolvency proceedings. The Council clarified that it is not necessary to reexamine a debtor's insolvency in the Member State in which secondary proceedings have be opened « *where the main proceedings required that the debtor is insolvent* », which means that it is necessary to conduct this analysis only when the main proceeding is not based on insolvency.

5.
In Article 28(a), the Council drastically changed the innovation proposed by the Commission relating to secondary proceedings. The Council's recommendations give the insolvency professional the right to give an undertaking with local creditors in the court that is charged with opening the secondary proceedings, in order to avoid such an opening.
The insolvency practitioner can give a unilateral undertaking, which distributes the local assets according to the local law. The text obliges the practitioner to notify the local creditors' about his intended distributions, and notification must be given in the local language. According to the Recitals, the court is able to refuse the opening of a secondary proceeding only when it has obtained assurances that the undertaking correctly protects the general interests of local creditors. This is done in the form of an agreement that ensures respect of the rights of distribution and the priorities provided by national law. The undertaking musts also clarify the value of the assets and the different options to realize them.
This undertaking, provided by Article 28, shall be approved by the known local creditors according to the rules of qualified majority and voting that apply for the adoption of restructuring plans.
The text gives binding effect to the undertaking in regards to property and, through the Recitals in particular, it clarifies the information that the insolvency practitioner must give to local creditors about distribution and the possibility to contest this distribution before the courts of the Member State where the main proceeding has been opened, if the information provided was not similar to the undertaking terms.
The Article gives a deadline of thirty days, starting from the receipt of the decision, to request the opening of secondary proceedings.
Article 28(a) states that if an insolvency practitioner gives an undertaking and makes a request of the court not to open secondary proceedings, the court should not open secondary proceeding if it believes the undertaking has given proper protection to the creditors' general interests. There are several additional dispositions that allow creditors to go to the courts of the Member State's site of main proceedings and request the insolvency practitioner to take all necessary measures to ensure the undertaking properly executed. They may also go to the courts of the Member State where a secondary proceeding would have been opened in order to request the adoption of temporary conservative measures.
The insolvency practitioner has an affirmative duty ensure the undertaking is done properly.

6.
The Council has introduced Article 29(a), which provides the right for the insolvency practitioner or for the debtor in possession in the main proceeding, to be immediately informed when a request of secondary proceeding's opening has been presented. This article has the aim of ensuring that all parties are heard in the event of a disagreement as to the secondary proceedings.
This right of being heard is different from the provision discussed previously that allows the insolvency practitioner to protest the request for an undertaking.

Article 29(b) provides that the main proceeding's insolvency practitioner may protest the opening of secondary proceedings before the courts of the Member State where the secondary proceeding has been opened, on the basis that the court has not respected the conditions and requirements of article 29(a).

7.
The second situation in which a secondary proceeding's opening could be avoided is provided by Recital 19 and Article 29(a)(2)(a). This allows the court to temporarily suspend the opening of a secondary proceeding when a temporary suspension of individual claims has been accorded in the main proceeding, having regard to the purpose of promoting negotiations between the debtor and its creditors and in this way preserve the efficacy of the suspension. The court should be able to give the temporary suspension for a period of three months if it considers that proper measures have been taken to protect the local creditor's interests. In this case, all the creditors should be informed and authorized to participate.
Conservative measures can be ordered to protect the local creditor's interests. For example, a conservative measure can prevent the relocation or transfer of assets in the Member State of the establishment, or take other action consistent with the local civil procedure laws. The suspension can be dismissed by the court on its own initiative, or at the request of all the creditors, if an agreement has taken place or if the suspension results in the abuse of the creditors' rights.
The fact that the suspension could be dismissed at the request of the creditors is a noteworthy revision of the Article.

8.
Article 29(a)(3) also provides that that, at the insolvency practitioner's request, the court «may open a type of insolvency proceedings referred to in Annex A (...) other than the one initially requested, provided that the conditions for opening this other procedure under national law are fulfilled and that this procedure (...) is the most appropriate, taking into account the interests of the local creditors and coherence between the main and secondary insolvency proceedings».

9.
Article 37 gives the insolvency practitioner the right to request for the conversion one type of proceeding into another, which the court may allow, but it must take into account the interests of the local creditors.

10.
The right to request the suspension of the secondary proceeding still exists, but in Article 33 the term «process liquidation» have been replaced by the expression «process of realization of assets ».

11.
Moreover, Recital 19(e) provides the possibility for the court of the Member State in which secondary proceedings have been opened to sanction the debtor's directors for any violation of their duties.

Groups of companies

Regulation No 1346/2000 did not originally address the issue of groups directly. Thus, the Commission has now introduced propositions that apply the Regulation to the group context.

1.
The Council has broadened the Regulation's scope by explicitly bringing groups under the purview of No. 1346/2000.
Hence, the Council defines «groups of companies» as "a parent undertaking and all its subsidiary undertakings," and a "parent undertaking" as "an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings, or which prepares consolidated financial statements."
In order to improve the coordination of the insolvency of members of a group of companies, the Regulation should, according to the Council, introduce procedural rules on the coordination of the insolvency of members of a group of companies. The aim is to ensure the efficiency of the coordination while respecting each group member's separate legal personality per Recital 20(f).
According to the Council, the courts of the different Member States should coordinate the designation of an insolvency practitioner by choosing only one practitioner for multiple proceedings when they involving the same debtor or members of the same group of companies. A new CHAPTER IVa has been introduced to provide specific regulations regarding insolvency proceedings that involve members of a group of enterprises.
We will examine these particular rules of cooperation and coordination below.

It is necessary to distinguish between two different situations in order to understand the paragraphs that follow. Essentially, there is either a main proceeding and secondary proceedings concerning the same debtor, or main proceedings of different debtors having the same COMI (and possibly secondary proceedings), but which do not form a group of companies.

Cooperation between the main and the secondary proceedings

Regulation No. 1346/2000, which recognized the existence of a main proceeding and secondary proceeding(s) for the same debtor, previously provided for some coordination and information sharing between liquidators. However, the old provisions were rather vague, and in practice they collided with linguistic, cultural and even nationalistic constraints. They did not apply to liquidators of main proceedings opened by the same court for different debtors having the same COMI, even in presence of an identical liquidator for all the proceedings.
Inspired by the work of INSOL's expert committee, the Commission has introduced several new and stricter dispositions that are described in detail below.

1.
The Council seeks to reinforce the rules of cooperation. Specifically, this cooperation will have to take place « as soon as possible » in order to explore the particularities of the debtor's restructuring, especially pertaining to the realization or utilization of the debtor's assets and business.

2.
Article 31 also adds that « Paragraphs 1 and 2 shall apply mutatis mutandis to situations where, in the main or in the secondary insolvency proceedings or in one of the territorial insolvency proceedings concerning the same debtor and opened at the same point in time, the debtor remains in possession of his assets ».

3.
Moreover, some cooperation and communication duties between the different courts have been extended to territorial proceedings.

4.
In order to allow for this cooperation, the courts may designate an agent, on the condition that the agent is independent and authorized by national law. This individual may then ensure cooperation between the courts, especially concerning the designation and coordination of insolvency professionals.
However, according to Article 31(c), Articles 31(a) and (b) « may not lead to courts charging costs to each other for cooperation and communication ».

5.
The parallelism resulting from the coexistence of main and secondary proceedings can contribute to the effective management of the debtor's property, provided that there is adequate cooperation between the actors who take part in each proceeding.
Under this provision, a close collaboration is necessary that includes the exchange of information between the different insolvency practitioners and the interested courts.
In implementing this cooperation, Recital 20 encourages insolvency practitioners and courts to reach agreements and utilize protocols in order to facilitate cross-border cooperation and coordination of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies. Such agreements and protocols may take written or oral form, and it is particularly recommended that they draw inspiration from the UNCITRAL Model Law.
Moreover, Recital 20 emphasizes that Member States should establish national rules to supplement the rules on cooperation, coordination and communication of the insolvency of members of groups of companies

6.
New Article 34 provides that the insolvency practitioner may propose restructuring plans. In particular, when the law of the Member State where the secondary proceeding has been opened provides rescue plans, agreements, or other comparable measures that can lead to the proceeding's closing without liquidation, the insolvency practitioner can propose the adoption of

these measures. In this case « Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.»

7.
Article 34(a) regulates the impact of the closure of insolvency proceedings. This closure shall not prevent the continuation of other insolvency proceedings concerning the same debtor that are still open.
When an insolvency proceeding would entail the dissolution of the legal person or of the company, this legal person or company ceases to exist only when any other proceedings concerning the same debtor have been closed, or when the insolvency practitioners in such proceedings have given consent to the dissolution.

8.
Article 37 provides for the possibility of converting a secondary proceeding into a main proceeding at the request of the insolvency practitioner. To do so, the court and insolvency practitioner must ensure the (1) respect of national laws as they pertain to the opening of these proceedings, (1) protection of the local creditors interests, and (3) coherence between the main and secondary insolvency proceedings.

Coordination in presence of groups of companies

Regulation No. 1346/2000 did not originally regulate the coordination of proceedings concerning different debtors, except when the same court led the proceedings under the same national law and with the same “liquidator.” This exception did not allow for flexibility, even in accordance of a domestic law, and resulted in the inability to address unique individual situations.

The Commission’s proposition is limited to assigning insolvency professionals of each debtor forming a group to cooperate with the other professionals and with the courts of the others debtors. The original text was also quite ambitious in this regard, as one debtor's professional was able to require the suspension of the proceeding concerning another debtor in order to better regulate the two distinct properties belonging to different legal persons.

1.
The Council has been more impressed than the Commission by the work of INSOL, and thus has made a greater effort to incorporate these suggestions into the Regulation. Thus, the Council uses Articles 42(a), 42(b), 42(c) and 42(d) to amend Articles 42(a) - 42(d) of the Commission's proposal.
The first correction aims to include insolvency agreements under the issue of cooperation.
The Council also requests the addition of a Recital that explains the rules regarding conflicts of interest and the importance of considering the interests of creditors of each company by seeking a solution that will be in best interests of all affected parties.
Professionals may also, in accordance with local rules, divide up certain collective tasks among themselves.
The courts are also invited to coordinate their efforts, specifically in the designation of insolvency professionals.
Concerning the cooperation between courts and insolvency professionals, the same consideration applies concerning conflict of interests and the respect of local rules.
Article 42(cx) introduces a rule regarding the allocation of the costs of cooperation.

2.
The main addition of the Council's proposition – in contrast to the Commission’s – is introduction of a new figure: the coordinator. The coordinator is « a person eligible under the law of a Member State to act as an insolvency practitioner » per Article 42(d)(11). The coordinator cannot be one of the insolvency practitioners named by any of the group members, nor can the coordinator have any conflicts of interest.
The insolvency practitioners should take into account the recommendations of the coordinator and the group coordination plan mentioned in Article 42(d)(12). If an insolvency practitioner does not follow these recommendations and the plan, « he shall give reasons for not doing so to the persons or bodies that he is to report to under his national law, and to the coordinator ».
The coordinator’s mission and duties are defined under Article 42(d)(12), and he must perform his duties « impartially and with due care ».

Articles 42(d)(1) and 42(d)(3) regulate the request to open group coordination proceedings, its form, the notice by the court seizing jurisdiction, and a priority rule which states that «where the opening of group coordination proceedings is requested at courts of different Member States, any court other than the court first seized shall decline jurisdiction in favor of that court ».
Article 42(d)(4) provides that an insolvency practitioner named by one of the members of the group may make objections concerning the inclusion within group coordination proceedings of the insolvency proceedings. These objections may concern the individual appointed as coordinator or the proceeding itself. The following article states the consequences of this objection.
Article 42(d)(6), provides for the choice of court for group coordination proceedings through a joint agreement between the insolvency practitioners appointed in the in insolvency proceedings by the members of the group.
Article 42(d)(8) discusses the decision to open group coordination proceedings by the court, which would be possible once the period of thirty days provided by Article 42(d)(4) paragraph 2 has expired). The next article concerns voluntary participation by an insolvency practitioner.
According to Article 42(d)(14), the insolvency practitioners must cooperate with the coordinator and communicate all pertinent information to assist in the fulfillment of his duties.
The coordinator may be removed by the court under the circumstances mentioned in Article 42(d)(15), which specifically allow for this if the coordinator has acted to the detriment of the creditors or failed to comply with his stated obligations. The coordinator's remuneration is regulated by Article 42(d)(17), which deals with the issue of costs and distribution.

Creditors' rights

Regulation No. 1346/2000 did not originally regulate the coordination of proceedings concerning different debtors, except when the same court led the proceedings under the same national law and with the same “liquidator.” This exception did not allow for flexibility, even in accordance of a domestic law, and resulted in the inability to address unique individual situations.

The Commission’s proposition is limited to assigning insolvency professionals of each debtor forming a group to cooperate with the other professionals and with the courts of the others debtors. The original text was also quite ambitious in this regard, as one debtor's professional was able to require the suspension of the proceeding concerning another debtor in order to better regulate the two distinct properties belonging to different legal persons.

1.

The Council has been more impressed than the Commission by the work of INSOL, and thus has made a greater effort to incorporate these suggestions into the Regulation. Thus, the Council uses Articles 42(a), 42(b), 42(c) and 42(d) to amend Articles 42(a) - 42(d) of the Commission's proposal.

The first correction aims to include insolvency agreements under the issue of cooperation.

The Council also requests the addition of a Recital that explains the rules regarding conflicts of interest and the importance of considering the interests of creditors of each company by seeking a solution that will be in best interests of all affected parties.

Professionals may also, in accordance with local rules, divide up certain collective tasks among themselves.

The courts are also invited to coordinate their efforts, specifically in the designation of insolvency professionals.Concerning the cooperation between courts and insolvency professionals, the same consideration applies concerning conflict of interests and the respect of local rules.

Article 42(cx) introduces a rule regarding the allocation of the costs of cooperation.

2.

The main addition of the Council's proposition – in contrast to the Commission’s – is introduction of a new figure: the coordinator. The coordinator is « a person eligible under the law of a Member State to act as an insolvency practitioner » per Article 42(d)(11). The coordinator cannot be one of the insolvency practitioners named by any of the group members, nor can the coordinator have any conflicts of interest.

The insolvency practitioners should take into account the recommendations of the coordinator and the group coordination plan mentioned in Article 42(d)(12). If an insolvency practitioner does not follow these recommendations and the plan, « he shall give reasons for not doing so to the persons or bodies that he is to report to under his national law, and to the coordinator ».

The coordinator's mission and duties are defined under Article 42(d)(12), and he must perform his duties « impartially and with due care ».

Articles 42(d)(1) and 42(d)(3) regulate the request to open group coordination proceedings, its form, the notice by the court seizing jurisdiction, and a priority rule which states that «where the opening of group coordination proceedings is requested at courts of different Member States, any court other than the court first seized shall decline jurisdiction in favor of that court ».

Article 42(d)(4) provides that an insolvency practitioner named by one of the members of the group may make objections concerning the inclusion within group coordination proceedings of the insolvency proceedings. These objections may concern the individual appointed as coordinator or the proceeding itself. The following article states the consequences of this objection.

Article 42(d)(6), provides for the choice of court for group coordination proceedings through a joint agreement between the insolvency practitioners appointed in the in insolvency proceedings by the members of the group.

Article 42(d)(8) discusses the decision to open group coordination proceedings by the court, which would be possible once the period of thirty days provided by Article 42(d)(4) paragraph 2 has expired). The next article concerns voluntary participation by an insolvency practitioner.

According to Article 42(d)(14), the insolvency practitioners must cooperate with the coordinator and communicate all pertinent information to assist in the fulfillment of his duties.

The coordinator may be removed by the court under the circumstances mentioned in Article 42(d)(15), which specifically allow for this if the coordinator has acted to the detriment of the creditors or failed to comply with his stated obligations. The coordinator's remuneration is regulated by Article 42(d)(17), which deals with the issue of costs and distribution.

The Insolvency Registers

Regulation No.1346/2000 did not originally provide a centralized and accessible source of information concerning insolvency laws and proceedings. This situation has been criticized, as it was almost impossible for a judge to know whether a debtor (1) was subjected to a proceeding, (2) if so, what kind of proceeding , and (3) what were the consequences of the proceeding.

The Commission has proposed the creation of an insolvency register in Articles 20(a), 20(b), 20(c), 20(d) and 20(e). They would be public registers in which information about insolvency proceedings are published as soon as possible after their opening.

The Article includes certain «mandated information» (such as the date of the opening, the court opening, the type of insolvency proceedings, their normative basis, etc.).

It is also requires that the introduction of registers «*shall not preclude Member States from including documents or additional information in their national insolvency registers* ».

Additionally, the Member States are not obliged to publish information concerning individuals not exercising an independent business or professional activity, nor must they make such information publicly available through the interconnected registry system.

In this case «*the insolvency proceedings shall not affect the claims of the foreign creditors who have not received the information referred to in the first subparagraph*».

1.

The Council amended the text in order to better clarify the information to publish in the different cases in order to make them useful to creditors. In particular, the Council requests publication of the national law deadline at which point the opening decision could be contested. It also requests for the publication of the insolvency-related directors' disqualifications in the information accessible through the registers of Member States.

2.

The Council has also pointed out that the publication of information in the registers only has the juridical effects stipulated by national law and by the Article 41 paragraph 4 of the Regulation.

3.
Article 20(b) regulates the system of interconnection, which involves the European E-Justice portal as central point of access. This includes a search function provided in all the institutions languages.
Article 20(c) deals with the costs of establishing and interconnecting insolvency registers, while Article 20(e) concerns the conditions of access to information through the system of interconnection.
Article 21 has been modified and now it is entitled « Publication in another Member State ». Article 22 has been replaced by a new text with the title « Registration in public registers of another Member State ».
In Article 25, the reference to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, has been replaced with a reference to Articles 39-57, except for articles 45 and 46, of Regulation (EU) No. 1215/2012.

4.
The revision provides that access to the registry should be free except for supplementary documents.

5.
Moreover, in order to sufficiently protect the information concerning individuals who do not exercise an independent business or professional activity, Member States may limit the access to this information by stipulating additional research criteria, as well as requiring the interested part to demonstrate competent authority or the existence of a lawful interest.

6.
In closing, the «general approach» also focuses on data protection, with the introduction of a specific regulation contained in the new Chapter IVB.
According to Article 42(e), « National rules implementing Directive 95/46/EC shall apply to the processing of personal data carried out in the Member States pursuant to this Regulation, provided that processing operations referred to in Article 3(2) of Directive 95/46/EC are not concerned. Regulation (EC) No 45/2001 shall apply to the processing of personal data carried out by the Commission pursuant to this Regulation. »
In accordance with Article 2(d) of Directive 95/46/EC, Member States must communicate the name of the person exercising the functions of controller, which will then be published on the European E-justice portal.
Member States shall also ensure the security of personal data processed in their national insolvency registers, verify that the controller ensures the accuracy and the updating of the data stored, and maintain responsibility for the collection and storage of data in accordance with Directive 95/46.
The Commission's responsibilities concerning personal data treatment are regulated by Article 42(g), which states that the Commission shall exercise the role of controller and ensure «the security of personal data while in transit, in particular the confidentiality and integrity for any transmission to and from the European E-Justice Portal.»
Article 42(i) provides guidelines for the storage of personal data on the European e-Justice Portal. In particular, it states that any personal data concerning individuals should be stored on the portal and «all such data shall be stored in the national databases operated by the Member States or other bodies. ».
Personal data stored in the national insolvency registers is accessible through the European e-Justice portal in accordance with Article 42(j).

Publicity

Articles 21 and 22 of Regulation No. 1346/2000 provide for the publication of the opening of insolvency proceedings, the appointment of an insolvency practitioner, and the opening of proceedings as it relates to assets in the land register, company register, or other public register.

The Commission modified these articles to take into account some propositions concerning the register as discussed above.

1.
Some specific rules concerning the transactions' publicity have been modified and added by the September version, particularly concerning electronic publicity.
In regards to the transaction, the insolvency practitioner may request the publication – in another Member State – of the essential content of the decision which opens the proceeding.

If there exists an establishment in the interested Member State, the publication of this information will be compulsory.
However, in both the cases, the publication should not be a precondition to the recognition of the foreign proceeding, as provided in Recital 29.

2.
Member States must publicize pertinent information concerning transnational insolvency affairs on an electronic register accessible by everyone, whose minimal information should be determined by the Regulation per Recital 29(a).

Temporary conclusions

The Council's latest propositions about groups align substantially with the recommendations we made as expert to the Commission, which the previous version did not yet include. It appears that the Commission foresees a new kind of insolvency practice, and the text of the revision even includes an invitation to improve the insolvency regime.

The tightening of the COMI rules is not fatal to the rescue of the business or its workforce. Therefore, the management of a group composed of different debtors will likely be easier than it was under the previous regime.

At the same time, the Council's propositions – particularly in regards to the pre-insolvency, secondary proceedings, and cooperation – demonstrate a greater concern for the rights of local creditors than for the rescue of a group and its entities.

Our upcoming February seminar, which will likely be the first in the wake of the final text's publication, will provide an excellent forum in which we will analyze these new developments in greater detail.

yves Brulard
DBBlaw
46 avenue des Arts
1000 Brussels
ybrulard@dbblaw