

## **Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings**

### **SUMMARY**

This Regulation establishes a common framework for insolvency proceedings in the European Union, except for Denmark (in accordance with Articles 1 and 2 of the protocol on the position of Denmark, attached as an appendix to the Treaty on European Union and to the Treaty establishing the European Community). The purpose of harmonised arrangements regarding insolvency proceedings is to avoid assets or judicial proceedings from being transferred from one Member State to another in order to obtain a more favourable legal position to the detriment of creditors ("forum shopping"). The Regulation applies to insolvency proceedings opened after the Regulation came into force on 31 May 2002. The annexes to the Regulation list in detail the insolvency proceedings referred to in the Member States (Annex A), the winding up procedures (Annex B) and the liquidators (Annex C).

It should be noted that one quarter of cases of insolvency in the European Union are associated with late payments.

### **Avoiding assets and judicial proceedings being transferred from one state to another**

Cases of insolvency with cross-border effects affect the proper functioning of the internal market. With a view to developing more uniform procedures that will avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position ("forum shopping"), the proposed solutions rely on the principle of proceedings with universal scope, while retaining the possibility of opening secondary proceedings within the territory of the Member State concerned.

The Regulation applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator" (Article 1). It applies equally to all proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. A liquidator is a person or body that administers or liquidates the assets of which the debtor has been divested or supervises the administration of his affairs. Annex C of the Regulation lists the persons or bodies who are authorized exercise this function in each Member State.

However, it does not apply to insolvency proceedings concerning:

- insurance undertakings;
- credit institutions;
- investment undertakings which provide services involving the holding of funds or securities for third parties;

- collective investment undertakings.

### **Determining the courts with jurisdiction and applicable law**

The Regulation interprets the concept of "court" in the wide sense: it may include a person or body authorised in national law to open proceedings. The courts with jurisdiction to open the **main proceedings** are those of the Member State where the debtor has his centre of main interests. This should be the place where the debtor usually administers his interests and should be verifiable by third parties. In the case of a company or legal person, this is the place of the registered office, in the absence of proof to the contrary. In the case of a natural person, in principle it is the place where their work is domiciled or is their place of usual residence.

**Secondary proceedings** may be opened subsequently in another Member State if the debtor has an establishment in the territory of this State. Establishment means any place of operations where the debtor carries out a non-transitory economic activity with human resources and goods. The effects of the winding up proceedings must be limited to the assets of the debtor located in the territory. It is the liquidator of the main proceedings who may request for such proceedings to be opened, or other persons or authorities who may do so according to the law of the State in which the opening of the proceedings is requested. In some cases, such territorial proceedings may be opened independently before the main proceedings if the local creditors and the creditors of the local establishment request it or where main proceedings cannot be opened under the law of the Member State where the debtor has his centre of interests. However, these proceedings will become secondary proceedings after the main proceedings have opened.

The law of the Member State in which proceedings are opened determines all the effects of those insolvency proceedings: the conditions for the opening of the proceedings, their conduct and their closure, as well as practical rules such as the definition of debtors and assets, the respective powers of the debtor and the liquidator, the effects of proceedings on contracts, individual creditors, claims, etc.

There are provisions throughout the Community guaranteeing the rights *in rem* of third parties, the right of a creditor to demand a set-off and that of a seller based on reservation of title, such that these rights are not affected by the opening of the proceedings. Rights to immovable property are governed solely by the law of the Member State where the property is situated. Similarly, employment contracts and relationships, and the rights and obligations of parties to a payment or settlement system or to a financial market are governed solely by the law of the Member State which is applicable to them (for further details, see the Council Directive of 19 May 1998 on settlement finality in payment and securities settlement systems).

## **Recognition of insolvency proceedings**

Decisions by the court with jurisdiction for the **main proceedings** are recognised immediately in the other Member States without further scrutiny, except:

- where the effects of such recognition would be contrary to the State's public policy;
- in the case of judgments which might result in a limitation of personal freedom or postal secrecy.

However, restrictions on creditors' rights (a stay or discharge) are possible only in the case of those who have given their consent.

If a court of a Member State decides to open insolvency proceedings, the decision is recognised in all the other Member States, even if the debtor would not be the subject of such proceedings in the other States. The effects of the decision are those provided for by the law of the State in which proceedings are opened and they come to an end in the event of secondary proceedings being opened in another Member State. The **effects of the secondary proceedings**, admissible only if the debtor has an establishment in the territory of this other state, are limited to the assets in that Member State.

The liquidator appointed by a court with jurisdiction may act in the other Member States in accordance with his powers provided for by the law of the Member State where the proceedings are opened, but respecting the law of the State on whose territory he is acting. He may in particular have the debtor's assets removed and may bring any action to set aside which is in the interests of the creditors if assets were removed from the State of the main proceedings to another Member State after the opening of the proceedings, subject to rights in rem of third parties or reservation of title.

A creditor domiciled in the Community who obtains total or partial satisfaction of his claim on the assets belonging to the debtor must return what he has obtained to the liquidator (subject to rights in rem or reservation of title). A consolidated account of dividends for the Community is drawn up to ensure that creditors receive equivalent dividends.

Publication measures may be taken in any other Member States at the request of the liquidator (publication of the decision opening the insolvency proceedings, registration in a public register). Publication may be mandatory, but in any event it is not a prior condition for recognition of the foreign proceedings.

Some of the persons concerned may not be aware that proceedings have been opened and may act in good faith in a way that conflicts with the new rules (payment to the debtor when they

should have made payment to the liquidator in another Member State). If such a payment is made before publication of the decision opening proceedings, the persons concerned are considered to have been unaware of the opening of proceedings. On the other hand, if a payment is made after publication of the decision, the persons concerned are assumed to have been aware unless there is proof to the contrary.

### **Limitation of the applicability of the Regulation**

The Regulation does not apply:

- in Denmark;
- in any Member State, to the extent that it is irreconcilable with the obligations in respect of winding-up resulting from a convention concluded prior to its entry into force by this State with one or more third countries;
- in the United Kingdom, to the extent that it is irreconcilable with existing arrangements with the Commonwealth.

The Regulation applies to insolvency proceedings opened after its entry into force on 31 May 2002. It replaces existing bilateral and multilateral conventions between two or more Member States.

### **Follow-up**

No later than 1 June 2012, and every five years thereafter, the Commission will present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation.

### **Amendments subsequent to the Regulation**

Acting by a qualified majority, the Council may amend the annexes to this Regulation, on the initiative of one or more of its members or on a proposal from the Commission.

Council Regulation (EC) No 603/2005 of 12 April 2005 amended the lists of insolvency proceedings, winding up proceedings and liquidators detailed in Annexes A, B and C of Regulation (EC) No 1346/2000, in order to take into account changes in legislation in a number of Member States (namely: Belgium, Spain, Italy, Latvia, Lithuania, Malta, Hungary, Austria, Poland, Portugal and the United Kingdom). Regulation (EC) No 694/2006 amended Annex A (insolvency proceedings referred to in Article 2 of Regulation (EC) No 1346/2000) and Annex C (the liquidators referred to in the same article) concerning France.

Following the enlargement of the EU on 1 May 2004, this regulation was amended by the act concerning the conditions of accession to the EU of ten new Member States [Official Journal L 236 of 23.09.2003]. Regulation (EC) No 1791/2006 adjusted the provisions of this Regulation to the accession of Bulgaria and Romania, on 1 January 2007.

Council Regulation (EC) No 681/2007 of 13 June 2007 amended the lists of insolvency proceedings, winding up proceedings and liquidators detailed in Annexes A, B and C for the following Member States: the Czech Republic, Romania, Italy, Sweden, the United Kingdom and Ireland.

### Context

The winding-up of insolvent companies, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention. Work has been carried out at various levels since 1963 with a view to formulating a Community instrument in the field. A convention on insolvency proceedings was concluded on 23 November 1995. This convention could not enter into force, because one Member State failed to sign the convention within the time limit. The Amsterdam Treaty, signed on 2 October 1997, lays down new provisions for judicial cooperation in civil matters. It was on this basis that this Regulation on insolvency proceedings was adopted.

### REFERENCES

Act	Entry into force - Date of expiry	Deadline for transposition in the Member States	Official Journal
Regulation (EC) No 1346/2000	31.05.2002	-	OJ L 160 of 30.06.2000
Amending act(s)	Entry into force	Deadline for transposition in the Member States	Official Journal
Regulation (EC) No 603/2005	21.04.2005	-	OJ L 100 of 20.04.2005
Act concerning the conditions for accession to the European Union of	01.05.2004	-	OJ L 236 of 23.09.2003

Amending act(s)	Entry into force	Deadline for transposition in the Member States	Official Journal
the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia, and on the adjustments of the treaties on which the European Union is founded.			
Regulation (EC) No 694/2006	07.05.2006	-	OJ L 121 of 06.05.2006
Regulation (EC) No 1791/2006	01.01.2007	-	OJ L 363 of 20.12.2006
Regulation (EC) No 681/2007	21.06.2007	-	OJ L 159 of 20.06.2007

## RELATED ACTS

### **Declaration by Portugal concerning the application of Articles 26 and 37 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings**

Converting territorial proceedings opened prior to the main proceedings into winding-up proceedings should be interpreted as meaning that such conversion does not exclude judicial application of the state of the local proceedings by the judge (Article 36) or of the application of the interests of public policy (Article 26).

**Winding-up of companies:**

**European Parliament and Council Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings [Official Journal L 110 of 20/04/2001].**

**European Parliament and Council Directive 2001/24/EC on the reorganisation and winding-up of credit institutions [Official Journal L 125 of 05.05.2001].**