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Insolvency proceedings in the context of EU company law

European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI))

The European Parliament,

– having regard to Article 225 of the Treaty on the Functioning of the European Union,

– having regard to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[1] (the Insolvency Regulation),

– having regard to the judgments of the Court of Justice of the European Union of 2 May 2006[2], 10 September 2009[3] and 21 January 2010[4],

– having regard to Rules 42 and 48 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs (A7-0355/2011),

A. whereas disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies; whereas those disparities favour forum-shopping; whereas the internal market would benefit from a level playing field;

B. whereas steps must be taken to prevent abuse, and any spread, of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided;

C. whereas even if the creation of a body of substantive insolvency law at EU level is not possible, there are certain areas of insolvency law where harmonisation is worthwhile and achievable;

D. whereas there is a progressive convergence in the national insolvency laws of the Member States;

E. whereas the Insolvency Regulation was adopted in 2000 and has been now in force for more than nine years; whereas the Commission should present a report on its application no later than 1 June 2012;

F. whereas the Insolvency Regulation was the outcome of a very lengthy negotiation process, the result of which is that many sensitive issues were left out and that its approach on a

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1 OJ L 160, 30.6.2000, p. 1.
2 Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.
3 Case C-97/08 P *Akzo Nobel and others* v *Commission* [2009] ECR I-8237.
4 Case C-444/07 *MG Probud Gdynia sp. z o.o*. [2010] ECR I-417.

number of questions was already outdated at the moment of its adoption;

G. whereas since the entry into force of the Insolvency Regulation many changes have taken place, 12 new Member States have joined the Union and the phenomenon of groups of companies has increased enormously;

H. whereas insolvency has an adverse impact not only on the businesses concerned but also on the economies of the Member States, and whereas the aim should therefore be to safeguard all economic stakeholders, taxpayers and employers against the repercussions of insolvency;

I. whereas the approach in relation to insolvency proceedings is now centred more on corporate rescue as an alternative to liquidation;

J. whereas insolvency law should be a tool for the rescue of companies at Union level; whereas such rescue, whenever it is possible, is to the benefit of the debtor, the creditors and the employees;

K. whereas insolvency proceedings should not be used abusively by a creditor to avoid joint action for the recovery of debts, and whereas it is therefore necessary to introduce appropriate procedural safeguards;

L. whereas a legal framework should be established that better suits cases of companies which are temporarily insolvent;

M. whereas in its Communication of 3 March 2010 entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (COM (2010) 2020), the Commission, referring to the missing links and bottlenecks obstructing the achievement of a single market for the 21st century, stated as follows: 'Access for SMEs to the single market must be improved. Entrepreneurship must be developed by concrete policy initiatives, including a simplification of company law (bankruptcy procedures, private company statute, etc.), and initiatives allowing entrepreneurs to restart after failed businesses';

N. whereas insolvency law should also lay down rules for the winding-up of a company in a way which is the least harmful and the most beneficial for all participants once it is established that the corporate rescue is likely to fail or has failed;

O. whereas in each specific case the reasons for the insolvency of a business must be investigated, i.e. it must be ascertained whether the business's financial difficulties are merely transient or whether the business is completely insolvent; whereas what is fundamentally required is to establish all the assets of a debtor and his liabilities in order to be able to assess his solvency or insolvency;

P. whereas groups of companies are a common phenomenon but their insolvency has not yet been addressed at Union level; whereas the insolvency of a group of companies is likely to result in the commencement of multiple separate insolvency proceedings in different jurisdictions with respect to each of the insolvent group members; whereas unless those proceedings can be coordinated, it is unlikely that the group can be reorganised as a whole and it may have to be broken up into its constituent parts, with consequent losses for the creditors, shareholders and employees;

Q. whereas where groups of companies become insolvent, a recovery is currently difficult to achieve in the EU, due to the differences in Member States' rules, thus endangering thousands of jobs;

R. whereas the interlinking of national insolvency registers leading to the creation of a generally accessible and comprehensive EU database of insolvency proceedings would allow creditors, shareholders, employees and courts to determine whether insolvency proceedings have been opened in another Member State and to ascertain the deadlines and details for the presentation of claims; whereas this would promote cost-effective administration and increase transparency while respecting data protection;

S. whereas cross-border 'living wills' should be legally enforceable in the case of financial institutions and should be considered for all systemically relevant corporations, even if they are not financial institutions, as an important step in the process of achieving an appropriate cross-border insolvency framework;

T. whereas provisions for insolvency proceedings must allow special arrangements for separation of viable units that provide essential services, such as payment systems and other mechanisms defined in 'living wills' and whereas, in this respect, Member States should also ensure that their insolvency laws include adequate provisions allowing special arrangements at EU level for separation of insolvent cross-border conglomerates into viable units;

U. whereas insolvency proceedings should take account of intra-group transfers, with the aim of ensuring that, where appropriate, assets are recoverable across borders, in order to achieve an equitable result;

V. whereas some investment companies, particularly insurers, cannot be dissolved on a 'snapshot' basis and require an outcome that achieves an equitable distribution of assets over time; whereas transfer of business, run-off, or continuity of operation should not be prevented and may need to be prioritised;

W. whereas the decision to involve whole groups rather than single legal entities in insolvency proceedings should be outcome-oriented and should take account of any knock-on effects such as the triggering of other resolution tools or the effect on guarantee schemes that cover multiple brands within a group;

X. whereas it would be appropriate to explore the definition of harmonised bail-in procedures and standards for cross-border conglomerates, including in particular debt-to-equity swaps;

Y. whereas although employment law is the responsibility of the Member States, insolvency law can have an impact on employment law, and whereas in the context of increasing globalisation – and, indeed, of the economic crisis – the issue of insolvency needs to be considered from an employment-law perspective, as differing definitions of 'employment' and 'employee' in Member States should not undermine the rights of employees in the event of insolvency; whereas, however, any debate on the specific issue of insolvency should not automatically be a pretext for regulating employment law at EU level;

Z. whereas the objective of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of

their employer[1] is to ensure a minimum degree of protection for employees in the event of insolvency, whilst maintaining adequate flexibility for Member States; whereas differences between Member States in terms of implementation do exist and those differences should be considered;

AA. whereas Directive 2008/94/EC explicitly includes in its scope part-time employees, employees with a fixed-term contract and employees with a temporary employment relationship; whereas greater protection in the event of insolvency should also be afforded to employees on non-standard contracts;

AB. whereas the current lack of harmonisation with regard to the ranking of creditors reduces predictability of outcomes of judicial proceedings; whereas it is necessary to increase the priority of employees' claims relative to other creditors' claims;

AC. whereas the scope of Directive 2008/94/EC, in particular the understanding of 'outstanding claim', is too wide, as a number of Member States apply a narrow definition of remuneration (e.g. excluding severance pay, bonuses, reimbursement arrangements, etc.) that can result in substantial claims not being met;

AD. whereas Member States are competent to define 'remuneration' and 'pay', provided that they adhere to the general principles of equality and non-discrimination between workers, with the result that any insolvency situation which is potentially prejudicial to the latter should be taken into account for the purposes of compensating them in accordance with the social objective of Directive 2008/94/EC and with threshold levels of compensation to be determined;

AE. whereas, due to employment contracts across the EU and the diversity of such contracts within Member States, it is currently impossible to seek to define 'employee' at European level;

AF. whereas exemptions from the scope of Directive 2008/94/EC should be avoided as far as possible;

AG. whereas the legislative action requested in this resolution should be based on detailed impact assessments, as requested by Parliament;

1. Requests the Commission to submit, on the basis of Article 50, Article 81(2) or Article 114 of the Treaty on the Functioning of the European Union, one or more proposals relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives;

2. Confirms that the recommendations respect fundamental rights and the principle of subsidiarity;

3. Considers that the financial implications of the requested proposal should be covered by appropriate budgetary allocations;

4. Instructs its President to forward this resolution and the accompanying detailed

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[1] OJ L 283, 28.10.2008, p. 36.

recommendations to the Commission and the Council.

ANNEX TO THE RESOLUTION:
DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED

Part 1: Recommendations regarding the harmonisation of specific aspects of insolvency and company law

1.1. Recommendation on the harmonisation of certain aspects of the opening of insolvency proceedings

The European Parliament proposes harmonisation of the conditions under which insolvency proceedings may be opened. The European Parliament considers that a directive should harmonise aspects of the opening of proceedings in such a way that:

– insolvency proceedings can be brought against debtors who are natural persons, legal entities or associations;

– insolvency proceedings are initiated in a timely manner in order to allow a rescue of the troubled enterprise;

– insolvency proceedings can be opened concerning the assets of the above-mentioned debtors, the assets of entities without legal personality (e.g. a European Economic Interest Grouping), a descendant's estate and the assets of a community of property;

– all companies can start insolvency proceedings in cases where the insolvency is temporary, in order to protect themselves;

– insolvency proceedings can also be opened after the dissolution of a legal entity or of an entity without legal personality, as long as the distribution of the assets has not yet taken place, or in cases where assets are still available;

– insolvency proceedings can be opened by a court or other competent authority upon a written request of a creditor or the debtor; the request for the opening of the proceedings can be withdrawn as long as the proceedings have not been opened or the request has not been refused by a court;

– a creditor may request the opening of proceedings if he/she has a legal interest therein and shows credibly that he/she has got a claim;

– proceedings can be opened if the debtor is insolvent, i.e. unable to satisfy the payment obligations; if the request is made by the debtor, the proceedings can also be opened if the debtor's insolvency is imminent, i.e. if the debtor is likely not to be able to satisfy the payment obligations;

– as far as mandatory filing for bankruptcy by the debtor is concerned, the proceedings must be opened within a period of between one and two months after the cessation of

payments if the court has not already initiated preliminary proceedings or other appropriate measures in order to protect the assets and provided that adequate assets are available to cover the costs of the insolvency proceedings;

– Member States are required to lay down rules rendering the debtor liable in the event of non-filing or improper filing, and to provide for effective, proportionate and dissuasive sanctions.

1.2. Recommendation on the harmonisation of certain aspects of the filing of claims

The European Parliament proposes harmonisation of the conditions under which claims in insolvency proceedings are to be filed. The European Parliament considers that a directive should harmonise aspects of the filing of claims in such a way that:

– the date for determining outstanding claims is the date on which the employer becomes insolvent, i.e. the date of the decision on the application to open insolvency proceedings or the date when the opening of proceedings was refused on grounds that the costs were not covered;

– creditors file their claim with the liquidator in written form within a certain period of time;

– Member States are required to fix the above-mentioned period of time within one to three months from the date of publication of the bankruptcy decision;

– the creditor is required to submit documentation in support of the claim;

– the liquidator establishes a table of all claims filed and that table is displayed at the competent court within the meaning of point (d) of Article 2 of the Insolvency Regulation;

– late filings, i.e. filings by a creditor who has missed the deadline for filing the claim, are to be verified but may entail additional costs for the creditor in question.

1.3. Recommendation on the harmonisation of aspects of avoidance actions

The European Parliament proposes harmonisation of aspects of avoidance actions in such a way that:

– the laws of the Member States provide for the possibility of challenging acts done before the opening of the proceedings which are detrimental to the creditors;

– acts that can be the object of an avoidance action are transactions in a situation of imminent insolvency, the creation of security rights, transactions with connected parties and transactions carried out with the intention of defrauding creditors;

– the periods during which an act can be challenged by an avoidance action vary according to the nature of the act at issue; the periods start with the date of the request for the

opening of proceedings; the periods could be between three and nine months for transactions carried out in a situation of imminent insolvency, between six and twelve months for the creation of security rights, between one and two years for transactions with connected parties, and between three and five years for transactions carried out with the intention of defrauding creditors;

– the onus of proof to show whether or not an act can be challenged lies in principle with the party who claims that the act can be challenged; for transactions with connected parties, the onus of proof lies with the connected person.

1.4. Recommendation on the harmonisation of general aspects of the requirements for the qualification and work of liquidators

– the liquidator must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State, must be of good repute and must have the educational background needed for the performance of his/her duties;

– the liquidator must be competent and qualified to assess the situation of the debtor's entity and to take over management duties for the company;

– when main insolvency proceedings are opened, the liquidator should be empowered for a period of six months to decide on the protection of assets with retroactive effect in cases where companies have moved capital;

– the liquidator must be empowered to use appropriate priority procedures to recover monies owing to companies, in advance of settlement with creditors and as an alternative to transfers of claims;

– the liquidator must be independent of the creditors and other stakeholders in the insolvency proceedings;

– in the event of a conflict of interest, the liquidator must resign from his/her office.

1.5. Recommendation on the harmonisation of aspects of restructuring plans

The European Parliament proposes harmonisation of aspects of the establishment, effects and content of restructuring plans in such a way that:

– as an alternative to complying with statutory rules, debtors or liquidators may present a restructuring plan;

– the plan must contain rules for the satisfaction of the creditors and for the debtor's liability after the insolvency proceeding have been concluded;

– the plan must contain all relevant information enabling the creditors to decide whether they can accept the plan;

– the plan must be approved or disapproved in a specific procedure before the relevant

court;

– unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it.

Part 2: Recommendations regarding the revision of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

2.1. Recommendation on the scope of the Insolvency Regulation

The European Parliament considers that the scope of the Insolvency Regulation should be broadened to include insolvency proceedings in which the debtor remains in possession or where a preliminary liquidator has been appointed. Annex A to the Insolvency Regulation should be revised accordingly.

2.2. Recommendation on the definition of 'centre of main interests'

The European Parliament considers that the Insolvency Regulation should include a definition of the term 'centre of main interest' formulated in such a way as to prevent fraudulent forum-shopping. The European Parliament suggests that a formal definition should be inserted, based on the wording of Recital 13, which is concerned with the objective possibility for third parties to ascertain it.

The European Parliament considers that the definition should take account of such features as the externally ascertainable principal transaction of business operations, the location of assets, the centre of the operational or production activities, the workplace of employees, etc.

2.3. Recommendation on the definition of 'establishment' in the context of secondary proceedings

The European Parliament considers that the Insolvency Regulation should include a definition of 'establishment' as any place of operations where the debtor carries on a non-transitory economic activity with human means and goods and services.

2.4. Recommendation on cooperation between courts

The European Parliament considers that Article 32 of the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation not only between liquidators but also between courts.

In the event of main and secondary insolvency proceedings being opened, the timeframes for these procedures should be harmonised and shortened.

2.5. Recommendation on certain aspects of avoidance actions

The European Parliament considers that Article 13 of the Insolvency Regulation should be

reviewed so that it does not encourage cross-border avoidance actions but helps to prevent avoidance actions from succeeding by means of choice-of-law clauses.

In any event, the review of the avoidance action rules should take into account the consideration that healthy subsidiaries of an insolvent holding company should not be driven into insolvency due to avoidance actions rather than being sold in the interests of the creditors as a going concern.

Part 3: Recommendations on the insolvency of groups of companies

Due to the different levels of integration which may exist within a group of companies, the European Parliament considers that the Commission should present a flexible proposal for the regulation of the insolvency of groups of companies, taking into account the following:

1. Whenever the functional/ownership structure allows it, the following approach should apply:

A. Proceedings should be opened in the Member State where the operational headquarters of the group are located. Recognition of the opening of the proceedings should be automatic.

B. The opening of the main proceedings should result in a stay of the proceedings opened in another Member State against other group members.

C. A single insolvency practitioner should be appointed.

D. In every Member State in which ancillary proceedings are opened, a committee should be set up to defend and represent the interests of local creditors and employees.

E. If it is impossible to determine which assets belong to which debtor, or to assess inter-company claims, recourse should exceptionally be had to the aggregation of estates.

2. For insolvency proceedings in respect of decentralised groups, the instrument should provide for the following:

A. Rules for mandatory coordination and cooperation between courts, between courts and insolvency representatives and between insolvency representatives.

B. Rules on immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings and judgments handed down in connection with such proceedings.

C. Rules on access to courts by liquidators and creditors.

D. Rules to facilitate and promote the use of various forms of cooperation between courts to coordinate the insolvency proceedings and establish the conditions and safeguards that should apply to those forms of cooperation. These would affect the exchange of information, the coordination of operations and the drafting of common solutions:

– communication of information between courts by any means,

– coordination of the administration and supervision of the debtor's assets and affairs,

– the negotiation, approval and implementation of insolvency agreements concerning the coordination of proceedings,

– the coordination of hearings.

E. Rules allowing and promoting the appointment of a common liquidator for all proceedings, to be nominated by the courts involved and assisted by local representatives forming a steering committee; and rules laying down the procedure governing cooperation between members of the steering committee.

F. Rules allowing and promoting cross-border insolvency agreements which would address the allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including:

– allocation of responsibilities between the parties to the agreement;

– availability and coordination of relief;

– coordination of recovery of assets for the benefit of creditors generally;

– submission and processing of claims;

– methods of communication, including language, frequency and means,

– use and disposal of assets;

– coordination and harmonisation of the reorganisation plans;

– issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;

– administration of proceedings, in particular with respect to stays of proceedings or agreements between parties not to have recourse to certain legal actions;

– safeguards;

– costs and fees.

Part 4: Recommendation on the creation of an EU insolvency register

The European Parliament proposes the creation of an EU insolvency register in the context of the European e-Justice Portal, which should contain, for every cross-border insolvency opened, at least:

– the relevant court orders and judgments,

– the appointment of the liquidator and that person's contact details,

– the deadlines for filing claims.

Transmission of these data to the EU registry by the courts should be compulsory.

The information should be expressed in the official language of the Member State in which the proceedings are opened and in English.