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REPORT

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

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

(Initiative – Rule 42 of the Rules of Procedure)

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

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

[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.* (OJ C 63, 13.3.2010, p. 2).

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, 15 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 to Parliament, 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 legislative 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 the principle of subsidiarity and the

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

fundamental rights of citizens;

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 recommendations to the Commission and the Council.

ANNEX TO THE MOTION FOR A 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.

EXPLANATORY STATEMENT

On 23.3.2011, the Legal Affairs Committee held a workshop on "harmonisation of insolvency proceedings at EU level". The aim was to identify areas in national insolvency laws that are accessible and eligible for harmonisation. In preparation of the hearing, the Legal Affairs Committee commissioned a study on "Harmonisation of Insolvency Law at EU level". The recommendations of this report take into account the ideas that experts elaborated in the aforementioned study and during the hearing and that were further explained in the accompanying documentation.

The different issues that were mentioned during the hearing suggested a four-fold structure of future legislative initiatives: (1) harmonisation where possible, (2) revision of the Insolvency Regulation where it will remain - in addition to harmonisation - relevant and where the practice has proven that improvement can be made, (3) improvement of the cooperation of liquidators and cooperation in general on administrative level in cases where enterprises that are part of a group of companies become insolvent and (4) creation of an EU Registry for insolvency cases.

This four fold structure does not prejudice the structure of future legislative proposals and the choice of legal instruments. It only reflects the pattern according to which the proposals by the rapporteur have been developed.

As regards the scope of the recommendations, the rapporteur confines his report to the scope of the Insolvency Regulation as defined in its Article 1.

The recommendations shall serve as guidelines for the Commission. Since the rapporteur has a background in the German legal system, most of the proposals may appear to be similar to German insolvency law. The rapporteur considers the recommendations as a starting point for further in-depth research by the Commission being carried out in preparation of legislative proposals.

The rapporteur is aware of the fact that the recommendations in this report will provoke controversial discussions. He knows that insolvency law is very different from one Member State to the other. Therefore, he would like to leave out those issues that seem likely to lead to debates that might become at this early stage of discussion unnecessarily long. All aspects that have not been mentioned explicitly in this report are left out on purpose, like for example aspects of the treatment of contracts (inter alia employment contracts, see Article 10 of the Insolvency Regulation) or the retention of title (see Article 7 of the Insolvency Regulation).

1) Harmonisation

a) Deadlines in general

Deadlines shall reflect a balance between the interest of the entrepreneur to look for rescue for

the company and the interest of the creditors to safeguard their claims. It might be difficult to recommend fixed deadlines. Therefore, the rapporteur prefers to propose corridors within which the Member States can find the adequate deadlines for their purpose.

b) Opening of insolvency proceedings

The Insolvency Regulation stipulates that the State of the opening of proceedings shall determine the conditions, in particular determine against which debtors insolvency proceedings may be brought on account of their capacity (Article 4(2) (a)), what assets form part of the estate and the treatment of assets (Article 4(2)(b)) . A new directive should harmonise these aspects so that there is more legal certainty directly from the very beginning of the proceedings.

c) Filing of claims

Chapter IV of the Insolvency Regulation provides for basic requirements for the lodgement of claims. According to the Insolvency Regulation, the lodging, verification and admission of claims shall be determined by the law of the State of the opening of proceedings (Article 4(2)(h)); the same shall apply to claims which are to be lodged against the debtor's estate (Article 4(2)(g)). Harmonisation with respect to the lodging etc of claims would add to the legal certainty for the creditors.

The deadline-corridor should reflect a balance between the interests of the single creditor to safeguard his/her particular claim, of the community of creditors to start a proceeding, of the liquidator to manage the satisfaction of claims on a clear basis and of the debtor to satisfy the creditors to the largest extent possible.

d) Avoidance actions

The Insolvency Regulation stipulates in Article 4(2)(m) that Member States shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. In addition, Article 13 of the Insolvency Regulation provides for an exemption. The said Article 4(2)(m) shall not apply where the person who benefitted from an act detrimental to all the creditors provides proof that "the said act is subject to the law of a Member State other than that of the State of the opening of the proceedings and that that law does not allow any means of challenging that act in the relevant case". Harmonisation in this respect would reduce the scope of Article 13 of the Insolvency Regulation and may, thus, contribute to the equal treatment of creditors within the Internal Market and diminish legal uncertainty among liquidators.

As regards to harmonisation of deadlines and periods, there must be a balance between the underlying principle of giving companies a second chance and helping them survive, the interests of the legitimate creditors in the insolvency proceeding and the trust of the "new" creditor outside of the proceeding. The recommendation of the rapporteur is here as elsewhere understood as a starting point for discussion.

e) Liquidators

The Insolvency Regulation offers in Article 2(b) a definition of the liquidator that shall be used also in this report. According to Article 4(2)(c), the State of the opening of proceedings shall determine the powers of the liquidator, and Articles 18 and 19 contain basic provisions for the liquidator. While the rapporteur would not endeavour to harmonise the powers and duties of liquidators at that stage, he would still like to propose some common requirements. Some harmonisation in this area would support the idea of closer cooperation between the liquidators and enhance the comparability in the profession.

f) Restructuring Plan

According to the political will to give companies a second chance when they risk to become insolvent or became insolvent, the rapporteur would like to take up the idea of restructuring plans which has been developed in the laws of some Member States.

2) Amendments to the Insolvency Regulation:

The recommendations made in this section are limited to those aspects that the rapporteur finds particularly relevant for the Commission to take into account in its revision of the Insolvency Regulation.

The rapporteur considers that the scope should be widened in order to include those procedures in which the management remains in control of the company as this would afford the debtor in possession a number of mechanisms to restructure its business.

The COMI is a most important concept, since of its definition depends the Insolvency Regulation's principal jurisdictional rule: which court is competent to open the main proceedings and which will be the applicable law. The concept is however not defined and this creates uncertainty.

The definition of establishment should include services, not just human means and goods.

The duty of communication and cooperation provided for in Article 32 should not only affect liquidators, but also courts.

3) Groups:

The Insolvency Regulation only applies to single companies and there is no legislation at EU level on the insolvency of groups of companies, despite the fact that groups are a very common form of business model of the economic life. This omission has important negative consequences. The rapporteur is aware of the great variety of different group structures and relationships between companies member of the same group and therefore of the fact that the same solution cannot be applied to all kinds of groups, at least in the current state of insolvency laws in the Union.

Ideally, the insolvency of groups of companies should be managed by a single court applying its own insolvency law. This solution facilitates coordination, the transmission of information,

saves costs, maximizes assets value and facilitates rescue. It has already been successfully applied by courts from different Member States. This is possible in centrally controlled groups.

For horizontal groups the rapporteur suggests to design a set of cooperation rules between the courts and insolvency representatives based on the UNCITRAL Legislative Guide on Insolvency Law (part three).

4) Registry:

The creation of an EU Registry is needed in order for creditors and courts to be able to determine whether insolvency proceedings have been opened in another Member State and the deadlines and details to present the claims.

12.7.2011

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on Legal Affairs

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

Rapporteur: Sharon Bowles

(Initiative – Rule 42 of the Rules of Procedure)

SUGGESTIONS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Takes the view that cross-border 'living wills' should be legally enforceable in the case of financial institutions and that they 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;

2. Underlines that a cross-border insolvency regime within the context of EU company law should constitute tools within a more general European crisis management framework, with a common minimum set of rules and ultimately a common crisis resolution and insolvency law system;

3. Believes that 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, in this respect, that 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;

4. To that end, considers that reverse stress-testing could be a useful tool in order to facilitate

an orderly resolution of cross-border conglomerates within the framework of 'living wills';

5. Is of the opinion that 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;

6. Observes that 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; considers that transfer of business, run-off, or continuity of operation should not be prevented and may need to be prioritised;

7. Takes the view that 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;

8. Believes that national law should treat similarly ranking creditors equally across the EU, and that ranking can not be based solely on location;

9. Is of the opinion that objectives should include building a roadmap for the achievement of fully harmonised cross-border insolvency across the EU and actively pursuing an international consensus, at least in the case of large conglomerates; considers that this harmonised framework should focus inter alia on:

   – setting up an administrative liquidation procedure for financial institutions and conglomerates in order to facilitate a more speedy and orderly liquidation than under the standard court-based procedure;

   – setting up priority rankings and rules on claw-back actions;

   – the coordination and efficient administration of international financial group insolvencies;

10. To that end, believes that 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;

11. Points out, however, that legal harmonisation is only one (and in fact probably the easiest) part of the process aimed at ensuring orderly international resolutions in future; observes that harmonisation alone is not a sufficient precondition to an orderly international resolution and that, ultimately, this will depend on countries agreeing to more effective mechanisms for procedural coordination.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	11.7.2011
Result of final vote	+: 38 –: 0 0: 0
Members present for the final vote	Udo Bullmann, Pascal Canfin, Nikolaos Chountis, Rachida Dati, Leonardo Domenici, Derk Jan Eppink, Diogo Feio, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sven Giegold, Liem Hoang Ngoc, Gunnar Hökmark, Wolf Klinz, Jürgen Klute, Philippe Lamberts, Astrid Lulling, Hans-Peter Martin, Alfredo Pallone, Anni Podimata, Antolín Sánchez Presedo, Edward Scicluna, Kay Swinburne, Marianne Thyssen, Ramon Tremosa i Balcells
Substitute(s) present for the final vote	Thijs Berman, Herbert Dorfmann, Sari Essayah, Ashley Fox, Sophia in ‘t Veld, Danuta Jazłowiecka, Krišjānis Kariņš, Olle Ludvigsson, Theodoros Skylakakis, Gianluca Susta, Pablo Zalba Bidegain
Substitute(s) under Rule 187(2) present for the final vote	Ismail Ertug, Knut Fleckenstein, Claudiu Ciprian Tănăsescu

31.5.2011

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on Legal Affairs

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

Rapporteur: Julie Girling

(Initiative – Rule 42 of the Rules of Procedure)

SUGGESTIONS

The Committee on Employment and Social Affairs calls on the Committee on Legal Affairs, as the committee responsible:

– to incorporate the following suggestions in its motion for a resolution:

1. Notes that the rules governing receivership proceedings concern a number of areas of the law, such as land law, employment law and contract law, some of which are very complex and which differ from one Member State to another, which prevents both the simplification of insolvency and restructuring proceedings and the equal treatment of creditors located in the EU;

2. Notes that freedom of establishment and the increased mobility of companies between Member States have highlighted the need for better coordination and a degree of harmonisation of insolvency law in order to combat the negative effects of ‘insolvency tourism’ on employees;

3. Is of the opinion that greater harmonisation of insolvency proceedings will promote equality and may have a positive impact on Member States' competitiveness and, therefore, on potential employment opportunities; is further of the opinion that disparities between national insolvency and restructuring laws create obstacles, competitive advantages and/or disadvantages or difficulties for companies with cross-border activities or ownership within the EU; takes the view that harmonisation of insolvency regimes will further promote a level playing field, give companies less reason to engage in ‘insolvency tourism’, remove obstacles to a successful restructuring of insolvent companies and

preserve employment, thus affording employees greater protection;

4. Emphasises that although employment law is the responsibility of the Member States, insolvency law can have an impact on employment law, and that 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; stresses, however, that any debate on the specific issue of insolvency should not automatically be a pretext for regulating employment law at EU level;

5. Takes the view that, notwithstanding the provisions of Article 4 of Directive 2008/94/EC, the length of the period for which outstanding claims are to be met by the guarantee institution is still too short and the ceilings for such payments are still too low, not least owing to the major disparities existing between Member States in terms of implementation of that Directive;

6. Notes with concern the increasing number of workers affected by insolvency proceedings, which can be attributed to the serious economic and social impact that the financial and economic crisis is having; notes that the nature of systemically-relevant cross-border financial institutions magnifies their role in this area;

7. Takes the view that the objective of Directive 2008/94/EC is to ensure a minimum degree of protection for employees in the event of insolvency, whilst maintaining adequate flexibility for Member States; points out that differences between Member States in terms of implementation do exist and calls for those differences to be considered;

8. Welcomes the fact that 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, and considers that greater protection in the event of insolvency should also be afforded to employees on non-standard contracts;

9. Recognises the current lack of harmonisation with regard to the ranking of creditors, which reduces predictability of outcomes of judicial proceedings; however, considers it necessary to increase the priority of employees' claims relative to other creditors' claims;

10. Is of the opinion, that the scope of the 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;

11. Notes that the 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 situation of insolvency 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;

12. Considers it necessary to set a minimum compensatory figure for the payments made by

the guarantee institution at national level, to be calculated on the basis of either the minimum wage in the country of origin of the contract of employment or a monthly amount corresponding to the average wage paid over the last six months; considers, in any event, that the payment made by the guarantee fund must:

(a) be in accordance with the principle of equality and non-discrimination;

(b) exclude bonuses;

(c) include social security contributions;

(d) include benefits in kind;

(e) be associated with provision for swift effective procedures in the event of disputes involving the guarantee institution;

considers further that the concept of 'outstanding claims' will have to include redundancy payments which the debtor was unable to meet, that the ceiling for such payments must not be less than an amount calculated in accordance with the criteria set out above, and that it is also necessary to harmonise the timeframe for the relevant proceedings (maximum one year) and intervention by the guarantee funds to enable the payments to be made, as well as the period in which the sums in question are payable (a year prior to and a year following the opening of the proceedings, if the claim covers that period);

13. Highlights the changing nature of employment contracts across the EU and the diversity of such contracts within Member States; considers it currently impossible, therefore, to seek to define 'employee' at European level;

14. Takes the view that a centre providing information on cross-border insolvency proceedings should be established that will maintain an electronic insolvency register containing information on the opening of proceedings and the basic features of insolvency procedure law, in order to facilitate the enforcement of claims of employees and of the guarantee institutions;

15. Takes the view that exemptions from the scope of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer should be avoided as far as possible;

16. Considers that the role played by guarantee institutions should be backed up by appropriate involvement of the social partners;

17. Points out that at present there are no rules on the coordination of insolvency proceedings with respect to different companies belonging to the same group of undertakings; draws attention to the need for rules to be adopted at EU level which further address the coordination and efficient administration of international group insolvencies so as to secure the interests of employees; additionally, stresses that rules on liabilities of subcontracting chains can help to protect workers affected by insolvency proceedings;

18. Considers that the concept of 'abuse' needs to be defined in accordance with the case-law

of the Court of Justice, in particular its judgment of 11 September 3003 in Case C-201/01 *Walcher*[1], as 'any abusive practice that is prejudicial to a guarantee institution inasmuch as it artificially creates a pay claim and thus unlawfully triggers a liability for the institution', having regard to the date on which an employer becomes insolvent;

– to incorporate the following recommendations in the annex to its motion for a resolution:

19. Calls for the transfer of information between the authorities responsible for managing business and company registers in all the Member States to be made compulsory, with a view to protecting employees' rights;

20. Calls for the timeframes for main and secondary proceedings to be harmonised and shortened in order to protect paid employees and afford them legal certainty;

21. Calls for the degree of harmonisation of insolvency proceedings to be not less than that provided for in Regulation (EC) No 1346/2000 and Directive 2008/94/EC;

22. Asks the Commission to introduce the following recital in Regulation (EC) No 1346/2000 on the occasion of the next revision thereof:

'Having regard to Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer,'.

[1] [2008] ECR I-8827.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	25.5.2011
Result of final vote	+: 33 –: 3 0: 8
Members present for the final vote	Regina Bastos, Edit Bauer, Heinz K. Becker, Jean-Luc Bennahmias, Pervenche Berès, Philippe Boulland, Milan Cabrnoch, David Casa, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Sergio Gaetano Cofferati, Marije Cornelissen, Frédéric Daerden, Karima Delli, Proinsias De Rossa, Frank Engel, Richard Falbr, Thomas Händel, Roger Helmer, Nadja Hirsch, Vincenzo Iovine, Liisa Jaakonsaari, Ádám Kósa, Jean Lambert, Patrick Le Hyaric, Veronica Lope Fontagné, Olle Ludvigsson, Elizabeth Lynne, Thomas Mann, Elisabeth Morin-Chartier, Csaba Őry, Siiri Oviir, Konstantinos Poupakis, Licia Ronzulli, Elisabeth Schroedter, Jutta Steinruck
Substitute(s) present for the final vote	Georges Bach, Raffaele Baldassarre, Sergio Gutiérrez Prieto, Jan Kozłowski, Evelyn Regner
Substitute(s) under Rule 187(2) present for the final vote	Liam Aylward, Ashley Fox

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	11.10.2011
Result of final vote	+: 24 –: 0 0: 0
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Jiří Maštálka, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Dimitar Stoyanov, Diana Wallis, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Kurt Lechner, Eva Lichtenberger, Toine Manders
Substitute(s) under Rule 187(2) present for the final vote	Giuseppe Gargani