

Recent Developments on the Reform of Insolvency Law at European Level



By Juan Ferré

Jones Day
Madrid, Spain

In 2012 the European Commission launched a legislative initiative aimed to amend the Regulation (EC) No 1346/2000 (“European Insolvency Regulation” or “EIR”). The initiative followed a report previously issued in October 2011 by the Legal Affairs Committee of the European Parliament with recommendations to the Commission on the reform of insolvency proceedings in the context of EU Company Law. The report was backed by the Plenary of the Parliament in October 2011 and its author was deputy Klaus Lehne (“the Lehne Report 1”). The main conclusion of the Lehne Report 1 was that there were certain areas of insolvency law where harmonization was worthwhile and achievable. The European Commission set up several tools to help with the drafting of a legislative proposal (i.e. an expert group, a consultation and a report on the application of the Regulation). On December 12, 2012 the EC published a legislative proposal containing several modifications of the EIR (the “Legislative Proposal”). The main elements of the proposed reform are: (i) the extension of the scope of the concept of insolvency proceedings to include hybrid and pre-insolvency proceedings; (ii) the enhancement of the definition of COMI; (iii) the improvement of secondary proceedings as a tool to facilitate the restructuring of companies at European level; (iv) the introduction of several tools aimed to facilitate the publication of insolvency proceedings and the lodging of claims; (v) and the creation of a specific framework to deal with the insolvency of a group of companies while maintaining the entity-by-entity approach.

After publication of the Legislative Proposal the the European Parliament initiated a process seeking to pass the proposed reform by mid 2014. On January 15, 2013 a Committee referral was announced in Parliament and a first reading of the Legislative Proposal was conducted. On June 6, 2013 a debate in Council took place to discuss on the proposed reform. On September 11, 2013, a draft report was issued by the Committee on Legal Affairs on the Legislative Proposal. The author of this report is Klaus Lehne (“Lehne Report 2”). The Lehne Report 2 backs most of the changes to the EIR proposed by the European Commission but makes several amendments to the Legislative Proposal.

One of the main amendments of the Lehne Report 2 to the Legislative Proposal address the important issue of the

scope of the EIR. As explained above one of the most relevant features of the Legislative Proposal is the proposed extension of the application of the EIR to hybrid and pre-insolvency proceedings in which the debtor restructures its debts without necessarily being insolvent or in which court involvement is only limited to appellate functions. The reason for this amendment was to include in the scope of the regulation proceedings such as the English Scheme of Arrangement or the Spanish “Acuerdos de Refinanciación”, which nowadays fall beyond the definition of insolvency proceedings under the EIR. The Lehne Report 2 aims to reduce the scope of the EIR to situations that involve a debtor in severe financial distress and which are court driven. The rationale behind this change is claimed to be avoiding forum shopping by the insolvency officer and to enhance legal certainty.

The Lehne Report 2 also address the issue of COMI. Pursuant to the Legislative Proposal the presumption that the COMI is at the place of a company’s registered office cannot be rebutted if the bodies responsible for its management and supervision are in the same place as its registered office and management decisions are taken there in a manner ascertainable by third parties. The Lehne Report 2 deletes this amendment in an attempt to make the definition of COMI more consistent with the relevant ECJ case law.

The Lehne Report 2 makes some amendments to the issue of synthetic secondary insolvency proceedings with the intention of enhancing the protection available to local creditors. The most relevant amendment of the Lehne Report 2 is the introduction of measures to co ordinate group insolvency proceedings. The Legislative Proposal proposed the coordination of group company insolvencies through the introduction of cooperation and communication obligations between courts and liquidations. The Lehne Report goes far beyond that. It adopts one of the proposals made by INSOL Europe, proposing a group coordination proceeding with the appointment of a co-ordinating insolvency representative who must identify and outline recommendations for the coordinated conduct of insolvency proceedings and to present a group coordination plan for the resolution of the insolvencies of other companies in the group.

The Legislative Proposal and the Lehne Report 2 are scheduled to be discussed in a plenary sitting of the Parliament that is due to take place on February 2, 2014. If this schedule is adhered to, a final text may be approved and published by mid 2014.

It is also worth noting that in parallel to the reform of the EIR the Commission has launched a public consultation on a new European approach to business failure and insolvency. This initiative has been taken as a part of a more ambitious plan to establish bases common to all EU Member States for the restructuring of companies at a European level. 🇪🇺