II

(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion of the Economic and Social Committee on the 'Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999' [1]

(2000/C 75/01)

On 22 July 1999 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned initiative.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 14 December 1999. The rapporteur was Mr Ravoet.

At its 369th plenary session (meeting of 26 January 2000), the Economic and Social Committee adopted the following opinion by 97 votes to 2.

1. **Introduction**

1.1. The present proposal for a regulation repeats word-for-word the provisions of the Brussels Convention of 23 November 1995 on insolvency proceedings, with the exception of Chapter V of the Convention concerning interpretation by the Court of Justice.

1.2. The purpose of the initiative is to speed up implementation of the Convention and to make it directly applicable in the Member States, in order to improve insolvency proceedings with cross-border implications.

2. **General comments**

2.1. *Scope*

2.1.1. The proposed regulation applies to collective insolvency proceedings — regarding either a natural or a legal person — and entailing the partial or total divestment of the debtor and the appointment of a liquidator. The proceedings involved are listed for each Member State in an annex.

2.1.2. Insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties, and collective investment undertakings, which are already subject to special arrangements, are excluded from the scope of the regulation.

2.2. *Proposed system*

2.2.1. The system introduced by the regulation represents a compromise between:

— the principle of the uniqueness and universality of insolvency, which implies that a business declared insolvent is subject to single proceedings the effects of which are acknowledged by all Member States; and

— the principle of the territorial and plural nature of insolvencies, under which proceedings may be initiated in each country where the debtor holds assets, and the effects of which are restricted to that country.

[1] OJ C 221, 3.8.1999, p. 8.

2.2.2. The text thus introduces the principle of main proceedings, opened in the country where the debtor's centre of main interests is located, which are recognised and effective in the other Member States with no further formalities. Unless proved otherwise, the centre of interest of companies is presumed to lie where their registered offices are located.

2.2.3. The courts of a Member State other than that in which the centre of main interests is located are empowered to open insolvency proceedings only if the debtor possesses an establishment within that state. The effects of the proceedings are limited to the debtor's assets located there. When opened after the main proceedings have already begun, such proceedings are referred to as secondary proceedings and must necessarily be winding-up proceedings.

2.2.4. Opening of secondary proceedings may be requested by the liquidator in the main proceedings, or by any other person or authority empowered to make such a request under the law of the country in which the request is made.

2.2.5. Guarantees are provided to ensure that the main and the secondary proceedings can be conducted simultaneously. They entail, for example, the duty of the different liquidators to communicate information, the option available to the liquidator in the main proceedings to request that the secondary proceedings be stayed, and the transfer of any remaining assets from the secondary proceedings to the total assets in the main proceedings.

2.3. *Law applicable*

2.3.1. The law applicable to the proceedings and their effects is in principle that of the Member State in which the proceedings are, or are to be, opened. The same applies to the conditions for the opening, closure and conduct of proceedings.

2.3.2. Specific rules are provided to resolve specific problems. One such is employment contracts: here it is stipulated that the effects of insolvency proceedings on such contracts shall be governed solely by the Member State law applicable to the contract of employment. Other rules concern the effects of proceedings on reservation of title, set-off, third parties' rights in rem and contracts relating to immovable property.

2.4. *Recognition of proceedings*

2.4.1. Under the terms of the draft regulation, any judgement opening insolvency proceedings handed down in a Member State is to be recognised within the territory of the others. This does not, however, prevent secondary proceedings from being opened.

2.4.2. Moreover, the liquidator in the main proceedings is empowered, as long as no secondary proceedings have been opened, to exercise within the territory of the other Member States all the powers conferred on him by the law of the state in which proceedings have been opened. In this way, he may remove the debtors' assets from the territory of the state in which they are situated, unless they are subject to third parties' rights in rem or reservation of title. In exercising his powers, however, the liquidator must comply with the law of the state in which he is taking action.

2.4.3. Judgements in insolvency proceedings handed down by the court which ordered that the proceedings be opened are recognised with no further formalities. Such judgements are enforced in accordance with the rules laid down by the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters. Under these rules, judgements given in a contracting state and enforceable in that state may be enforced in another state when, on the application of any interested party, the order for its enforcement has been issued there.

3. **Specific comments**

3.1. *Appropriateness of the initiative*

3.1.1. The Committee is in principle in favour of a Community regulation to overcome the difficulties raised by insolvencies with an international dimension and, thereby, to speed up the implementation of the 1995 Brussels Convention on Insolvency Proceedings. The initiative should make an effective contribution to integrating national economies into the single market.

3.1.2. The initiative is all the more welcome in that it is the first taken by the Council in the field of civil proceedings not directly related to consumer protection, employing for this purpose the new provisions introduced by the Treaty of Amsterdam.

3.1.3. The Committee would however emphasise the need to avoid an excessively complex system which might prove unworkable in practice. It is evident that most of the provisions contained in the proposed regulation are highly complex.

3.1.4. The Committee would also emphasise the need for the regulation to apply throughout the European Union. It therefore hopes that the United Kingdom, Ireland and Denmark will join in the planned arrangements, making use of the opportunities available to them under the protocols to the Treaty of Amsterdam.

3.2. *Objective*

3.2.1. The Committee must stress that insolvency proceedings are not intended only to settle liabilities and share assets among creditors. Other objectives must be pursued, such as the survival of viable businesses and the safeguarding of jobs. In this regard, the Committee is pleased to note that the draft regulation is not restricted to winding-up proceedings alone, but also extends to procedures aimed at rescuing companies (cf. Annex A).

3.2.2. The Committee nevertheless regrets that the proposed regulation does not remove the distortions caused by differences in national law. Similarly, it fails to set common objectives for all the Member States. While representing a degree of progress, therefore, the proposed arrangements are extremely modest and unambitious.

3.3. *Rapidity*

3.3.1. One of the main criticisms generally levelled against insolvency proceedings is their excessive length. Here, the Committee regrets that the planned regulation fails to reflect the concern to accelerate proceedings, for example by proposing to introduce uniform machinery to this end in all the Member States.

3.4. *Planned system*

3.4.1. The Committee regrets that the planned regulation does not simply enshrine the principle of the uniqueness and universality of insolvency within the European Union: this would mean that a business declared insolvent would be subject to single proceedings, the effects of which would be recognised by all Member States. The European Commission did in fact express its support for this approach when the Brussels Convention was finalised in 1995.

3.4.2. While it may be understandable that a system of this kind cannot be set up at world level, the same is certainly not true for the EU countries, which form a single market — a concept which, by its very nature, should exclude the possibility of secondary insolvency.

3.4.3. The universality of insolvency approach is unquestionably that most likely to guarantee equality of creditors and rapid and rational organisation of liquidation. Indeed, the system envisaged — which provides for simultaneous conduct of main and secondary proceedings, the effects of which would be restricted to a single Member State — may well in practice raise insurmountable problems.

3.4.4. Moreover, the possibility of opening secondary proceedings could render the main proceedings meaningless in economic terms.

3.4.5. The introduction of single proceedings would, on the other hand, serve to boost the chances of success of action to put failing businesses back on their feet.

3.5. *Scope*

3.5.1. The exclusion of credit institutions, insurance enterprises, investment undertakings and collective investment undertakings from the scope of the proposed regulation is to be welcomed. These entities are subject to specific rules and a single source of supervision — by the country in which the company has its registered office — which clearly could not fit in with a system recognising a plurality of procedures with limited territorial effects.

3.6. *Recognition and enforceability of judgements*

3.6.1. Seeking decisions to order enforcement may slow down proceedings and entail unnecessary cost. The Committee therefore believes that judgements handed down under the terms of the draft regulation should be automatically enforceable. In this regard, it warmly welcomes the current work at Community level to up-date and simplify the provisions of the 1968 Brussels Convention on jurisdiction and enforcement of judgements, and to incorporate these provisions in a regulation.

3.6.2. The Committee believes that the regulation should provide for recognition within the EU of judgements prohibiting persons having contributed to the failure of their own businesses, through negligent or improper management, from exercising certain activities.

3.7. *Comments on articles*

3.7.1. Article 16: it would seem that the provision contained in paragraph 2 is to be interpreted in the light of Article 3(4). Should Article 16(2) not contain a direct reference to this provision?

3.7.2. Article 18(1): it might be clearer to refer to preservation measures 'contrary to the exercise of these powers'.

4. **Conclusion**

4.1. Notwithstanding its reservations, the Committee considers the text to be preferable to a total absence of rules governing insolvencies with an international dimension. It

would however stress that it can only be a step towards a fuller and more ambitious measure. Efforts must in particular be pursued to ensure that the principle of the uniqueness and universality of insolvency is acknowledged.

4.2. The Committee therefore feels that at the very least, the emphasis of the text should be shifted to strengthening main rather than secondary proceedings. One way of doing this might be to reinforce the powers of the liquidator in the main proceedings, and to provide broader opportunities for securing stay of secondary proceedings.

4.3. The Committee is pleased to note that an evaluation clause was added to the Brussels Convention shortly before it was finalised. Under this provision, the system as set up may be evaluated at the request of a contracting state and in any case ten years after its implementation (Article 53). A similar provision should be inserted into the proposed regulation. However, in the Committee's view, this evaluation should take place after five years.

Brussels, 26 January 2000.

The President

of the Economic and Social Committee

Beatrice RANGONI MACHIAVELLI

Opinion of the Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — The European Airline Industry: from Single Market to Worldwide Challenges'

(2000/C 75/02)

On 20 May 1999 the European Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned communication.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 December 1999. The rapporteur was Mr von Schwerin.

At its 369th plenary session of 26 and 27 January 2000 (meeting of 26 January) the Committee adopted the following opinion with 116 votes in favour and three abstentions.

1. **Introduction**

1.1. In its Communication The European Airline Industry: From Single Market to Worldwide Challenges the Commission looks at the current state of the European airline industry, the need for continuing improvement of the competitiveness of European airlines and the past ten years of liberalisation of air transport.

1.2. The aim of the communication is to assess the progress made and to identify the initiatives which can contribute to the competitiveness of the industry.

1.3. The Commission considers that European airlines have developed innovative strategies in order to adapt themselves to market growth and competition challenges. During the last decade they have achieved considerable productivity improvements, which now permits the sector to create new jobs. However, the sector still suffers from a high degree of fragmentation and financial fragility when compared to its main competitors, notably North American carriers.

1.4. Liberalisation and globalisation make the market increasingly competitive and require airlines to undertake large restructuring efforts.