

**EUROPEAN UNION  
THE COUNCIL**

**Brussels, 12 July 1999 (16.07)**

**10017/99**

**LIMITE**

**JUSTCIV 102**

**NOTE**

---

from: Secretariat  
to: Committee on Civil Law (Insolvency)

---

Subject: Comments from Delegations on the draft Regulation on Insolvency proceedings during the meeting of 21 June 1999.

---

## **1. COMMENTS FROM THE PORTUGUESE DELEGATION** (meeting document No 1)

### **Initial comments from the Portuguese delegation**

1. It is necessary to take account of the statement by the Portuguese Republic to which reference is made in point 210, page 130 of the explanatory report with regard to the effects of the judgment in the main proceedings opening bankruptcy procedures on reorganisation proceedings initiated earlier within Portuguese territory.
2. The judgment in the bankruptcy proceedings only has intra-Community effects (it does not apply to "the debtor's assets on a world-wide basis" as stated in a recital).
3. The rules concerning the Annexes must be open-ended to allow for legislative changes in the Member States which establish other types of proceedings to prevent bankruptcy (rule similar to the existing Article 54 of the 1995 Convention).
4. In order to update the Regulation to be adopted, Annex A should be worded as follows with regard to Portugal, given the legislative changes which have meanwhile taken place in Portugal:

### **PORTUGAL**

- O processo de falência
- Os processos especiais de recuperação de empresa, ou seja:
  - = A concordata
  - = A reconstituição empresarial
  - = A estruturação financeira
  - = A gestão controlada.

## **2. COMMENTS FROM THE DANISH DELEGATION (meeting document No 2)**

With the purpose of reducing problems on how to interpret the regulation it is proposed to include some considerations regarding article 20 and article 13.

In a situation where there is more than one insolvency proceeding a creditor is entitled to make a claim in every proceeding. It is possible that the calculation of the amount this creditor can obtain in these proceedings can cause some difficulties. Therefore it is proposed that the main calculation principles as expressed in the explanatory report, paragraph 172-176, is mentioned in a consideration.

Furthermore it would be preferable if it is expressed in a consideration that article 13 does not protect against the effect of an insolvency proceeding if the transaction is made after the opening of a insolvency proceeding (see the explanatory report, paragraph 138).

## **3. COMMENTS FROM THE ITALIAN DELEGATION (meeting document No 3)**

Subject to any subsequent comments and general formal points concerning the Italian text, the Italian delegation would at present propose the following:

point (12): delete the words "recognised in other Member States" in the first sentence;

point (15): delete the words "also" and "covering assets situated outside the country" in the fourth sentence.

The delegation would also like clarification of the words "the Council reserves the right to amend these Annexes" in point (29).

## **4. COMMENTS FROM THE GREEK DELEGATION (meeting document No 4)**

Referring to your telex no 2656/8-6-99, we are hereby sending you a proposal from the Greek delegation concerning point 4 of the preamble to the "initiative for a Council regulation on insolvency proceedings submitted by the German and Finnish delegations" (doc. No 8195/99, JUSTCIV 78 MI 54):

"4 {Whereas} *natural persons* and undertakings' activities have more and more cross border effects and are therefore increasingly being regulated by Community law.."

## 5. COMMENTS FROM THE BELGIAN DELEGATION (meeting document No 5)

### Preliminary remark

Given the short time delegations were allowed in which to formulate their comments, this note makes no claim to be exhaustive and the Belgian delegation reserves the right to draft further comments if a more thorough examination were to reveal other difficulties.

### 1. Recitals

Insert the following recital between Nos 17 and 18:

*"Whereas, in order to guarantee that the main proceedings themselves are well founded, i.e. that their effects are universal, territorial proceedings may be opened in a State different from that in which the main proceedings are to be conducted only if the debtor has an establishment in that State; whereas "establishment" means a place of operations from which the debtor carries out a non-transitory economic activity using human resources and goods, reflecting the need for a minimum of organisation; whereas an occasional place of operations cannot be described as an establishment."*

### Reasons

Belgium wants one of the recitals to the proposal for a Regulation on insolvency proceedings to contain a comment on the notion of establishment. This criterion is in fact the precondition for the right to open territorial proceedings and is therefore essential. Belgium considers that this should be based on point 40 of the explanatory report on the Convention on insolvency proceedings so as to emphasise the need for a minimum of organisation and the fact that an occasional place of operations cannot be described as an establishment.

2. Article 42(2)

Replace the words *"In addition, he may be required to provide a translation, into that language, of the lodgement of claim."* by *"In addition, he may be required to provide a translation, into the official language or one of the official languages of the State of the opening of proceedings, of the lodgement of claim."*

Reason

The Belgian delegation does not wish to call into question the content of the provisions agreed to under the Convention but wishes to rectify a technical error with regard to a problem – the existence of more than one language in a State – which is of particular interest to Belgium.

Article 42(2) of the proposal for a Regulation states that any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of the claim shall bear the heading "Lodgement of claim" in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation, *into that language*, of the lodgement of claim.

Pursuant to that provision, the creditor concerned could choose as the heading for his lodgement of claim one of the official languages of Belgium which was not that of the court hearing the insolvency proceedings and could as a result be required to provide a translation of the lodgement of claim only in that language.

It should be noted that in 6866/93 of 3 June 1993, the final part of Article 34(2) stated that a translation of the lodgement of claim could be required of the creditor concerned in the official language or one of the official languages of the State in which proceedings were opened. The replacement of the words *"in the official language or one of the official languages of the State in which proceedings have been opened"* by the words *"into that language"* would seem to have been prompted by an otherwise laudable concern for conciseness which for Belgium, however, will have quite undesirable effects owing to the use of three different languages of proceedings by the Belgian courts.

The Belgian delegation therefore wishes the words *"into the official language of one of the official languages of the State of the opening of proceedings"* to be reinserted in Article 42(2) of the proposal for a Regulation to replace *"into that language"*. The sole effect of this change will be to enable courts in Member States which use more than one language of proceedings to obtain from the creditor a translation in the language of the proceedings, i.e. to restore the effect of the text previously approved by the delegations.

3. Annexes

The amendments to be made to the Annexes as a result of legislative changes in Belgium since the Convention was signed are still being considered.

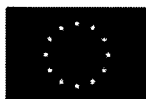
6. **Suggestion submitted by the Secretariat** (meeting document No 6)

**Article 45**

**Amendment of the Annexes**

**The Member States may at any time send the Council a declaration containing any amendments they wish to make to the Annexes. On that basis, the Annexes to this Regulation may be amended by decision of the Council.**

---



**EUROPEAN UNION  
THE COUNCIL**

**Brussels, 15 July 1999 (19.07)  
(OR. en,f,p)**

**9934/99**

**LIMITE**

**JUSTCIV 99**

**NOTE**

from :	General Secretariat of the Council
to :	Committee on Civil Law
No. prev. doc.:	9178/99 JUSTCIV 86 MI 65
Subject :	Draft Council Regulation on insolvency proceedings - List of amendments

Delegations will find below a list of amendments to the German and Finnish initiative for a Council Regulation on insolvency proceedings (9178/99 JUSTCIV 86 MI 65) on which the Civil Law Committee has reached consensus or a certain level of agreement so far:

**1. The following recitals should read as follows:**

- (12) [A parallelism between main insolvency proceedings – recognised in the other Member States – and secondary proceedings – enabling creditors in another Member State to invoke a local instrument in order to safeguard their interests – avoids over-rigid centralisation. Mandatory rules of coordination with the main proceedings guarantee the needs for unity within Community.] <sup>1</sup>

<sup>1</sup> Subject to further examination.

- (13) [Insolvency proceedings may be opened in the Member State where the debtor has the centre of his main interests. Main insolvency proceedings have universal scope, they aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located. The centre of main interest is taken as meaning the place where the assets are administered or where the debtor carries out his business. The creditor is also very familiar with that place.] <sup>1</sup>
- (15) The rule on international jurisdiction in Article 3(1) enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In this connection the Regulation affords two possibilities. On the one hand, the court competent for the main insolvency proceedings can order provisional protective measures in the territory of Member States covering assets situated outside the country. Such measures are enforced in accordance with the third subparagraph of Article 25(1). On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings may, in the States in which an establishment belonging to the debtor is to be found and in which he would like to introduce secondary insolvency proceedings, apply for the preservation measures which are possible under the laws of those States (Article 38).
- (17a) [In order to guarantee that the main proceedings themselves are well founded, i.e. that their effects are universal, territorial proceedings may be opened in a State different from that in which the main proceedings are to be conducted only if the debtor has an establishment in that State; "establishment" means a place of operations from which the debtor carries out a non-transitory economic activity using human resources and goods, reflecting the need for a minimum of organisation; an occasional place of operations cannot be described as an establishment.] <sup>2</sup>

---

<sup>1</sup> Subject to further examination.

<sup>2</sup> Subject to further examination.



2. **The Annexes should be amended as follows:**

In order to update the Regulation to be adopted, Annex A should be worded as follows with regard to Portugal and Belgium, given the legislative changes which have meanwhile taken place.

**PORTUGAL**

- O processo de falência
- Os processos especiais de recuperação de empresa, ou seja:
  - = A concordata
  - = A reconstituição empresarial
  - = A estruturação financeira
  - = A gestão controlada.

**BELGIUM**

[to be added later]

=====