

**PUBLIC DRAFT**  
**Version September 2006**

**European Communication and Cooperation Guidelines  
For Cross-border Insolvency**

**Developed Under the Aegis of  
Academic Wing of INSOL Europe**

**by**

**Professor Bob Wessels and Professor Miguel Virgós**

	Pages
Guidelines	2
Brief explanation	6
Task Force and Review Group	9
Checklist Protocol	10

**To be discussed during the Annual Congress of INSOL Europe  
Bucharest, 28 September – 1 October 2006**

# **European Communication and Cooperation Guidelines For Cross-border Insolvency (Public draft September 2006)**

## **Guideline 1   Overriding objective**

- 1.1. These Guidelines embody the overriding objective of enabling courts and liquidators to efficiently and effectively operate in cross-border insolvency proceedings within the context of the EC Insolvency Regulation.
- 1.2. All interested parties in cross-border insolvency proceedings are required to further the overriding objective as set out above in Guideline 1.1.

## **Guideline 2   Aim**

- 2.1. The aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol.
- 2.2. In particular, these Guidelines aim to promote:
  - (i) The orderly, effective, efficient and timely administration of proceedings;
  - (ii) The identification, preservation and maximization of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis;
  - (iii) The sharing of information in order to reduce the costs involved;
  - (iv) The avoidance or minimization of litigation, costs and inconvenience to creditors and other parties affected by proceedings.

## **Guideline 3   Status**

- 3.1. Nothing in these Guidelines is intended:
  - (i) To interfere with the independent exercise of jurisdiction by each of the national courts involved, including their respective authority over a liquidator;
  - (ii) To interfere with national rules or ethical principles by which a liquidator is bound according to applicable national law and professional rules;
  - (iii) To confer substantive rights or to interfere with any function or duty arising out of the EC Insolvency Regulation or to impinge on applicable national law.

## **Guideline 4   Liquidator**

- 4.1. A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs, either in reorganisation or in liquidation proceedings.
- 4.2. A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.
- 4.3. A liquidator is required to act objectively, fairly and expeditiously in dealing with all parties concerned, including the courts.

## **Guideline 5   Direct Access**

5. A liquidator should be granted direct access to any court necessary for the exercise of legal rights to the same extent that a national liquidator is so permitted.

## **Guideline 6   Communications**

- 6.1. Liquidators in related cases are required to communicate with each other directly and as soon as they are appointed.
- 6.2. The main liquidator should always take the initiative to start or to continue said communications.

6.3. Substantive replies to queries from duty bound liquidators should be done with always as soon as reasonably practical. The same rule applies to queries from creditors or the debtor.

#### **Guideline 7 Information**

7.1. Liquidators are required to provide prompt and full disclosure, to all other liquidators involved, of all relevant information about the existence and status of the insolvency proceedings in which they have been appointed.

7.2. The liquidators are required to periodically provide information which may be relevant to the other proceedings, detailing the conduct of the proceedings, in particular the progress made in lodging and verifying claims, the ranking of the admitted claims, the calling of creditors meetings, planned actions regarding realization of relevant assets, and all measures aimed at terminating proceedings, including a composition or rescue plan. The information may include details of the debtor's assets and past transactions, specially those taking place during an applicable suspect period, and such other particulars as the other liquidators may reasonable require.

7.3. Liquidators in possession of such information are required, insofar as they are subject to any reporting duties under national law, to inform the courts of any material development in any such other proceedings.

7.4. A foreign liquidator should be permitted to use all legal methods to obtain information that would be available to a creditor or to a liquidator in any national insolvency proceedings.

7.5. To the fullest extent permissible under any applicable law, any relevant information not available publicly should be shared with other liquidators subject to appropriate confidentiality arrangements insofar as this is commercially and practically sensible.

#### **Guideline 8 Information by a liquidator in secondary proceedings**

8.1. The liquidator in any secondary proceedings should provide without any delay all relevant information to the liquidator in main proceedings so as to facilitate the submission of proposals on the liquidation or use of assets in secondary proceedings.

8.2. The liquidator in any secondary proceedings is encouraged to provide advice to the liquidator in main proceedings concerning any views on how to best to proceed.

8.3. The liquidator in main proceedings is encouraged to involve liquidators in any secondary proceedings in devising those proposals referred to above in Guideline 8.1.

8.4. Where a reorganization plan can be adopted in secondary proceedings that would give better value to creditors in main proceedings or reduce the overall debt, the liquidator in main proceedings and the courts shall take advantage of the opportunity to promote the adoption of this plan.

#### **Guideline 9 Authentication**

9.1. Save as otherwise provided under any law applicable, where existing authentication of documents is required, methods should be established so as to permit rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies on any basis that permits their acceptance as official and genuine communications by liquidators and courts in other jurisdictions.

9.2. To the extent permissible under national law, courts are encouraged to provide or publish judgements, orders or rulings also in languages other than those regularly used in proceedings or encourage as much as possible to allow translations to be made.

#### **Guideline 10 Language**

10.1. The liquidators shall determine the language in which communications take place on the basis of convenience and the avoidance of costs.

10.2. Courts are encouraged, to the maximum extent permissible under national law, to accept any documents related to those communications in this language, without the need for a translation into the language of proceedings before them.

### **Guideline 11 Costs**

11.1. Obligations incurred by the liquidator during proceedings and the liquidator's fees are funded from the assets within those proceedings in which the liquidator is appointed.

11.2. Obligations and fees incurred by the liquidator in the main proceedings prior to the opening of any secondary proceedings but concerning assets to be included in the secondary estate will be funded by this estate.

### **Guideline 12 Cooperation**

12.1. Liquidators are required to cooperate in all aspects of the case.

12.2. Cooperation takes place, to the maximum extent permissible under national law, with other liquidators with a view to minimizing conflicts between parallel proceedings and maximizing prospects for the rehabilitation and reorganization of the debtor's business or the value of the debtor's assets subject to realization, as may be the case.

12.3. Cooperation is intended to address all issues that are important to the actual case, including but not limited to:

- (i) Publication of the proceedings and notice to creditors;
- (ii) Organising creditors meetings;
- (iii) Continuing operation and management of the business;
- (iv) Disposal of relevant assets;
- (v) Raising of new finance;
- (vi) Preparing and implementing composition or reorganisation plans;
- (vii) Realization of the estate in liquidation and distribution to creditors.

12.4. Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or "protocol".

12.5. A protocol for cooperation between proceedings should include, at the very least, provisions for the coordination of court approval for decisions and actions whenever required and for communications with creditors as required under any applicable law. It should also include a statement of the various cross-border issues to be addressed (e.g. reorganisation, treatment of claims, realisation of assets) and any questions in respect of which the liquidators are required to seek agreement in advance from other liquidators.

12.6. In cases where any matter is not specifically provided for within the protocol, the parties shall act in a manner designed to promote the overriding objective set out above in Guideline 1.1.

### **Guideline 13 Cross-Border Sales**

13.1. Where during any period of cooperation between liquidators in main and any secondary proceedings assets are to be sold or otherwise disposed of, every liquidator should seek to sell these assets in cooperation with the other liquidators so as to produce the maximum value for the assets of the debtor as a whole.

13.2. Any national court, where required to act, should approve those sales or disposals that will produce such value.

### **Guideline 14 Assistance in Reorganization**

14.1. Where main proceedings are aimed at ensuring the rehabilitation and reorganization of the debtor's business, all other liquidators shall cooperate in any manner consistent with the objective of

reorganization or the sale of the business as a going concern wherever possible, without however prejudicing interests protected by local insolvency proceedings.

14.2. Liquidators should cooperate so as to obtain any necessary post-commencement financing, including through the granting of priority or secured status to reorganization lenders as may be appropriate and insofar as permitted under any applicable law.

#### **Guideline 15 Coordination between secondary proceedings**

15. Liquidators in all secondary proceedings are required to comply with these Guidelines.

#### **Guideline 16 Courts**

16.1. Courts are advised to seek to give effect to the overriding objective as set out above in Guideline 1.1. wherever they:

- (i) Exercise any power given to them by the law applicable or by the EC Insolvency Regulation;
- (ii) Interpret any of these Guidelines in light of the requirements set out above in Guideline 2.

16.2. Courts are advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol.

16.3. Courts are advised to consider whether a joint appointment of the liquidator in main proceedings or a nominated agent thereof to function as a liquidator in secondary proceedings would form an appropriate way of ensuring cooperation between liquidators in different proceedings under the court's supervision.

16.4. To the maximum extent permissible under national law, courts supervising insolvency proceedings or requests for assistance or any matters relating to communications from other courts should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the court.

16.5. Courts should encourage liquidators to report periodically, as part of national reporting duties, on the way these Guidelines and/or agreed Protocols are applied, including any practical problems which have been encountered.

#### **Guideline 17 Notices**

17.1. Notice of any court hearing or the making of any order by a court should be given to each of the liquidators at the earliest possible point in time, where the hearing or order is relevant to that liquidator.

17.2. Where a liquidator cannot be present in person before the court, the court is advised to invite the liquidator to communicate any observations to the court prior to any order being made.

17.3. The liquidators should provide for the keeping of an accessible record of such notices, which shall be regularly updated, to note the dates and relevant descriptions of any legal documents communicated, including those filed or transferred electronically.

#### **Guideline 18 Scope**

18. Where the aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol, liquidators, administrators and courts outside the scope of the EC Insolvency Regulation are encouraged, wherever possible, to use these Guidelines so as to facilitate or increase the prospects of cooperation in other proceedings taking place.

-0-0-0-

## **Brief explanation to European Communication and Cooperation Guidelines For Cross-border Insolvency (Public draft September 2006)**

### **Guideline 1   Overriding objective**

Member States have a strong mutuality of interests in the management and execution of effective operations of cross-border insolvency proceedings. It is therefore important that Member States, courts, any other competent legal authority and (associations of) insolvency practitioners develop arrangements for the efficient and effective cooperation in enforcing these proceedings.

### **Guideline 2   Aim**

In the system of the EC Insolvency Regulation there is only one debtor who is submitted to main insolvency proceeding and one or more secondary proceedings in other Member States towards that same debtor. The Insolvency Regulation requires these proceedings to be coordinated. Coordination means that the duties of communication and cooperation as set out in Article 31 of the Insolvency Regulation are fulfilled within the context of a common purpose regarding the debtor, his assets and the treatment of his creditors.

### **Guideline 3   Status**

Guideline 3 seeks to ensure that the Guidelines do not cause friction with existing applicable laws or professional rules or with duties flowing from the Regulation, nor that the Guidelines create any rights. In their nature these Guidelines are non-binding for anyone concerned (court, liquidator, creditor, debtor).

### **Guideline 4   Liquidator**

The text aims to secure that in cross-border insolvency cases liquidators act with appropriate know how and experience and in an honest way, with appropriate understanding of that any parallel proceedings are interwoven. Courts are invited to play an active role in ensuring the overriding objective of the Guidelines.

### **Guideline 5   Direct Access**

The text underlines the importance of direct access to the courts of each Member State for intervention or for substitution, as appropriate, in lawsuits involving the debtor. It also allows for bringing lawsuits to obtain or defend assets or for other purposes. Granting access does not alter the need to engage local counsel in each State.

### **Guideline 6   Communications**

Cross-border insolvency proceedings where the insolvent debtor's estate is managed and realized in two or more separate proceedings raises questions with regard to the coordination of these proceedings. A close and trustful cooperation between liquidators in main and secondary insolvency proceedings is indispensable in order to achieve an efficient and optimal administration of the insolvent debtor's assets.

### **Guideline 7   Information**

Communications relate to information. Exchange of information and cooperation cannot take place without knowledge of the other proceedings. In main or secondary proceeding local rules cannot be correctly applied in ignorance of activities elsewhere. In its role as a representative of creditors, liquidators should be able to use all legal processes to obtain information to the same extent as a creditor seeking to enforce a claim or a judgment. This information should include, as far as possible, non-public information.

### **Guideline 8 Information by a liquidator in secondary proceedings**

Guideline 8 reflects the dominant role of the main proceedings, within the context of a fair relationship between insolvency professionals. The liquidator in the secondary proceedings must give the liquidator in the main proceedings the opportunity to submit proposals on the realization or use of the assets in the secondary proceedings (Article 31(3)). In these proposals the main liquidator should involve liquidators in any secondary proceeding. The duty to communicate information forms at the same time the basis for the liquidator's supplementary duty to ensure mutual cooperation as provided in Article 31(2) and enables the main liquidator to intervene in any individual secondary insolvency proceeding according to Articles 32 to 38.

The overriding objective of Guideline 1.1 and the liquidators' general obligation to act fair and in respect of each others know how and professional integrity in the meaning of Guideline 4 justify that any secondary liquidator can give to the main liquidator his advice on how to proceed best, which will be in accordance with applicable domestic law. All liquidators should be mindful for unnecessary delay and of the fact that the main liquidator represents the dominant proceedings.

### **Guideline 9 Authentication**

Efficient operation of cross-border proceeding is enhanced greatly by authentication procedures with respect to judicial cooperation. National rules and practices may include such procedures; in individual cases they may be agreed. Where certain judgments and orders follow a same structure court may anticipate use of foreign language, to facilitate coordination and promote the speedy administration of proceedings.

### **Guideline 10 Language**

Although in appropriate cases of cross-border insolvency e.g. German or French will be the language used in parallel proceedings and cross-border communication between liquidators, the general experience is that English is the language of the global business community and in the cross-border communications between advisors, lawyers and liquidators involved in a cross-border insolvency case. Where a choice for a language is made native speakers of that language should be cautious of the fact that the person(s) s/he is speaking to communicates in its second or third language. Acting fair (Guideline 4.3) in general will mean the usage of simple, clear words, spoken in slow pronunciation and avoiding dialect, sophisticated language, puns or references.

Where courts are involved, the ordinary language will be the language regularly used by the courts, although the Guideline seeks a balance by avoiding unnecessary translations.

### **Guideline 11 Costs**

Costs may relate to obligations incurred (including trading costs), to fees, to the costs of the court, costs for service of documents, costs for an expert, costs for representation in a court or costs of enforcement. The general principle is that costs are to be funded from the debtor's assets and satisfied as they fall due. Pre-secondary proceedings costs will be borne by the estate in the secondary proceedings. Liquidators may agree another division based on the availability of assets in a certain estate and the interests of creditors concerned.

### **Guideline 12 Cooperation**

Article 31(2) of the Insolvency Regulation is the central provision concerning the coordination between main and secondary insolvency proceedings. Main liquidators are obliged to actively cooperate with secondary liquidators. Guideline 12 seeks to ensure that cooperation is related to all aspects of certain insolvency proceedings, to the maximum extend possible and encourages globally accepted practices of recording method and content of cooperation in writing.

See Checklist Protocol (attached).

### **Guideline 13 Cross-Border Sales**

A central goal of cooperation is maximizing value (Guideline 2.2(ii)). In reorganisation cases that objective may be sought primarily in a financial or operational restructuring or in a sale of the business. Sale of (large parts of) the assets is the most common method used in liquidation. An coordinated and aligned approach across national borders is likely to produce greater value. Guideline 13 addresses the latter goal. Approval by anyone concerned, but at least by any national court, will be encouraged when proposals are based on advice of or marketed by a professional third party, employed jointly by all liquidators concerned. This third party may also provide an expert opinion as to allocation of the sales price among the assets sold, which allocation could be the basis for distributions to creditors, unless a protocol contains another principle.

### **Guideline 14 Assistance to Reorganization**

In case the chosen method of maximizing value is reorganisation all liquidators should cooperate. Quite often the prospect of reorganisation is based on the availability of post-commencement financing. Liquidators should cooperate to the maximum extent possible to put in place a financing proposal, which may count on the approval of a large group of creditors.

### **Guideline 15 Coordination between secondary proceedings**

Estate assets and business values are more likely to be preserved and enhanced if administration is coordinated from a single forum. If there are multiple insolvency proceedings and there is no main forum and if assets are located in several plenary fora or outside of any plenary forum, the same objectives may be met if the relevant fora agree upon a governance protocol. The protocol should take into account Guideline 12.5 and consider a balanced way of cooperation, as all secondary proceedings are on the same footing.

### **Guideline 16 Courts**

Article 31 only provides a duty of the liquidator to communicate information and to cooperate as far as the relationship between main and secondary liquidators is concerned. Mutual communication and cooperation between courts is however not excluded and flows generally from the rational of the duty of mutual assistance and cooperation between Member States as provided in Article 10 of the EC Treaty. Courts are encouraged to manage insolvency proceedings efficiently. Furthermore, as may flow from the principle of mutual trust, courts are advised to act in aid of, and be auxiliary to each other and to all courts, as well as judges and officers of those courts, that have jurisdiction under corresponding laws in all administration matters. Cooperation between two courts takes place with a view to establishing methods of communication, with or without counsel, the co-appointment of a liquidator, coordinating orders and rulings and conducting joint hearings, e.g. by conference call. Guidelines 16.5 underlines the importance of accountability of insolvency professionals.

### **Guideline 17 Notice between liquidators**

When a court is involved by a specific order or approval it is presumed to be important enough to require notice to the other liquidators. When allowed hearings could be assisted by technological aids (conference call; video conference) or by making certain court orders subject to action by the other interested court. When the exigencies of the circumstances render it impractical to provide prior written notice as required herein, the necessary notice shall be provided as soon as possible thereafter and providing a liquidator to give his views.

### **Guideline 18 Scope**

It is encouraged that the Guidelines are applied by analogy in instances which are outside the scope of the EC Insolvency Regulation.



# **European Communication and Cooperation Guidelines For Cross-border Insolvency**

## **Task Force**

- Paul Omar, Associate Professor University of Sussex, United Kingdom;
- Klaus Pannen, insolvency practitioner, partner White & Case, Hamburg, Germany;
- Susanne Riedemann, associate White & Case, Hamburg, Germany;
- Anker Sörensen, Medus Devaux Sorensen, Paris, France;
- Professor Miguel Virgós, Universidad Autónoma de Madrid, Spain
- Professor Bob Wessels, Vrije University, Amsterdam, the Netherlands
- Willem van Nielen, attorney-at-law, Udink & De Jong, The Hague, the Netherlands.

## **Review Group**

- Jan van Apeldoorn, Attorney-at-law, Amsterdam, The Netherlands; former member of several Technical Committees of INSOL Europe;
- Neil Cooper, Partner Corporate Advisory & Restructuring Group, Kroll, London, United Kingdom; Past President of Insol Europe and INSOL International;
- Isabelle Didier, Insolvency Practitioner, Paris, France; Former President Insol Europe; Chair “Best Practices” Committee of Insol Europe;
- Professor Eric Dirix, University of Leuven (Belgium) and Justice Supreme Court Belgium;
- Honourable James Farley, Senior Counsel to McCarthy Tetrault LLP, Toronto, formerly Justice in the Ontario Superior Court of Justice, Toronto, Canada; Member of the Committee on Cross Border Communications in Insolvency Cases, International Insolvency Institute (III);
- Richard Gitlin, Gitlin & Company, Hartford (CT), USA. Past president of the American Bankruptcy Institute;
- R. Han C. Jongeneel, Justice District Court (Bankruptcy Chambers), Amsterdam, The Netherlands;
- Professor Sebastian Kortmann, University of Nijmegen, The Netherlands; Chair Core Group Academic Wing INSOL Europe;
- Maggie Mills, Partner Corporate Finance & Advisory Services, Ernst & Young, London, United Kingdom;
- Steven Taylor, partner AlixPartners, London, United Kingdom;
- Professor Heinz Vallender, Justice District Court Cologne, Germany; Professor University of Cologne;
- Professor Jay Westbrook, Benno C. Smidt Chair of Business Law, University of Texas Law School, Austin (Texas), USA. U.S. Reporter of American Law Institute’s Principles of Cooperation in Transnational Insolvency Cases Among the Members of NAFTA.

## **Checklist Protocol**

A Protocol is designed to apply within the framework of the EC Insolvency Regulation and all liquidators should be acquainted with the terms referred to in the Regulation, the Guidelines and in a Protocol. See Guideline 4.1. In practice, cooperation – and therefore a Protocol – will particularly refer to certain basic requirements and to specific issues to be addressed in the cross-border insolvency case at hand.

### **Basic requirements with regard to liquidators**

1. Statement of the status of the liquidators
2. Statement that each of the liquidators is subject only to the jurisdiction of its own court
3. Statement of the right of each of the liquidators to be heard as a foreign representative in the other insolvency proceedings
4. Statement of each of the liquidators that they will communicate and cooperate with each other as best as possible under the application of the European Communication and Cooperation Guidelines For Cross-border Insolvency

### **Basic requirements with regard to the debtor**

1. Statement of identity of the debtor and its management
2. Statement of the involvement of the debtor prior to certain steps taken

### **Basic requirement with regard to the proceedings**

1. Statement of type (main, secondary) and nature (domestic name) of the insolvency proceedings
2. Statement of specific topics, like mandatory involvement of certain third parties or bodies and to certain mandatory forms to use
3. Statement of the use of language
4. Statement of division of costs
5. Statement relating to methods of exchanging and sharing information

### **Basis requirements with regard to courts**

1. Statement confirming the sovereignty and independence of the courts involved
2. Statement on recognition by each court of the proceedings opened by the other, any other judgments or preservation measures and of any stays granted
3. Statement of each of the courts that they will, while respecting the sovereignty and independence of each other, communicate and cooperate with each as best as possible under the application of the European Communication and Cooperation Guidelines For Cross-border Insolvency

### **Specific issues for cooperation**

1. The goal of co-operation;
2. The performance of certain acts and timescales to realise this goal;
3. The coordination of issuing information to be communicated to creditors;
4. The coordination of lodging of claims
5. Information on claims lodged, the verification and disputes concerning claims
6. The ranking of creditors
7. The description and disposal of relevant assets;
8. The actions planned or underway in order to recover assets;
9. The location of assets when not covered by the location rule of Article 2(g), e.g. shares, IP rights or inter-company accounts;
10. The actions to obtain payment from debtors
11. The initiation of actions to set aside detrimental acts;

12. The filing of actions against third parties in relation to the insolvent company;
13. The exercise of the an option (to continue; to terminate) in case of reciprocal agreements;
14. The exercise of any voting rights;
15. The termination of contracts;
16. The decisions relating to (post-commencement) borrowing or the provision of security;
17. The filing of additional insolvency petitions concerning establishments in other Member States;
18. The process of drawing up or the submission of a liquidation or reorganisation plan;
19. The submission of an insolvency plan (of reorganization or liquidation) or a composition;
20. The distribution of any dividends;
21. The application of the hotch-pot rule;
22. The applicable law on certain issues;
23. The closure of secondary proceedings and the change in applicable law