



12.7.2010

NOTICE TO MEMBERS

Subject: Petition 1119/2008 by John Ashford (British), on the incompatibility of the Portuguese insolvency law with EU trade rules

1. Summary of petition

The petitioner refers to the Portuguese insolvency law, under which the insolvency administrator is able to annul contracts concluded within the two years preceding insolvency proceedings. The petitioner points out that this situation creates particular difficulties in connection with foreign investors' cross-border transactions and, as he believes that the Portuguese law is incompatible with EU trade rules, he asks the European Parliament to take the matter up.

2. Admissibility

Declared admissible on 26 January 2009. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 25 September 2009.

The petitioner refers to the Portuguese insolvency law, under which the insolvency administrator may annul contracts concluded within the two years preceding insolvency proceedings.

The European Commission is unable to take any action in such a case. Under the Treaty establishing the European Community and the Treaty on European Union, the European Commission has no general power to intervene in cases which have no link with European Union law.

On the basis of the information provided by the petitioner, it is established that the case

concerns national substantive law.’

4. Commission reply, received on 12 July 2010.

The petitioner complains that the previous reply of the Commission has not indicated on what basis there is no link with European law, while it is not equitable to rely on the Portuguese substantive law in the application of an insolvency.

Under the Treaty on the functioning of the EU, the Commission does not have any general powers to intervene in individual cases relating to problems of general administration of justice, inefficiency of the judicial system and particular issues such as described in the petition, unless there is a breach to European law.

As EU law stands at present, there are no European rules governing the legal requirements relating to a claw back clause or the use of testimonies in insolvency proceedings. Such issues are substantive, and procedural aspects of insolvency proceedings remain under the competence of Member States. Therefore, they are regulated by national law.

There exists a Council Regulation (EC) No 1346/2000 on insolvency proceedings which provides private international rules for cross-border insolvency proceedings. The Regulation set up common schemes for the interaction of different insolvency regimes. Pursuant to Article 39 thereof, every creditor, who has his habitual residence in the EU, shall have the right to lodge his claims in each of the insolvency proceedings pending in the EU relating to the debtor's assets. However, national law should apply to the proceedings, that is to say the insolvency law of the State where proceedings are opened or the law of the State where immovable property is registered. By virtue of Article 4, the law of the State of opening shall determine in particular the rules governing the lodging, verification and admission of claims, the ranking of claims and the rights of creditors, the voidness of legal acts.

On the basis of the additional information provided by the petitioner, it is therefore not possible to establish a possible breach of Council Regulation (EC) No 1346/2000.

Furthermore, it is not clear how Article 63 TFEU (ex Article 56 TEC) which prohibits any restrictions on the movement of capital would apply to this case. Indeed, there is no EU law concerning the purchase of private property, different from time-share (Directive 94/47/EC). Questions of immoveable property are to be considered under the relevant national law. National authorities and courts may consider individual cases.

Moreover, if the petitioner is seeking redress under the European Convention for the Protection of Human Rights and Fundamental Freedoms, he should contact the European Court of Human Rights direct. He may, however, bring an action before that Court only after he has exhausted all the domestic remedies available in the country which has jurisdiction, and within six months of the domestic decision becoming definitive.

In the absence of an infringement to EU law, the Commission has no power to take action in this case.