

Evaluation of Council Regulation (EC) No
1346/2000 of 29 May 2000 on Insolvency
Proceedings – Evaluation Questionnaire

July 2009



CUSTOMER SERVICE EXCELLENCE



INVESTOR IN PEOPLE

The Purpose of this Questionnaire

The EC Regulation on Insolvency Proceedings (“the Regulation”) was adopted by the Council of the European Union on 29 May 2000, becoming operative on 31 May 2002.

The Regulation aims to provide an ordered regime governing the administration of the affairs of an insolvent whose centre of main interests is in the EU, recognising that cross-border issues can arise in insolvency proceedings.

Its principal objective is that insolvency proceedings should operate efficiently and effectively. It aims to achieve this principal objective by ensuring that:

- measures to be taken regarding an insolvent debtor’s assets are co-ordinated where the activities of an undertaking have a cross-border effect, and
- incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping), are avoided.

The European Commission is required to report on the Regulation by 1 June 2012 and, if necessary, to produce proposals for its amendment. To this end, the Commission intends to launch a study of the Regulation in 2010. It will be the task of the contractor in charge of the study to seek the views of Member States and stakeholders in due course. However, in order that we may be in a position to inform and influence the Commission's report, we intend to carry out our own evaluation of the Regulation in advance of the Commission's study.

This questionnaire sets out to gather information on the experiences of individuals working with the Regulation in practice to assess whether or not it meets its objectives.

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Respond by	29 September 2009
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SECTION 1 - EXECUTIVE SUMMARY

National insolvency laws are often not designed to cope with cross-border insolvencies and the problems that arise, both jurisdictional and practical, make it difficult for insolvency officeholders to administer such insolvencies speedily and effectively.

Any uncertainty in cross-border insolvencies can act as a barrier to trade and the flow of investment from country to country. A universal approach to cross-border insolvencies is crucial, as is the co-operation between national courts, authorities and practitioners.

One of the principal obstacles in cross-border insolvency is determining where insolvency proceedings should be opened and administered in cases with a cross-border dimension and which laws should apply. The conflict of laws between different jurisdictions can result in the dissipation of assets and the loss of an opportunity to save a viable business. To address this issue within the European Union ("EU"), the EC Regulation on Insolvency Proceedings ("the Regulation") was adopted by the Council of the European Union on 29 May 2000, becoming operative on 31 May 2002.

The Regulation aims to provide an ordered regime governing the administration of the affairs of an insolvent whose centre of main interests ("COMI") is in the EU, recognising that cross-border issues can arise in insolvency proceedings. It does not seek to harmonise insolvency law across the EU. Instead, it aims to provide a hierarchy of judicial competence, allowing for only one "main" proceeding in a single Member State (where the debtor's COMI is situated), with the possibility of there being any number of "secondary" or "territorial" proceedings in any other Member States where the debtor has an establishment.

Its principal objective is that insolvency proceedings should operate efficiently and effectively. To achieve this, action regarding an insolvent debtor's assets must be co-ordinated where there is a cross-border dimension and forum shopping (transferring assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position) is to be avoided.

This evaluation questionnaire sets out to gather information on the experiences of individuals working with the Regulation in practice to assess whether or not it meets its objectives. It focuses on 7 main areas:

- General overview
- Centre of Main Interests ("COMI")
- The interaction of main and secondary proceedings
- The applicable law in any given case
- The opening of proceedings
- Group companies, and
- General technical points

SECTION 2 - HOW TO RESPOND

We are interested in the views of respondents who have knowledge or experience of how the Regulation is working in practice. The questions posed are significant in number and if respondents have no knowledge or experience relating to a particular question, a response need not be provided in relation to that question.

Responses to this questionnaire should be sent to:

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The Insolvency Service
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Or by DX subscribers to:

**DX 120875
Bloomsbury 6DX**

Or by e-mail to Alison.Dennis@insolvency.gsi.gov.uk

Or by fax to 020 7291 6746

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A copy of the Response form is given at Annex A.

If you have any questions about the questionnaire you can contact us at the above address or speak to:

Alison Dennis

Tel: 020 7637 6234

A list of those organisations and individuals consulted is provided at Annex B. We would welcome suggestions of others who may wish to be involved in this evaluation process.

Additional copies

This document is available electronically at www.insolvency.gov.uk. If this causes difficulty for anyone, we will provide a hard copy – please see contact details above.

Confidentiality

The Insolvency Service may make your response public. If you do not wish your response (or any part of it) or your name made public, please state this clearly in your reply. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax coversheet will be taken to apply only to information in your response for which confidentiality has been requested.

We will handle any personal data you provide appropriately and in accordance with the Data Protection Act 1998.

Timetable for responses

In order that your comments can be given full consideration as part of the evaluation of this Regulation, please ensure that your reply is sent to us by 29 September 2009. Contact details are listed at page 5.

SECTION 3 - SUMMARY OF QUESTIONS

General overview

Q1 - The questions which follow seek information on a number of specific areas. However, in general, does the Regulation work satisfactorily and, if not, what principal changes would you want to see?

Q2 - Please give an indication of:

- a) how often you have experienced the effects of the Regulation in a cross-border context;
- b) in what role you have experienced the effects of the Regulation, e.g. as an insolvency office-holder, creditor, legal advisor etc
- c) whether your experience of the Regulation has related to:
 - a UK entity subject only to main proceedings elsewhere in the EU; and/or
 - an entity subject to main proceedings in the UK and secondary proceedings in another Member State; and/or
 - an entity subject to secondary proceedings in the UK and main proceedings in another Member State.

Centre Of Main Interests (“COMI”)

Q3 - Is the lack of a comprehensive definition of COMI a problem? If so, in what way and how might the difficulties be overcome?

Q4 - Does any uncertainty as to the location of a debtor’s COMI or the fact that the debtor can change this COMI at some future date (i.e. after a debt has been incurred) cause difficulties for creditors or other parties such as directors, employees or regulatory authorities in assessing the risks of entering into business transactions?

Q5 - Is there evidence of debtors relocating their COMI from one Member State to another in order to frustrate creditor claims or to benefit from insolvency laws more advantageous to them?

Q6 – Is there evidence of debtors not being able to gain bankruptcy relief for debts incurred in one EU Member State due to a legitimate change in COMI and limitations in the scope of national insolvency proceedings in the Member State of the new COMI? For example, this might arise in the case of individuals who have incurred debts in the UK (their original COMI) but who have since moved their COMI as a result of their now living and working in another EU Member State. To gain relief from debts incurred in the UK, they would have to seek bankruptcy proceedings in the location of the new COMI but the national bankruptcy laws of that jurisdiction may limit bankruptcy proceedings to traders. If yes, is this a problem that needs to be addressed?

Q7 - Are there adequate provisions enabling interested parties to ascertain the reasons behind a Court’s determination of the location of the COMI?

Q8 - Are there adequate provisions enabling interested parties to challenge a decision on the location of the COMI?

Interaction of Main and Secondary Proceedings

Q9 - Have there been any difficulties with the definition of "Establishment" (any place of operations where the debtor carries out a non-transitory economic activity with human means and goods)? For example, should the definition of "Establishment" be extended to human means, goods *and services*?

Q10 – Have any difficulties arisen in cases where assets are located within a particular jurisdiction but insolvency proceedings cannot be brought by local creditors because the debtor does not have or no longer has its COMI or an establishment in that jurisdiction? If so, is there any evidence that this has been used as a means to avoid creditor claims?

Q11 - Does the fact that secondary proceedings are restricted to winding up proceedings create difficulties in conducting a cross-border rescue of a company with establishments in different Member States? If so, has it been possible to overcome these difficulties?

Q12 - Does the relationship between the main proceedings and any secondary proceedings work efficiently and effectively? For example, is it beneficial for the proper co-ordination of action relating to a debtor's assets that secondary proceedings can be opened at any time and by any person empowered under the relevant national law and what impact does this have on the efficiency and effectiveness of the insolvency as a whole?

Q13 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

Q14 - Does the duty to co-operate and communicate with liquidators in different Member States operate in a satisfactory way in practice?

Q15 - Have the provisions of Article 34 (measures ending secondary insolvency proceedings) been used in practice and, if so, was the outcome satisfactory?

Applicable law

Q16 - Do the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) adequately protect expectations and certainty of transactions and contracts of employment? For example, do they strike the right balance between the need to protect 3rd parties and the general principal that the applicable law should be that of the State of opening?

Q17 - Are the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) appropriate? For example, do they work as they should/are they sufficiently clear?

Opening of Proceedings

Q18 - Does the definition of Court create any difficulties in terms of 'extra-judicial' insolvency proceedings, if so, what are those difficulties and how might they be overcome? In particular, have any difficulties been encountered in the recognition of insolvency proceedings which are not opened by an order of court, e.g. voluntary arrangements, and have any difficulties been encountered in the current regime whereby creditor voluntary liquidations must be confirmed by the Court under Rule 7.62 of The Insolvency Rules 1986 before they are brought within the scope of the Regulation?

Q19 - Is the time at which proceedings are opened clear in relation to any given insolvency proceedings in any Member State and, if not, what difficulties does this cause?

Group Companies

Q20 - Is the lack of special provisions dealing with group companies detrimental to the efficiency and effectiveness of cross border insolvency proceedings and, if so, in what way and how might this be addressed?

General Technical Issues

Recognition and enforcement of insolvency proceedings and judgements

Q21 - Are there any problems with the interaction of the Regulation with the Judgments Regulation/Brussels I, not just in terms of the application of the enforcement provisions of the Judgments Regulation/Brussels I but also in terms of the insolvency exception in Article 1(2)(b) of the Judgments Regulation/Brussels I? If so, what practical difficulties do they create?

Q22 - Have any Member States relied on the provisions of Article 26 to refuse to recognise insolvency proceedings or to enforce a judgment on the grounds of public policy? If so, please provide examples and state what sort of public policy grounds were raised.

Detrimental acts

Q23 - How do the provisions in the Regulation relating to detrimental acts impact on our provisions relating to antecedent transactions? For example, do our antecedent transaction provisions operate successfully in cross-border cases?

Publications

Q24 - Is the lack of mandatory publication across the EU of (main) insolvency proceedings a problem? If yes, what issues arise as a result?

Q25 - Is it currently easy to establish whether a company has been placed into insolvency proceedings in any Member State? If not, what problems has this caused and how might this be addressed?

Powers of the liquidator

Q26 - Do the provisions relating to the exercise of the liquidator's powers operate in a satisfactory way in practice? If not, why not and what needs to be done to address the issue?

Q27 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

Stay of liquidation

Q28 - Have the provisions of Article 33 (stay of liquidation) been used in practice and, if so, was the outcome satisfactory?

Preservation measures

Q29 - Have the provisions of Article 38 (preservation measures) been used in practice and, if so, was the outcome satisfactory?

Duty to inform creditors

Q30 - Are liquidators complying with the obligation to provide the heading on the "Invitation to lodge a claim" form in all the official languages of the institutions of the EU and are there any problems associated with this?

Right to lodge claims & distributions to creditors

Q31 - Are the claims of creditors from Member States other than the State of the opening of proceedings being dealt with satisfactorily? If not, why not and what needs to be done to address the issue?

Q32 - Does the cross-lodgement of claims between different proceedings work satisfactorily in practice? If not, why not and what needs to be done to address the issue?

Content of the lodgement of a claim

Q33 - Are creditors from Member States other than the State of the opening of proceedings complying with the obligation to provide the heading on the

“Lodgement of claim” form in the official language of the State of the opening of proceedings and are there any problems associated with this?

Other issues

Q 34 – If you have encountered any other problems or issues with the Regulation, please provide details.

SECTION 4 - THE ISSUES IN DETAIL (including evaluation questions)

4.1 Introduction

The EC Regulation on Insolvency Proceedings (“the Regulation”) was adopted by the Council of the European Union on 29 May 2000, becoming operative on 31 May 2002.

Being a Regulation, it is binding and directly applicable in all Member States (except Denmark which exercised its right to opt-out) without the need for ratification or implementation by domestic legislation - Article 47.

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(1)) opened after the Regulation came into force (Article 43). It does not apply to solvent liquidations.

Furthermore, the Regulation applies only to proceedings where the centre of the debtor’s main interests (“COMI”) is located in the EU (other than Denmark). If the debtor’s COMI is based outside the EU, matters will continue to be governed by existing domestic law. It applies to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The Regulation 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, or to collective investment undertakings.

In the main, the Regulation determines the Member State in which insolvency proceedings may be opened and administered and the law which will apply. The Regulation does not seek to harmonise insolvency law across the EU. Instead, it aims to provide a hierarchy of judicial competence, allowing for only one “main” proceeding in a single Member State (where the debtor’s COMI is situated), with the possibility of there being any number of “secondary” or “territorial” proceedings in any other Member States where the debtor has an establishment.

The main proceedings have universal scope and (in the absence of any secondary proceedings) aim at encompassing all the debtor’s assets. Secondary proceedings may be opened and run in parallel with the main proceedings, their effects being limited to the assets situated in the Member State where the secondary proceedings are opened. Territorial proceedings may be opened in limited circumstances prior to the opening of main proceedings but become “secondary” proceedings on the opening of main proceedings.

The Regulation seeks to ensure recognition of relevant insolvency proceedings throughout the EU without further formality and defines the respective roles of the office-holders where more than one set of insolvency proceedings involving the same debtor have been instituted in different Member States.

The Regulation provides that the various liquidators in concurrent proceedings must co-operate closely, in particular by exchanging sufficient information. To ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings is given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time e.g. he may propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

In general, the applicable law is that of the Member State where the particular insolvency proceedings are being conducted. However, provision is made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment).

4.2 Objectives

Recitals 2, 3 and 4 to the Regulation set out the following objectives:

- For the proper functioning of the internal market, cross-border insolvency proceedings should operate efficiently and effectively.
- Where the activities of an undertaking have a cross-border effect, measures to be taken regarding an insolvent debtor's assets need to be co-ordinated.
- Incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping), are to be avoided.

4.3 General overview

Although the Regulation applies in every relevant insolvency where the debtor's COMI is located in the EU, its effects are only noticeable in the relatively few cases which have a cross-border dimension.

Q1 - The questions which follow seek information on a number of specific areas. However, in general, does the Regulation work satisfactorily and, if not, what principal changes would you want to see?

Q2 - Please give an indication of:

- a) how often you have experienced the effects of the Regulation in a cross-border context;
- b) in what role you have experienced the effects of the Regulation, e.g. as an insolvency office-holder, creditor, legal advisor etc
- c) whether your experience of the Regulation has related to:
 - a UK entity subject only to main proceedings elsewhere in the EU; and/or
 - an entity subject to main proceedings in the UK and secondary proceedings in another Member State; and/or
 - an entity subject to secondary proceedings in the UK and main proceedings in another Member State.

4.4 Centre Of Main Interests (“COMI”)

“Main” insolvency proceedings may be opened by the Courts of the Member State in which the debtor has its COMI. “Insolvency proceedings” are defined as collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. These proceedings are listed in Annex A to the Regulation and include both winding up and reorganisation proceedings - Articles 1(1) and 2(a). As stated above, these “main” insolvency proceedings have universal scope and aim to encompass all the debtor’s assets.

In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary - Article 3(1).

COMI is not further defined in the Regulation although Recital 13 states that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

Case law has held that a debtor can change its COMI and for self serving reasons. There is some evidence that individuals from Member States with insolvency laws which appear less favourable to them than those in the UK are seeking to ‘move’ their COMI for the purpose of filing their own bankruptcy petition.

Q3 - Is the lack of a comprehensive definition of COMI a problem? If so, in what way and how might the difficulties be overcome?

Q4 - Does any uncertainty as to the location of a debtor's COMI or the fact that the debtor can change this COMI at some future date (i.e. after a debt has been incurred) cause difficulties for creditors or other parties such as directors, employees or regulatory authorities in assessing the risks of entering into business transactions?

Q5 - Is there evidence of debtors relocating their COMI from one Member State to another in order to frustrate creditor claims or to benefit from insolvency laws more advantageous to them?

Q6 – Is there evidence of debtors not being able to gain bankruptcy relief for debts incurred in one EU Member State due to a legitimate change in COMI and limitations in the scope of national insolvency proceedings in the Member State of the new COMI? For example, this might arise in the case of individuals who have incurred debts in the UK (their original COMI) but who have since moved their COMI as a result of their now living and working in another EU Member State. To gain relief from debts incurred in the UK, they would have to seek bankruptcy proceedings in the location of the new COMI but the national bankruptcy laws of that jurisdiction may limit bankruptcy proceedings to traders. If yes, is this a problem that needs to be addressed?

Q7 - Are there adequate provisions enabling interested parties to ascertain the reasons behind a Court's determination of the location of the COMI?

Q8 - Are there adequate provisions enabling interested parties to challenge a decision on the location of the COMI?

4.5 Interaction of Main and Secondary Proceedings

Where a debtor's COMI is situated within the territory of one Member State, the courts of another Member State have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State ("territorial proceedings"). The effects of these proceedings are restricted to the assets located in that State - Article 3(2).

"Establishment" is defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods - Article 2(h). The mere presence of assets within a jurisdiction is not considered sufficient to fulfil the definition of establishment.

Where main proceedings have already been opened in the Member State where the debtor has his COMI, any (territorial) proceedings subsequently opened are termed "secondary proceedings". These latter proceedings are

restricted to the “winding up” proceedings listed in Annex B to the Regulation - Article 3(3) and Article 27 (although any secondary proceedings may be closed by way of a rescue plan, see below). They may be opened in a Member State where the debtor has an establishment without the debtor's insolvency being examined in that State and, as stated above, their effects are restricted to the assets of the debtor situated within the territory of that State - Article 27. The law applicable to secondary proceedings is that of the Member State where they are opened - Article 28.

Prior to the opening of main proceedings, the right to request the opening of territorial insolvency proceedings in the Member State where the debtor has an establishment is limited to local creditors or creditors whose claim arises from the operation of that establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has its COMI - Article 3(4). This has the aim of limiting territorial proceedings to those which are absolutely necessary.

Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted. The opening of secondary proceedings may be requested by the liquidator in the main proceedings or any other person empowered under the national law of the Member State in which the secondary proceedings are being requested - Article 29.

Secondary proceedings may be necessary where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the opening State to the other States where the assets are located.

The liquidator in the main proceedings and the liquidators in the secondary proceedings are duty bound to communicate with each other (subject to any rules restricting communication) and duty bound to cooperate with each other - Articles 31(1) & 31(2). They must immediately communicate any information which may be relevant to the other proceedings, in particular progress made in lodging and verifying claims and all measures aimed at terminating the proceedings - Article 31(1). Also the liquidator in the secondary proceedings must give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of assets in the secondary proceedings - Article 31(3).

The liquidator in the main proceedings may propose that any secondary proceedings be closed by way of a rescue plan, composition or comparable measure (rather than liquidation) where the law applicable to the secondary proceedings allows for such a measure. Closure in this way requires the consent of the main liquidator unless the financial interests of the creditors in the main proceedings are not affected by the measure - Article 34 (1).

Q9 - Have there been any difficulties with the definition of "Establishment" (any place of operations where the debtor carries out a non-transitory economic activity with human means and goods)? For example, should the definition of "Establishment" be extended to human means, goods *and services*?

Q10 – Have any difficulties arisen in cases where assets are located within a particular jurisdiction but insolvency proceedings cannot be brought by local creditors because the debtor does not have or no longer has its COMI or an establishment in that jurisdiction? If so, is there any evidence that this has been used as a means to avoid creditor claims?

Q11 - Does the fact that secondary proceedings are restricted to winding up proceedings create difficulties in conducting a cross-border rescue of a company with establishments in different Member States? If so, has it been possible to overcome these difficulties?

Q12 - Does the relationship between the main proceedings and any secondary proceedings work efficiently and effectively? For example, is it beneficial for the proper co-ordination of action relating to a debtor's assets that secondary proceedings can be opened at any time and by any person empowered under the relevant national law and what impact does this have on the efficiency and effectiveness of the insolvency as a whole?

Q13 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

Q14 - Does the duty to co-operate and communicate with liquidators in different Member States operate in a satisfactory way in practice?

Q15 - Have the provisions of Article 34 (measures ending secondary insolvency proceedings) been used in practice and, if so, was the outcome satisfactory?

4.6 Applicable law

Unless otherwise stated, in the case of both the main proceedings and any territorial or secondary proceedings, the law applicable to the proceedings is that of the Member State within the territory of which the proceedings are opened. The law of the State of opening determines the conditions for the opening, conduct and closure of the insolvency proceedings - Articles 4 and 28.

However, to protect expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision is made for a number of exceptions to the general rule. These include rights in rem, set-off, reservation of title and contracts of employment – Articles 5 - 15.

Q16 - Do the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) adequately protect expectations and certainty of transactions and contracts of employment? For example, do they strike the right balance between the need to protect 3rd parties and the general principal that the applicable law should be that of the State of opening?

Q17 - Are the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) appropriate? For example, do they work as they should/are they sufficiently clear?

4.7 Opening of Proceedings

The Regulation refers to the “Courts” of the Member States having jurisdiction to open insolvency proceedings. “Court” is defined as the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings. The Regulation intends that this definition is given a wide interpretation. It states in Recital 10, “insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression “court” in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings.”

The time at which insolvency proceedings are opened is important for a number of reasons under the Regulation.

Q18 - Does the definition of Court create any difficulties in terms of ‘extra-judicial’ insolvency proceedings, if so, what are those difficulties and how might they be overcome? In particular, have any difficulties been encountered in the recognition of insolvency proceedings which are not opened by an order of court, e.g. voluntary arrangements, and have any difficulties been encountered in the current regime whereby creditor voluntary liquidations must be confirmed by the Court under Rule 7.62 of The Insolvency Rules 1986 before they are brought within the scope of the Regulation?

Q19 - Is the time at which proceedings are opened clear in relation to any given insolvency proceedings in any Member State and, if not, what difficulties does this cause?

4.8 Group Companies

There are no special provisions in the Regulation to deal with groups of companies with separately incorporated subsidiaries with COMIs in different Member States. In certain cases it might be desirable for separately incorporated companies within the group to be rescued or wound up as a whole. However, recent case law indicates that the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption that a company's COMI is the place of its registered office.

Q20 - Is the lack of special provisions dealing with group companies detrimental to the efficiency and effectiveness of cross border insolvency proceedings and, if so, in what way and how might this be addressed?

4.9 General Technical Issues

4.9.1 Recognition and enforcement of insolvency proceedings and judgements

The Regulation aims to provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court - Articles 16(1) and 25(1). Such judgments are to be enforced in accordance with Articles 31 to 51 (with the exception of Article 34(2)) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention (now superseded by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters known as the "Judgments Regulation" or "Brussels I").

Q21 - Are there any problems with the interaction of the Regulation with the Judgments Regulation/Brussels I, not just in terms of the application of the enforcement provisions of the Judgments Regulation/Brussels I but also in terms of the insolvency exception in Article 1(2)(b) of the Judgments Regulation/Brussels I? If so, what practical difficulties do they create?

The judgment opening main proceedings shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings unless the Regulation provides otherwise and as long as no territorial or secondary proceedings are opened in that other Member State - Article 17(1).

In other words, automatic recognition should mean that the effects attributed to the proceedings by the law of the State in which the proceedings were

opened extend to all other Member States. Automatic recognition should be based on the principle of mutual trust without Member States having the power to scrutinise the decision of the first court to open proceedings in cases where the courts of two Member States both claim competence to open main proceedings - Recital 22.

The Regulation provides that the liquidator's appointment shall be recognised throughout the Community without any further formality. Specifically, the liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction. A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required - Article 19.

However, any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or constitutional rights and the liberties of the individual - Article 26.

Q22 - Have any Member States relied on the provisions of Article 26 to refuse to recognise insolvency proceedings or to enforce a judgment on the grounds of public policy? If so, please provide examples and state what sort of public policy grounds were raised.

4.9.2 Detrimental acts

Article 4(2)(m) specifies that the law of the State of opening of proceedings shall determine "the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors". This remains the case when dealing with third parties' rights in rem - Article 5(4), set-off - Article 6(2), reservation of title - Article 7(3) and payment systems and financial markets - Article 9(2), notwithstanding that the Regulation provides that such matters should be determined according their location and not by the law of the Member State where the proceedings are opened.

However, the provisions of Article 4(2)(m) are disapplied where the person who benefited 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 proceedings, and that law does not allow any means of challenging that act in the relevant case - Article 13.

In other words if the proper law would, apart from Article 4(2)(m), be that of a Member State other than that of the State of the opening of proceedings and the transaction is not open to challenge at all under that law, the transaction

cannot be avoided or held to be void or unenforceable in the court where proceedings have been opened.

Q23 - How do the provisions in the Regulation relating to detrimental acts impact on our provisions relating to antecedent transactions? For example, do our antecedent transaction provisions operate successfully in cross-border cases?

4.9.3 Publications

The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. This publication shall also specify the liquidator appointed and whether the proceedings are main or territorial - Article 21(1).

However, any Member State where the debtor has an establishment may require mandatory publication - Article 21(2).

In neither case, however, is publication a prior condition for recognition of the foreign proceedings.

Q24 - Is the lack of mandatory publication across the EU of (main) insolvency proceedings a problem? If yes, what issues arise as a result?

Q25 - Is it currently easy to establish whether a company has been placed into insolvency proceedings in any Member State? If not, what problems has this caused and how might this be addressed?

4.9.4 Powers of the liquidator

The liquidator appointed in the main proceedings may exercise all of the powers conferred on him by the law of the State of opening in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. In particular he may remove the debtor's assets from the territory of the Member State in which they are situated, subject to the protection given in the case of rights in rem and reservation of title - Article 18(1).

The liquidator appointed in any territorial proceedings may claim that moveable property was removed from the territory of the State of the opening to the territory of another Member State after the opening of the insolvency proceedings - Article 18(2).

In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action - Article 18(3).

Q26 - Do the provisions relating to the exercise of the liquidator's powers operate in a satisfactory way in practice? If not, why not and what needs to be done to address the issue?

Q27 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

4.9.5 Stay of liquidation

The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods - Article 33(1).

The court referred to in the above paragraph shall terminate the stay of the process of liquidation:

- at the request of the liquidator in the main proceedings,
- of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings - Article 33(2).

Q28 - Have the provisions of Article 33 (stay of liquidation) been used in practice and, if so, was the outcome satisfactory?

4.9.6 Preservation measures

The court of a Member State opening main proceedings may appoint a temporary administrator in order to preserve the debtor's assets. That administrator shall have the power to request any measure to secure and preserve any of the debtor's assets situated in another Member State (provided for under the law of that State) for the period between the request for opening of the insolvency proceedings and the judgment opening the proceedings - Article 38. Additionally, a liquidator temporarily appointed prior to the opening of main proceedings should be able to apply for preservation measures under the laws of the Member State where the debtor has an establishment.

Q29 - Have the provisions of Article 38 (preservation measures) been used in practice and, if so, was the outcome satisfactory?

4.9.7 Duty to inform creditors

As soon as insolvency proceedings are opened in a Member State, the court of that State or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences domiciles or registered offices in the other Member States. The notice shall include time limits, penalties and the body/authority empowered to accept lodgement of claims. The notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims - Article 40.

This information shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading "Invitation to lodge a claim. Time limits to be observed" in all the official languages of the institutions of the EU - Article 42(1).

Q30 - Are liquidators complying with the obligation to provide the heading on the "Invitation to lodge a claim" form in all the official languages of the institutions of the EU and are there any problems associated with this?

4.9.8 Right to lodge claims & distributions to creditors

To ensure equal treatment, distributions to creditors must be co-ordinated.

Any creditor may lodge his claim in the main proceedings and in any secondary proceedings - Article 32(1). Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, has the right to lodge claims in the insolvency proceedings in writing - Article 39.

The liquidators in the main and any secondary proceedings may lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides - Article 32(2).

The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings - Article 32(3).

Subject to the provisions concerning rights in rem and reservation of title, a creditor who obtains total or partial satisfaction of his claim after the opening of main proceedings on assets situated within another Member State shall return what he has obtained to the liquidator - Article 20(1).

Where a creditor has received a dividend in the course of insolvency proceedings, the creditor may share in distributions in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend - Article 20(2).

Q31 - Are the claims of creditors from Member States other than the State of the opening of proceedings being dealt with satisfactorily? If not, why not and what needs to be done to address the issue?

Q32 - Does the cross-lodgement of claims between different proceedings work satisfactorily in practice? If not, why not and what needs to be done to address the issue?

4.9.9 Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking - Article 41.

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 but, in that event, the lodgement of his claim shall bear the heading "Lodgement of claim" in the official language of the State of the opening of proceedings. 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 - Article 42(2).

Q33 - Are creditors from Member States other than the State of the opening of proceedings complying with the obligation to provide the heading on the "Lodgement of claim" form in the official language of the State of the opening of proceedings and are there any problems associated with this?

4.10 Other issues

Q 34 – If you have encountered any other problems or issues with the Regulation, please provide details.

SECTION 5 - WHAT HAPPENS NEXT?

The results of the evaluation will be published on The Insolvency Service's website at www.insolvency.gov.uk .

Annex A: Response Form

Annex B: List of Individuals/Organisations questioned

**EVALUATION OF COUNCIL REGULATION (EC) NO 1346/2000 OF 29 MAY 2000
ON INSOLVENCY PROCEEDINGS**

Response Form For Evaluation Questionnaire

Respondent Details	Please return by 29 September 2009 to:
Name: Organisation: Address: Town/City: County/Postcode: Telephone: Fax: E-mail:	Alison Dennis Policy Unit Zone B, 3 rd Floor The Insolvency Service 21 Bloomsbury Street London WC1B 3QW Alison.Dennis@insolvency.gsi.gov.uk Tel: 020 7637 6234 Fax: 020 7291 6746

Tick this box if you are requesting non-disclosure of your response.

Please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

General overview

Q1 - The questions which follow seek information on a number of specific areas. However, in general, does the Regulation work satisfactorily and, if not, what principal changes would you want to see?

Q2 - Please give an indication of:

- a) how often you have experienced the effects of the Regulation in a cross-border context;
- b) in what role you have experienced the effects of the Regulation, e.g. as an insolvency office-holder, creditor, legal advisor etc
- c) whether your experience of the Regulation has related to:
 - a UK entity subject only to main proceedings elsewhere in the EU; and/or
 - an entity subject to main proceedings in the UK and secondary proceedings in another Member State; and/or
 - an entity subject to secondary proceedings in the UK and main proceedings in another Member State.

Centre Of Main Interests (“COMI”)

Q3 - Is the lack of a comprehensive definition of “Centre of main interests” a problem? If so, in what way and how might the difficulties be overcome?

Q4 - Does any uncertainty as to the location of a debtor’s COMI or the fact that the debtor can change this COMI at some future date (i.e. after a debt has been incurred) cause difficulties for creditors or other parties such as directors, employees or regulatory authorities in assessing the risks of entering into business transactions?

Q5 - Is there evidence of debtors relocating their COMI from one Member State to another in order to frustrate creditor claims or to benefit from insolvency laws more advantageous to them?

Q6 – Is there evidence of debtors not being able to gain bankruptcy relief for debts incurred in one EU Member State due to a legitimate change in COMI and limitations in the scope of national insolvency proceedings in the Member State of the new COMI? For example, this might arise in the case of individuals who have incurred debts in the UK (their original COMI) but who have since moved their COMI as a result of their now living and working in another EU Member State. To gain relief from debts incurred in the UK, they would have to seek bankruptcy proceedings in the location of the new COMI but the national bankruptcy laws of that jurisdiction may limit bankruptcy proceedings to traders. If yes, is this a problem that needs to be addressed?

Q7 - Are there adequate provisions enabling interested parties to ascertain the reasons behind a Court's determination of the location of the COMI?

Q8 - Are there adequate provisions enabling interested parties to challenge a decision on the location of the COMI?

Interaction of Main and Secondary Proceedings

Q9 - Have there been any difficulties with the definition of "Establishment" (any place of operations where the debtor carries out a non-transitory economic activity with human means and goods)? For example, should the definition of "Establishment" be extended to human means, goods *and services*?

Q10 – Have any difficulties arisen in cases where assets are located within a particular jurisdiction but insolvency proceedings cannot be brought by local creditors because the debtor does not have or no longer has its COMI or an establishment in that jurisdiction? If so, is there any evidence that this has been used as a means to avoid creditor claims?

Q11 - Does the fact that secondary proceedings are restricted to winding up proceedings create difficulties in conducting a cross-border rescue of a company with establishments in different Member States? If so, has it been possible to overcome these difficulties?

Q12 - Does the relationship between the main proceedings and any secondary proceedings work efficiently and effectively? For example, is it beneficial for the proper co-ordination of action relating to a debtor's assets that secondary proceedings can be opened at any time and by any person empowered under the relevant national law and what impact does this have on the efficiency and effectiveness of the insolvency as a whole?

Q13 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

Q14 - Does the duty to co-operate and communicate with liquidators in different Member States operate in a satisfactory way in practice?

Q15 - Have the provisions of Article 34 (measures ending secondary insolvency proceedings) been used in practice and, if so, was the outcome satisfactory?

Applicable law

Q16 - Do the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) adequately protect expectations and certainty of transactions and contracts of employment? For example, do they strike the right balance between the need to protect 3rd parties and the general principle that the applicable law should be that of the State of opening?

Q17 - Are the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) appropriate? For example, do they work as they should/are they sufficiently clear?

Opening of Proceedings

Q18 - Does the definition of Court create any difficulties in terms of 'extra-judicial' insolvency proceedings, if so, what are those difficulties and how might they be overcome? In particular, have any difficulties been encountered in the recognition of insolvency proceedings which are not opened by an order of court, e.g. voluntary arrangements and have any difficulties been encountered in the current regime whereby creditor voluntary liquidations must be confirmed by the Court under Rule 7.62 of The Insolvency Rules 1986 before they are brought within the scope of the Regulation?

Q19 - Is the time at which proceedings are opened clear in relation to any given insolvency proceedings in any Member State and, if not, what difficulties does this cause?

Group Companies

Q20 - Is the lack of special provisions dealing with group companies detrimental to the efficiency and effectiveness of cross border insolvency proceedings and, if so, in what way and how might this be addressed?

General Technical Issues

Recognition and enforcement of insolvency proceedings and judgements

Q21 - Are there any problems with the interaction of the Regulation with the Judgments Regulation/Brussels I, not just in terms of the application of the enforcement provisions of the Judgments Regulation/Brussels I but also in terms of the insolvency exception in Article 1(2)(b) of the Judgments Regulation/Brussels I? If so, what practical difficulties do they create?

Q22 - Have any Member States relied on the provisions of Article 26 to refuse to recognise insolvency proceedings or to enforce a judgment on the grounds of public policy? If so, please provide examples and state what sort of public policy grounds were raised.

Detrimental acts

Q23 - How do the provisions in the Regulation relating to detrimental acts impact on our provisions relating to antecedent transactions? For example, do our antecedent transaction provisions operate successfully in cross-border cases?

Publications

Q24 - Is the lack of mandatory publication across the EU of (main) insolvency proceedings a problem? If yes, what issues arise as a result?

Q25 - Is it currently easy to establish whether a company has been placed into insolvency proceedings in any Member State? If not, what problems has this caused and how might this be addressed?

Powers of the liquidator

Q26 - Do the provisions relating to the exercise of the liquidator's powers operate in a satisfactory way in practice? If not, why not and what needs to be done to address the issue?

Q27 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

Stay of liquidation

Q28 - Have the provisions of Article 33 (stay of liquidation) been used in practice and, if so, was the outcome satisfactory?

Preservation measures

Q29 - Have the provisions of Article 38 (preservation measures) been used in practice and, if so, was the outcome satisfactory?

Duty to inform creditors

Q30 - Are liquidators complying with the obligation to provide the heading on the "Invitation to lodge a claim" form in all the official languages of the institutions of the EU and are there any problems associated with this?

Right to lodge claims & distributions to creditors

Q31 - Are the claims of creditors from Member States other than the State of the opening of proceedings being dealt with satisfactorily? If not, why not and what needs to be done to address the issue?

Q32 - Does the cross-lodgement of claims between different proceedings work satisfactorily in practice? If not, why not and what needs to be done to address the issue?

Content of the lodgement of a claim

Q33 - Are creditors from Member States other than the State of the opening of proceedings complying with the obligation to provide the heading on the "Lodgement of claim" form in the official language of the State of the opening of proceedings and are there any problems associated with this?

Other issues

Q 34 – If you have encountered any other problems or issues with the Regulation, please provide details.

ANNEX B

EVALUATION OF COUNCIL REGULATION (EC) NO 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS

List of Individuals/Organisations questioned

Accountant in Bankruptcy
Alan Katz – Lancaster University
Asset Based Finance Association
Association of British Insurers
Association of Business Recovery Professionals (R3)
Association of District Judges
Association of Property and Fixed Charge Receivers
Bank of England – Financial Markets Law Committee
Bankruptcy Advisory Service
British Bankers Association
Citizens' Advice
Citizens' Advice Scotland
City of London Law Society - Financial Law committee
Civil Court Users Association
Companies House
Companies Registry, Northern Ireland
Confederation of British Industries
Department for Business Innovation and Skills (BIS)
Department of Enterprise, Trade and Investment, Northern Ireland (DETINI)
Dr Paul Omar - Sussex Law School, University of Sussex
Dr Sandra Frisbee – School of Law, University of Nottingham
European High Yield Association
Experian
Federation of Small Businesses
Fiona Tolmie – Faculty of Business & Law Kingston University
Finance and Leasing Association
Financial Services Authority
High Court Judges of the Chancery Division
HM Revenue and Customs
HM Treasury
HM Courts Service
INSOL International
Insolvency Court Users' Committee
Insolvency Law Committee of the City of London Law Society
Insolvency Lawyers Association
Insolvency Practices Council
Insolvency Rules Committee
Insolvency Technical Managers' Forum
Institute for Turnaround
Institute of Credit Management
Institute of Directors
International Association of Insolvency Regulators (IAIR)
Irit Ronen-Mevorach - School of Law, University of Nottingham
John Tribe - Faculty of Business & Law Kingston University
Land Registry
Law Commission
Michael Mumford – Lancaster University Management School
Ministry of Justice

Pension Protection Fund

Professor Adrian Walters – Nottingham Law School, Nottingham Trent University

Professor Andrew Keay - School of Law, University of Leeds

Professor David Milman – Law School, University of Lancaster

Professor Gerard McCormack - University of Leeds

Professor Harry Rajak - Sussex Law School, University of Sussex

Professor Ian Fletcher – University College London

Professor John Armour – Oriel College, Oxford

Professor Julian Franks - London Business School

Professor Len Sealy – University of Cambridge

Professor Maria Carapeto – CASS Business School

Professor Paul Torremans - School of Law, University of Nottingham

Professor Rebecca Parry – Nottingham Law School, Nottingham Trent University

Professor Sarah Worthington – Law Department, London School of

Professor Sir Roy Goode – St John's College, University of Oxford

R3 Scottish Technical Committee

Riz Mokhal – Faculty of Law, University College London

Scottish Law Commission

Senior Bankruptcy Registrar RCJ London - Stephen Baister

Trades Union Congress