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Committee on Legal Affairs

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DRAFT REPORT

on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2012)0744),
 - having regard to Article 294(2) and Article 81 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0413/2012),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of 22 May 2013¹,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0000/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 3

Text proposed by the Commission

(3) The scope of Regulation (EC) No 1346/2000 should be extended to proceedings which promote the rescue of ***an economically viable*** debtor in order to help sound companies to survive and give a

Amendment

(3) The scope of Regulation (EC) No 1346/2000 should be extended to proceedings which promote the rescue of a debtor ***in severe financial distress*** in order to help sound companies to survive and

¹ Not yet published in the Official Journal.

second chance to entrepreneurs. It should notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage or which leave the existing management in place. The Regulation should also cover those proceedings providing for a debt discharge of consumers and self-employed persons which do not fulfil the criteria of the current instrument.

give a second chance to entrepreneurs. It should notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage or which leave the existing management in place. The Regulation should also cover those proceedings providing for a debt discharge of consumers and self-employed persons which do not fulfil the criteria of the current instrument.

Or. en

Amendment 2

Proposal for a regulation

Recital 4

Text proposed by the Commission

(4) The rules on jurisdiction for opening insolvency proceedings should be clarified and the procedural framework for determining jurisdiction should be improved. There should also be an explicit rule on jurisdiction for actions which are deriving directly from insolvency proceedings *or* are closely linked with them.

Amendment

(4) The rules on jurisdiction for opening insolvency proceedings should be clarified and the procedural framework for determining jurisdiction should be improved. There should also be an explicit rule on jurisdiction for actions which are deriving directly from insolvency proceedings *and* are closely linked with them.

Or. en

Justification

Alignment with Article 3a (1).

Amendment 3

Proposal for a regulation

Article 1 – point 7

Regulation (EC) No 1346/2000

Recital 9 a

Text proposed by the Commission

"(9a) The scope of this Regulation should extend to proceedings which promote the rescue of ***an economically viable*** debtor in order to help sound businesses to survive and give a second chance to entrepreneurs. It should notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage, proceedings which leave the existing management in place and proceedings providing for a debt discharge of consumers and self-employed persons. Since these proceedings do not necessarily entail the appointment of ***a liquidator***, they should be covered by this Regulation if they take place under the control or supervision of a court. ***In this context, the term "control" should include situations where the court only intervenes on appeal by a creditor or interested party.***"

Amendment

"(9a) The scope of this Regulation should extend to proceedings which promote the rescue of a debtor ***in severe financial distress*** in order to help sound businesses to survive and give a second chance to entrepreneurs. It should notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage, proceedings which leave the existing management in place and proceedings providing for a debt discharge of consumers and self-employed persons. Since these proceedings do not necessarily entail the appointment of ***an insolvency representative***, they should be covered by this Regulation if they take place under the control or supervision of a court."

Or. en

Justification

See changes to Article 3b.

Amendment 4

Proposal for a regulation

Article 1 – point 8

Regulation (EC) No 1346/2000

Recital 10

Text proposed by the Commission

(8) Recital 10 is replaced by the following:

"(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open

Amendment

deleted

insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened."

Or. en

Justification

Alignment with deletion of Article 3b(2).

Amendment 5

Proposal for a regulation

Article 1 – point 11

Regulation (EC) No 1346/2000

Recital 13 a

Text proposed by the Commission

(13a) The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. ***By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties.***

Amendment

(13a) The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption, ***in particular*** if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.

Justification

Clarification that not only management decisions but also other factors - such as such as the location of main assets - are relevant when determining COMI.

Amendment 6**Proposal for a regulation****Article 1 – point 12**

Regulation (EC) No 1346/2000

Recital 19 a

Text proposed by the Commission

(19a) Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the **liquidator**, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the **liquidator**, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the **liquidator** the possibility to give such undertakings.

Amendment

(19a) Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the **insolvency representative**, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the **insolvency representative**, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the **insolvency representative** the possibility to give such undertakings **and to lay down minimum criteria which such undertakings need to meet.**

Justification

See justification for Article 18.

Amendment 7

Proposal for a regulation

Article 1 – point 12

Regulation (EC) No 1346/2000

Recital 19 b

Text proposed by the Commission

(19b) In order to ensure an effective protection of local interests, the **liquidator** of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened.

Amendment

(19b) In order to ensure an effective protection of local interests, the **insolvency representative** of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened. **Local creditors should also be entitled to seek protective measures from a court in cases where an insolvency representative appears to be unable to honour the undertakings.**

Or. en

Justification

See justification for Article 29a.

Amendment 8

Proposal for a regulation

Article 1 – point 14

Text proposed by the Commission

(14) The following recitals 20a **and** 20b are inserted:

Amendment

(14) The following recitals 20a, **20aa** and 20b are inserted:

Or. en

Amendment 9

Proposal for a regulation

Article 1 – point 14

Regulation (EC) No 1346/2000

Recital 20 a

Text proposed by the Commission

(20a) This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various **liquidators** and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. ***In addition, a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law.***

Amendment

(20a) This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various ***insolvency representatives*** and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor.

Or. en

Justification

See explanations in explanatory statement.

Amendment 10

Proposal for a regulation

Article 1 – point 14

Regulation (EC) No 1346/2000

Recital 20 a a (new)

Text proposed by the Commission

Amendment

(20aa) The introduction of group coordination proceedings should in particular strengthen the restructuring of a group and/or members of the group by allowing for the flexible coordinated conduct of insolvency proceedings. Group coordination proceedings should not bind the individual proceedings but much rather serve as a reference for the measures to be taken within those individual proceedings.

Or. en

Justification

See explanations in explanatory statement.

Amendment 11

Proposal for a regulation

Article 1 – point 14

Regulation (EC) No 1346/2000

Recital 20 b

Text proposed by the Commission

Amendment

(20b) The introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in ***a single Member State***. In such situations, the court should also be able to appoint, if appropriate, the same ***liquidator*** in all proceedings concerned.

(20b) The introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in ***its national and local jurisdiction***. In such situations, the court should also be able to appoint, if appropriate, the same ***insolvency representative*** in all proceedings concerned. ***Member States may also introduce provisions on the insolvency of groups of companies within their jurisdiction which go beyond the***

provisions of this Regulation and do not affect the efficient and effective application of this Regulation.

Or. en

Justification

Clarification that in particular with regard to insolvency of groups also the local jurisdiction plays an important role. As some Member States are currently discussing the introduction of domestic rules on corporate groups in insolvency it needs to be clarified that these reform processes are not hampered as long as the national rules do not impair the proper functioning of the Regulation.

Amendment 12

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 1 – paragraph 1

Text proposed by the Commission

1. This Regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency ***or adjustment of debt*** and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation,
- (a) the debtor is totally or partially divested of his assets and a ***liquidator*** is appointed, or
- (b) the assets and affairs of the debtor are subject to control or supervision by a court.

The proceedings referred to in this paragraph shall be listed in Annex A.

Amendment

1. This Regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation,
- (a) the debtor is totally or partially divested of his assets and a ***insolvency representative*** is appointed, or
- (b) the assets and affairs of the debtor are subject to control or supervision by a court.

Where such proceedings may be commenced prior to the insolvency, their purpose must be the avoidance of liquidation.

The proceedings referred to in this paragraph shall be listed in Annex A.

Or. en

Justification

Scope shall only cover situations where there is at least a threat of insolvency.

Amendment 13

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 1 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Where under the law of the Member State of the opening of insolvency proceedings, the proceedings referred to in paragraph 1 are confidential, this Regulation shall apply to such proceedings only as from the time when they become public in accordance with the law of that Member State and provided that they do not affect the claims of those creditors who are not involved in them.

Or. en

Justification

As certain proceedings are indeed confidential it would be unfair to extend their effects to parties not having been involved in the proceeding at all.

Amendment 14

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point b

Text proposed by the Commission

Amendment

(b) "**liquidator**" means
(i) any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the

(b) "**insolvency representative**" means
(i) any person or body whose function, **including on a provisional basis**, is to administer or liquidate assets of which the

administration of his affairs. Those persons and bodies are listed in Annex C;

(ii) in a case which does not involve the appointment of, or the transfer of the debtor's powers to, **a liquidator**, the debtor in possession.

debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

(ii) in a case which does not involve the appointment of, or the transfer of the debtor's powers to, **an insolvency representative**, the debtor in possession.

(The amendment aiming at replacing the word "liquidator" by "insolvency representative" applies throughout the text. Adopting it will necessitate corresponding changes throughout the Regulation)

Or. en

Justification

The replacement of the word "liquidator" by "insolvency representative" is a horizontal amendment. This term is also used by UNCITRAL and unlike liquidator also emphasises the aim to rescue companies in difficulties.

Amendment 15

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point b a (new)

Text proposed by the Commission

Amendment

(ba) "debtor in possession" means a debtor in respect of whom insolvency proceedings have been opened which do not involve the complete transfer of the rights and duties to administer the debtor's assets to an insolvency representative and where the debtor therefore remains at least partially in control of his assets and affairs;

Or. en

Justification

In some Member States there are insolvency proceedings known where the debtor remains in

possession.

Amendment 16

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point c

Text proposed by the Commission

(c) "court" means in all articles *except Article 3b(2)* the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings;

Amendment

(c) "court" means in all articles the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings;

Or. en

Amendment 17

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point e

Text proposed by the Commission

(e) "the time of the opening of proceedings" means the time at which the judgment opening insolvency proceedings becomes effective, whether it is *a* final **judgment** or not;

Amendment

(e) "the time of the opening of proceedings" means the time at which the judgment opening insolvency proceedings becomes effective, whether it is final or not;

Or. en

Justification

Clarification that challenging a judgment is irrelevant for the determination of the time of the opening of proceedings.

Amendment 18

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point g

Text proposed by the Commission

(g) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and assets;

Amendment

(g) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and assets ***or services***;

Or. en

Justification

Alignment with UNCITRAL.

Amendment 19

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point g a (new)

Text proposed by the Commission

Amendment

(ga) “action directly deriving from insolvency proceedings and closely linked with them” means an action directed at obtaining a judgment that, in its substance, cannot be, or could not have been, obtained outside of, or independently from, insolvency proceedings, and that is exclusively admissible where insolvency proceedings are pending;

Or. en

Justification

Clarification which actions are covered as this is important for the determination of jurisdiction according to Article 3a.

Amendment 20

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point g b (new)

Text proposed by the Commission

Amendment

(gb) "close-out netting provision" means a contractual provision on the basis of which, upon the occurrence of an event predefined in the provision in relation to a party to the contract, the obligations owed by the parties to each other that are covered by the provision, whether or not they are at that time due and payable, are automatically or at the election of one of the parties reduced to or replaced by a single net obligation, whether by way of novation, termination or otherwise, representing the aggregate value of the combined obligations, which is thereupon due and payable by one party to the other;

Or. en

Justification

Alignment with UNIDROIT.

Amendment 21

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point i

Text proposed by the Commission

Amendment

(i) "group of companies" means a **number of companies consisting of** parent and subsidiary companies;

(i) "group of companies" means a parent **company** and **all its** subsidiary companies;

Justification

Both (i) and (j) aligned with accounting Directive.

Amendment 22

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point j

Text proposed by the Commission

(j) "parent company" means a company which

(i) has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company"); or
(ii) is a shareholder or member of the subsidiary company and has the right to
(aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or
(bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association."

Amendment

(j) "parent company" means a company which ***controls one or more subsidiary companies. A company which is preparing consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council¹ shall be deemed to be a parent company;***

¹ ***Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings amending Directive 2006/43/EC of the European Parliament and of the Council and***

repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

Or. en

Justification

Both (i) and (j) aligned with accounting Directive.

Amendment 23

Proposal for a regulation

Article 1 – point 21

Regulation (EC) No 1346/2000

Article 2 – point j a (new)

Text proposed by the Commission

Amendment

(ja) “crucial functions within the group” means

(i) the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it; or

(ii) the economic significance within the group, which shall be presumed if the group member or group members contribute at least 10 per cent to the consolidated balance sheet total and consolidated turnover.”

Or. en

Amendment 24

Proposal for a regulation

Article 1 – point 22

Regulation (EC) No 1346/2000

Article 3 – paragraph 3

Text proposed by the Commission

Amendment

3. Where insolvency proceedings ***have***

3. Where ***a judgment opening*** insolvency

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been *opened* in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary proceedings. In such a case, the relevant time for assessing whether the debtor possesses an establishment within the territory of another Member State shall be the date of the opening of the main proceedings."

proceedings *has* been *issued* in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary proceedings. In such a case, the relevant time for assessing whether the debtor possesses an establishment within the territory of another Member State shall be the date of the opening of the main proceedings."

Or. en

Justification

Alignment with definition in Article 2d.

Amendment 25

Proposal for a regulation

Article 1 – point 23

Regulation (EC) No 1346/2000

Article 3 a – paragraph 2

Text proposed by the Commission

2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the *liquidator* may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, in the courts of the Member State within the territory of which any of them is domiciled, provided that that court has jurisdiction pursuant to the rules of Regulation (EC) No **44/2001**.

Amendment

2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the *insolvency representative* may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, in the courts of the Member State within the territory of which any of them is domiciled, provided that that court has jurisdiction pursuant to the rules of Regulation (EU) No **1215/2012**.

Or. en

Amendment 26

Proposal for a regulation

Article 1 – point 23

Regulation (EC) No 1346/2000

Article 3 a – paragraph 3

Text proposed by the Commission

3. For the purpose of *this Article*, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Amendment

3. For the purpose of *paragraph 2*, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Or. en

Amendment 27

Proposal for a regulation

Article 1 – point 23

Regulation (EC) No 1346/2000

Article 3 b – paragraph 2

Text proposed by the Commission

2. Where insolvency proceedings are opened in accordance with national law without a decision by a court, the liquidator appointed in such proceedings shall examine whether the Member State in which the proceedings are pending has jurisdiction pursuant to Article 3. Where this is the case, the liquidator shall specify the grounds on which jurisdiction is based and, in particular, whether jurisdiction is based on Article 3(1) or (2).

Amendment

deleted

Or. en

Justification

A minimum control by a court is necessary when establishing COMI.

Amendment 28

Proposal for a regulation

Article 1 – point 23

Regulation (EC) No 1346/2000

Article 3 b – paragraph 3

Text proposed by the Commission

3. Any creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, shall have the right to challenge the decision opening main proceedings. ***The court opening main proceedings or the liquidator shall inform such creditors insofar as they are known of the decision in due time in order to enable them to challenge it.***

Amendment

3. Any creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, shall have the right to challenge the decision opening main proceedings ***on grounds of international jurisdiction within three weeks after the date of the opening of insolvency proceedings has been made publicly available in accordance with point (a) of Article 20a.***

Or. en

Justification

Clarification that the validity of the decision to open proceedings can be challenged within three weeks after publication. With publication in register there is no need for court/insolvency representative to inform creditors anymore.

Amendment 29

Proposal for a regulation

Article 1 – point 25

Regulation (EC) No 1346/2000

Article 6 a

Text proposed by the Commission

Netting agreements

Netting agreements shall be governed solely by the law of the contract governing such ***agreements***."

Amendment

Close-out netting provisions

When one party to the contract containing a close-out netting provision is an institution falling within the scope of Directive 2001/24/EC, such close-out netting provision shall be governed solely by the law of the contract governing such

provision."

Or. en

Justification

Alignment with the acquis.

Amendment 30

Proposal for a regulation

Article 1 – point 26 a (new)

Regulation (EC) No 1346/2000

Article 12

Text proposed by the Commission

Amendment

(26a) Article 12 is replaced by the following:

" Article 12

European patents with unitary effect and Community trade marks

For the purposes of this Regulation, a European patent with unitary effect, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1)."

Or. en

Justification

Alignment with the new Regulation on unitary patents.

Amendment 31

Proposal for a regulation

Article 1 – point 28 – point a

Regulation (EC) No 1346/2000

Article 18 – paragraph 1

1. The **liquidator** appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to Articles 5 and 7, he may in particular remove the debtor's assets from the territory of the Member State in which they are situated. He may also give **the** undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. **Such an undertaking shall be subject to the form** requirements, if any, of the State of the opening of the main proceedings **and shall be enforceable and binding on the estate.**"

1. The **insolvency representative** appointed by a court which has jurisdiction pursuant to Article 3(1) **or in the case of a debtor in possession proceedings in accordance with that jurisdiction, either the insolvency representative or the debtor** may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to Articles 5 and 7, he may in particular remove the debtor's assets from the territory of the Member State in which they are situated. He may also give **an enforceable and binding** undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. **Such an undertaking shall specify the factual assumptions upon which it is based, in particular with respect to the distribution of local claims over the priority and ranking system under the law governing the secondary proceedings, the value of distributable assets within the secondary proceedings, the options available to realize such value, the proportion of creditors in the main proceedings participating in the secondary proceedings and the costs that would have to be incurred by the opening of secondary proceedings. Form** requirements **for the undertaking**, if any, **shall be specified by the laws** of the State of the opening of the main proceedings."

Or. en

Justification

The Regulation itself shall lay down the minimum criteria an undertaking needs to fulfil in order to not only serve legal clarity but also provide minimum protection to local creditors.

Amendment 32

Proposal for a regulation

Article 1 – point 29

Regulation (EC) No 1346/2000

Article 20 a – point d a (new)

Text proposed by the Commission

Amendment

(da) if the debtor is a company, the company number and its registered office;

Or. en

Amendment 33

Proposal for a regulation

Article 1 – point 29

Regulation (EC) No 1346/2000

Article 20 d

Text proposed by the Commission

Amendment

Where main or secondary proceedings are opened ***in relation to a company or legal person or an individual exercising an independent business or professional activity***, the court opening insolvency proceedings shall ensure that the information referred to in Article 20a is published immediately in the insolvency register of the State of opening."

Where main or secondary proceedings are opened, the court opening insolvency proceedings shall ensure that the information referred to in Article 20a is published immediately in the insolvency register of the State of opening."

Or. en

Justification

Clarification that publication is not limited to certain debtors.

Amendment 34

Proposal for a regulation

Article 1 – point 30

Regulation (EC) No 1346/2000

Article 21 – paragraph 2

Text proposed by the Commission

2. The **liquidator** may request that the information referred to in the first paragraph of this Article be published in any other Member State where assets **or** creditors of the debtor are located in accordance with the procedure provided for in that State."

Amendment

2. The **insolvency representative** may request that the information referred to in the first paragraph of this Article be published in any other Member State where assets, creditors **or debtors** of the debtor are located in accordance with the procedure provided for in that State."

Or. en

Justification

Necessary alignment with regard to Article 24.

Amendment 35

Proposal for a regulation

Article 1 – point 31 a (new)

Regulation (EC) No 1346/2000

Article 24 – paragraph 2

Text proposed by the Commission

Amendment

(31a) Article 24(2) is replaced by the following:

"2. Where such an obligation is honoured before the publication provided for in *Articles 20a or 21* has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the

contrary, to have been aware of the opening of proceedings."

Or. en

Justification

Clarification that publication in register is also covered.

Amendment 36

Proposal for a regulation

Article 1 – point 32

Regulation (EC) No 1346/2000

Article 25 – paragraph 1

Text proposed by the Commission

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 32 to 56, **with the exception of Article 34(2)**, Regulation (EC) No 44/2001.

Amendment

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 46 of Regulation (EU) No 1215/2012.

Or. en

Justification

Alignment with new Brussels I Regulation.

Amendment 37

Proposal for a regulation

Article 1 – point 34

Regulation (EC) No 1346/2000

Article 29 a – paragraph 2

Text proposed by the Commission

2. Upon request by the **liquidator** in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if the opening of such proceedings is not necessary to protect the interests of local creditors, in particular, when the **liquidator** in the main proceedings has given the undertaking referred to in Article 18 (1) and complies with its terms.

Amendment

2. Upon request by the **insolvency representative** in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if **the insolvency representative in the main proceedings provides sufficient evidence that** the opening of such proceedings is not necessary to protect the interests of local creditors, in particular, when the **insolvency representative** in the main proceedings has given the undertaking referred to in Article 18(1) and complies with its terms.

Or. en

Justification

Clarification with regard to burden of proof.

Amendment 38

Proposal for a regulation

Article 1 – point 34

Regulation (EC) No 1346/2000

Article 29 a – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Local creditors shall have the right to challenge the decision to postpone or to refuse the opening of secondary proceedings within three weeks of the decision having been made available to the public under point (a) of Article 20a.

Or. en

Justification

Clarification that an appeal to a court decision is possible.

Amendment 39

Proposal for a regulation

Article 1 – point 34

Regulation (EC) No 1346/2000

Article 29 a – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. Local creditors shall have the right to petition the court conducting the main proceedings to require the insolvency representative in the main proceeding to take suitable measures necessary to protect the interests of the local creditors. Such requirement may include a prohibition against a removal of assets from the Member State in which the opening of secondary proceedings has been postponed or refused, a postponement of the distribution of proceeds in the main proceedings or an obligation on the insolvency representative in the main proceedings to provide security for the performance of the undertakings.

Or. en

Justification

Local creditors need protection in case of non-compliance with the undertaking.

Amendment 40

Proposal for a regulation

Article 1 – point 34

Regulation (EC) No 1346/2000

Article 29 a – paragraph 4

Text proposed by the Commission

Amendment

4. The ***liquidator*** in the main proceedings shall be notified of the decision to open secondary proceedings and shall have the right to challenge that decision."

4. The ***insolvency representative*** in the main proceedings shall be notified of the decision to open secondary proceedings and shall have the right to challenge that decision ***within two weeks of receipt of***

this notification. In justified cases the court opening secondary proceedings may shorten this period to up to three working days after receipt of the notification."

Or. en

Justification

In order to ensure legal certainty a time limit is introduced.

Amendment 41

Proposal for a regulation

Article 1 – point 35

Regulation (EC) No 1346/2000

Article 31 – paragraph 1

Text proposed by the Commission

1. The **liquidator in the main proceedings and the liquidators in the secondary proceedings** shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. Such cooperation may take the form of agreements or protocols.

Amendment

1. The **insolvency representative in insolvency proceedings concerning the same debtor** shall cooperate with each other to the extent such cooperation is **appropriate to facilitate the effective administration of the proceedings, is** not incompatible with the rules applicable to each of the proceedings **and does not entail any conflict of interests**. Such cooperation may take the form of agreements or protocols.

Or. en

Justification

Alignment with Article 42a as stated in recital 20a. The change also clarifies that territorial proceedings are covered.

Amendment 42

Proposal for a regulation

Article 1 – point 36

Regulation (EC) No 1346/2000

Article 31 a – paragraph 1

Text proposed by the Commission

1. In order to facilitate the coordination of **main and secondary** insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body **acting** on its instructions.

Amendment

1. In order to facilitate the coordination of insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation **is appropriate to facilitate the effective administration of the proceedings and** is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body **to act** on its instructions, **provided that this is not incompatible with the rules applicable to them.**

Or. en

Justification

Alignment with Article 42b as stated in recital 20a.

Amendment 43

Proposal for a regulation

Article 1 – point 36

Regulation (EC) No 1346/2000

Article 31 b – paragraph 1 – subparagraph 1 – introductory wording

Text proposed by the Commission

1. In order to facilitate the coordination of **main and secondary** insolvency proceedings opened with respect to the same debtor,

Amendment

1. In order to facilitate the coordination of insolvency proceedings opened with respect to the same debtor,

Or. en

Justification

Alignment with Article 42c as stated in recital 20a.

Amendment 44

Proposal for a regulation

Article 1 – point 36

Regulation (EC) No 1346/2000

Article 31 b – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

in each case to the extent that such cooperation and communication are appropriate to facilitate the coordination of the proceedings, are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interests.

Or. en

Justification

Alignment with Article 42c as stated in recital 20a.

Amendment 45

Proposal for a regulation

Article 1 – point 38

Regulation (EC) No 1346/2000

Article 34 – paragraph 2

Text proposed by the Commission

Amendment

2. Where secondary proceedings concerning a legal person have been opened in the Member State of that person's registered office and the closure of those proceedings entails the dissolution of the legal person, ***such dissolution shall not prevent the continuation of main proceedings which have been opened in another Member State.***"

2. Where secondary proceedings concerning a legal person have been opened in the Member State of that person's registered office and the closure of those proceedings entails the dissolution of the legal person, ***the legal person concerned shall not be struck off the company register until the main proceedings are closed.***"

Or. en

Justification

Clarification for situations where COMI and registered seat of company are separated.

Amendment 46

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 a – paragraph 2 – point b

Text proposed by the Commission

(b) explore the possibilities for restructuring the group and, where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated restructuring plan;

Amendment

(b) explore the possibilities for restructuring the group ***members subject to insolvency proceedings*** and, where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated restructuring plan;

Or. en

Amendment 47

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 b – paragraph 1

Text proposed by the Commission

1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open proceedings concerning a member of the group is pending or which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them. For this purpose, the courts may, where

Amendment

1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open proceedings concerning a member of the group is pending or which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them. For this purpose, the courts may, where

appropriate, appoint a person or body **acting** on its instructions.

appropriate, appoint a person or body **to act** on its instructions, **provided that this is not incompatible with the rules applicable to them.**

Or. en

Justification

Clarification as this also applies to courts.

Amendment 48

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 c

Text proposed by the Commission

A liquidator appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the proceedings **and** is not incompatible with the rules applicable to them. In particular, the **liquidator** may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed.

Amendment

An insolvency representative appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the proceedings, is not incompatible with the rules applicable to them **and does not entail any conflict of interests.** In particular, the **insolvency representative** may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed.

Or. en

Justification

Clarification that conflicts of interests pose limits to the cooperation between courts and

insolvency representatives.

Amendment 49

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d – paragraph 1 – point b

Text proposed by the Commission

(b) to request a stay of the proceedings opened with respect to any other member of the same group;

Amendment

(b) to request ***for a period of up to two months*** a stay of the proceedings opened with respect to any other member of the same group;

Or. en

Amendment 50

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d – paragraph 1 – point c

Text proposed by the Commission

(c) to propose a rescue plan, a composition or a comparable measure for all or some members of the group for which insolvency proceedings have been opened and to introduce it into any of the proceedings opened with respect to another member of the same group in accordance with law applicable to those proceedings; and

Amendment

deleted

Or. en

Amendment 51

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d – paragraph 1 – point d

Text proposed by the Commission

Amendment

(d) to request any additional procedural measures under the law referred to in point c) which may be necessary to promote rescue, including the conversion of proceedings.

deleted

Or. en

Amendment 52

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d – paragraph 2

Text proposed by the Commission

Amendment

2. The court having opened proceedings referred to in point b) of paragraph 1 shall stay the proceedings in whole or in part if *it is proven* that such a stay would be to the benefit of the creditors in these proceedings. *Such a stay may be ordered for up to three months and may be continued or renewed for the same period.* The court ordering the stay may require the *liquidator* to take any suitable measure to guarantee the interests of the creditors in the proceedings."

2. The court having opened proceedings referred to in point b) of paragraph 1 shall stay the proceedings in whole or in part if *the insolvency representative provides sufficient evidence* that such a stay would be to the benefit of the creditors in these proceedings. The court ordering the stay may require the *insolvency representative* to take any suitable measure to guarantee the interests of the creditors in the proceedings.

Or. en

Amendment 53

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d a (new)

Text proposed by the Commission

Amendment

Article 42da

Opening of group coordination proceedings

1. Group coordination proceedings may be brought by an insolvency representative in any court having jurisdiction over the insolvency proceedings of a member of the group, provided that

(a) insolvency proceedings with respect to such member of the group are pending; and

(b) the members of the group having their centre of main interests in the Member State of the court seized to open the group coordination proceedings perform crucial functions within the group.

2. Where more than one court is seized to open group coordination proceedings, the group coordination proceedings shall be opened in the Member State where the most crucial functions within the group are performed. To that extent the courts seized shall communicate and cooperate in accordance with Article 42b. Where the most crucial functions cannot be determined, the first court seized may open group coordination proceedings provided that the conditions for opening such proceedings are satisfied

3. Where group coordination proceedings have been opened, the right of insolvency representatives to request a stay of the proceedings in accordance with point (b) of Article 42d (1) shall cease. Existing stays shall remain in force and effect,

subject to the coordinator's power to request the cessation of such stay.

Or. en

Amendment 54

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d b (new)

Text proposed by the Commission

Amendment

Article 42db

Tasks and rights of the coordinator

1. The court opening group coordination proceedings shall appoint a coordinator. The coordinator shall be independent of the group members and their creditors. The coordinator shall have the task of

(a) identifying and outlining procedural and substantive recommendations for the coordinated conduct of the insolvency proceedings;

(b) mediating disputes arising between two or more insolvency representatives of group members; and

(c) presenting a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may entail recommendations on

(i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(ii) the settlement of intra-group disputes, in particular with respect to intra-group transactions and avoidance actions;

(iii) agreements between the insolvency representatives of the insolvent group members.

2. The coordinator shall have the right

(a) to be heard and to participate, in particular by attending creditors' meetings, in any of the proceedings opened with respect to any member of the group, in particular

(b) to present and explain a group coordination plan approved in accordance with Article 42dc (3);

(c) to request information from any insolvency representative that is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; and

(d) to request a stay for a period of up to six months of the proceedings opened with respect to any other member of the group and to request the cessation of such stay.

Or. en

Amendment 55

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d c (new)

Text proposed by the Commission

Amendment

Article 42dc

Court approval of group coordination plan

1. Insolvency representatives appointed for insolvency proceedings that would be affected by the implementation of a group coordination plan may comment on the draft of the group coordination plan within 10 working days after transmission by the coordinator. The coordinator may

extend this period.

2. The draft plan submitted for court approval shall be accompanied by

(a) a representation of the coordinator as to how paragraph 1 was complied with;

(b) the comments received by the insolvency representatives as of the time of the submission of the draft plan; and

(c) a reasoned statement by the coordinator as to how the comments have, or have not, been reflected in the draft plan.

3. The court shall approve the plan if it is satisfied that the coordinator complied with the formal requirements of paragraph 2 and of point (c) of paragraph 1 of Article 42db.

Or. en

Amendment 56

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d d (new)

Text proposed by the Commission

Amendment

Article 42dd

Relation between group coordination proceedings and insolvency proceedings

1. When conducting their insolvency proceedings, insolvency representatives shall have a duty to consider the recommendations of the coordinator and the group coordination plan. Where an insolvency representative intends to deviate from measures or actions proposed in the group coordination plan, he shall explain such deviation on reasonable grounds at the creditors' meeting or to any other body to which he

is accountable for under the laws of the relevant Member State.

2. Non-compliance with paragraph 1 shall be treated as a violation of the duties of the insolvency representative under the laws of the relevant Member State.

Or. en

Amendment 57

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d e (new)

Text proposed by the Commission

Amendment

Article 42de

Coordinator's liability

The coordinator shall perform his duties with due care. He shall be responsible vis-à-vis the estates of the insolvency proceedings covered by the group coordination proceedings for damage reasonably attributable to breaches of such duties. His liability shall be established according to the law of the Member State where the coordination proceedings were opened.

Or. en

Amendment 58

Proposal for a regulation

Article 1 – point 45

Regulation (EC) No 1346/2000

Article 42 d f (new)

Text proposed by the Commission

Amendment

Article 42df

Costs

1. The laws of the Member States shall make provision for the court fees and the remuneration for the coordinator.

2. The costs in the group coordination proceedings shall be borne pro rata by the group members in relation to which an insolvency proceedings had been opened at the time of the opening of the coordination proceedings. The share to be borne by each group member shall be calculated with reference to the share of the asset value of such member in the consolidated assets of all the members of the group in relation to which insolvency proceedings had been opened."

Or. en

Justification

See elaboration in the explanatory statement.

Amendment 59

Proposal for a regulation

Article 1 – point 47

Regulation (EC) No 1346/2000

Article 45 – paragraph 2

Text proposed by the Commission

2. In order to trigger an amendment of Annex A, Member States shall notify the Commission of their national rules on insolvency proceedings which **they want to have included in Annex A**, accompanied by a short description. The Commission shall examine whether the notified rules comply with the conditions set out in Article 1 and, where this is the case, shall amend Annex A by way of delegated act."

Amendment

2. Member States shall notify the Commission of their national rules on insolvency proceedings which **meet the criteria set out in Article 1**, accompanied by a short description. The Commission shall examine whether the notified rules comply with the conditions set out in Article 1 and, where this is the case, shall amend Annex A by way of delegated act."

Or. en

Justification

It is not for the Member States to decide which proceedings fall under Annex A. If the conditions of Article 1 are met, Member States need to notify.

Amendment 60

Proposal for a regulation

Article 1 – point 47

Regulation (EC) No 1346/2000

Article 45 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States shall notify the Commission of any substantial changes affecting their national rules on insolvency proceedings. The Commission shall examine whether the amended rules comply with the conditions set out in Article 1, and, where they do comply therewith, shall amend Annex A by means of delegated acts.

Or. en

Justification

Clarification that also substantial changes need to be notified.

Amendment 61

Proposal for a regulation

Article 1 – point 50

Regulation (EC) No 1346/2000

Article 46 a – paragraph 1

Text proposed by the Commission

Amendment

1. ***Member States shall apply the*** Directive 95/46/EC to the processing of personal data carried out in the Member States pursuant to this Regulation.

1. ***National rules transposing*** Directive 95/46/EC ***shall apply*** to the processing of personal data carried out in the Member States pursuant to this Regulation ***provided that the processing operations referred to in Article 3(2) of Directive 95/46/EC are***

not affected.

Or. en

Justification

These changes reflect recommendation presented in the opinion of the European Data Protection Supervisor.

Amendment 62

Proposal for a regulation

Article 1 – point 51 a (new)

Regulation (EC) No 1346/2000

Annex C – DEUTSCHLAND

Text proposed by the Commission

Amendment

(51a) In Annex C, the section entitled 'DEUTSCHLAND' is amended as follows:

"DEUTSCHLAND

- Konkursverwalter

- Vergleichsverwalter

- Sachwalter (nach der Vergleichsordnung)

- Verwalter

- Insolvenzverwalter

- Sachwalter (nach der Insolvenzordnung)

- Treuhänder

- Vorläufiger Insolvenzverwalter

- Vorläufiger Sachwalter"

Or. de

Justification

Reflects changes in Article 2 (b) (i).

EXPLANATORY STATEMENT

The Commission's proposal is an important initiative Parliament has asked for in its report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), adopted by Plenary in October 2011. Parliament's observation in the report, namely that "there are certain areas of insolvency law where harmonisation is worthwhile and achievable", is still valid today. It cannot be neglected that "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".

Cross-border insolvencies are not an exemption anymore but a daily phenomenon not only with regard to large (group) companies but also reaching out to SMEs. There is sufficient data available on the application of the European Insolvency Regulation which allows us to tackle the most pressing issues. There are many arguments supporting the reform process, last but not least modernising EU Insolvency Law in order to shift the focus from merely winding a company up towards giving businesses a second chance.

The draft report supports the changes proposed by the Commission. Many amendments tabled do neither aim to change the structure of the Commission proposal nor introduce new elements but much suggest clarifications or align the text with the *acquis*.

The Commission identified five important shortcomings that need to be addressed. Amendments to the scope of the Insolvency Regulation proposed by the Commission are necessary in order to cover additional restructuring mechanisms. However, there are doubts as to whether - under certain conditions - it should be possible to open insolvency proceedings without a court involvement, as in such a situation it would be up to the insolvency representative appointed to establish the centre of main interest (COMI). This might run counter to the aim of enhancing legal certainty and avoiding forum shopping and has therefore been deleted.

Improving COMI by bringing it in line with the relevant ECJ case law is broadly welcomed. In this regard, the Parliament argued in its legislative initiative report that the definition of COMI 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, etc. In order not to focus merely on management decisions and leave aside the question of the location of assets one amendment was introduced in recital 13(a).

As also asked for by Parliament the draft report supports the creation of an EU registry which enables creditors and courts to determine whether or not insolvency proceedings have been opened in another Member State. The register should be embedded in the e-justice portal and entail all relevant information on opened cross-border insolvency proceedings. Such a registry is vital in order to enhance publicity and transparency.

The draft report also welcomes the Commission's suggestions on secondary proceedings. In addition, the draft report also formulates minimum criteria an undertaking given by an

insolvency representative to local creditors needs to fulfil in order to be enforceable and binding. It also clarifies that any decision to postpone or refuse the opening of secondary proceedings can be challenged by local creditors. Last but not least, the draft report also addresses the important question of what happens if the insolvency representative is not complying with the undertaking. In such a case the local creditors should have the right to seek protection via a court order for instance by prohibiting removal from assets (Art. 29a (2b)).

Finally, appropriate solutions to deal with insolvencies of groups of companies need to be formulated. The Parliament asked the Commission in its legislative initiative report for a flexible proposal for the regulation on the insolvency of groups, distinguishing between two scenarios, namely groups where the ownership is rather clear cut and decentralised groups. For the moment, the Commission is not following the recommendations of Parliament but focuses on enhancing the coordination and communication of different insolvency proceedings. Proper and well-coordinated insolvency proceedings can indeed help to avoid the liquidation of groups and increase the possibility of a better realisation of assets and preservation of jobs.

However, the draft report goes a step further by formulating a more ambitious solution on insolvency of groups of companies. This solution can be understood as a compromise between the Commission's "coordination and communication" approach and Parliament's position taken in the legislative initiative report. It is suggested to appoint a coordinator who shall not only identify and outline recommendations for a coordinated conduct of the insolvency proceedings (Art. 42f (1) (a)) but also present a group coordination plan that identifies, describes and recommends a comprehensive set of measures to the resolution of the group members' insolvencies (Art. 42f (1) (c)). This coordination plan needs to be approved by a court. Insolvency representative have the opportunity to comment on the plan prior to approval, Art 42g (1). However, the group coordination plan is not binding for the insolvency practitioners who can deviate from such plan, Art. 42h.