

Insolvency proceedings. Recast

2012/0360(COD) - 17/03/2015 - Council position

The Council's position in first reading reflects the overall compromises reached by the two co-legislators, with the support of the Commission with a view to concluding an agreement at the stage of the Council's position at first reading.

The main elements of the Council's position are as follows:

Scope: one of the key objectives of the proposed Insolvency Regulation is to move away from a traditional liquidation approach to insolvency to a "second-chance approach" for businesses and entrepreneurs in financial difficulties when cross-border insolvency proceedings are involved.

The scope of the proposed Insolvency Regulation is therefore broader than the scope of the current Insolvency Regulation and extends to hybrid and pre-insolvency proceedings, as well as to proceedings providing for a debt discharge or a debt adjustment for consumers and self-employed persons.

Jurisdiction for opening insolvency proceedings: the concept of centre of main interest ("COMI") and that of "establishment" are further clarified to provide useful guidance to all those concerned and increase legal certainty.

Before opening insolvency proceedings, courts must actively examine whether the debtor's COMI is actually located within their jurisdiction. As regards the determination of the COMI, special consideration should be given to creditors and to their perception as to where the debtor conducts the administration of his business.

Moreover, the new rules contain a set of safeguards aimed at preventing abusive forum shopping.

In all cases, where the circumstances give rise to doubts regarding the court's jurisdiction, the court should ask the debtor to supply additional evidence to support his assertions as to the location of the COMI and, where the law applicable to the insolvency proceedings so allows, give creditors an opportunity to present their views on the question of jurisdiction.

Secondary proceedings: the proposed regulation sets out two specific situations in which a court seized with a request to open secondary proceedings should be able, at the request of the insolvency practitioner in main proceedings, to refuse or to postpone the opening of such proceedings.

1) the insolvency practitioner in the main proceedings may propose an undertaking to local creditors according to which they will be treated, in the main proceedings, as if secondary proceedings had been opened. Where such an undertaking has been given, the court seized with a request to open secondary proceedings should be able to refuse the opening when it is satisfied that the undertaking adequately protects the general interests of local creditors.

2) the court may temporarily stay the opening of secondary proceedings when a temporary stay of individual enforcement is granted in the Member State where main proceedings have been opened.

Insolvency registers: in order to improve the provision of relevant and timely information to creditors and courts involved and to prevent the opening of parallel insolvency proceedings, the Regulation would impose on Member States an obligation to establish insolvency registers that contain, under the conditions set out in the Regulation, certain information on the debtor and the insolvency practitioner, as well as information relating to the insolvency proceedings.

These national insolvency registers are to be interconnected and accessible via the European e-Justice portal, in full conformity with the European legislation on data protection.

Group of companies: the regulation would include specific provisions on cooperation and communication between the courts and the insolvency practitioners involved in the insolvency of members of groups of companies. The provisions on cooperation and communication referred to above are completed with a system for the coordination of the insolvency proceedings of members of a group of companies.