THE EUROPEAN INSOLVENCY FRAMEWORK ON THE RESTRUCTURING OF ENTERPRISES CURRENT STATUS AND ONGOING DEVELOPMENTS

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1. Introduction

It is well established that the first attempt of the European Commission to create an instrument dealing with insolvency proceedings was considerably restricted in scope. Among others, the Regulation 1346/2000 does not contain any provision dealing with the restructuring of enterprises. Given the present financial circumstances, when enterprises are facing the danger of insolvency, as never before in the past, there is a huge need for an instrument providing for restructuring procedures1, so that their early recovery to materialize. In this context, the main issue of the present paper is the Commission's proposals on the amendment of the existing Regulation on Insolvency and in particular the proposals relevant to restructuring of enterprises.

The first part of the essay presents in shorthand the scope and the deficiencies of the existing Regulation (1346/2000) regarding insolvency, so that the reader gets informed about the issue at hand. The second part outlines the legal framework proposed for restructuring proceedings, which are so far regulated solely by national rules. To end with, the writer refers to how the proposed amendments handle restructuring procedures of national origin and introduce them to the amended Regulation.

2. Overview of the Regulation 1346/2000

The territorial principle was for many years the prevailing standard towards European insolvency law2. Member states considered that their sovereignty should prevail over unified rules towards the substantive provisions of insolvency law. In particular, the provisions so far adopted deal solely with international jurisdiction, the recognition of foreign decisions, whereas international private law rules are

1 Commission, Communication to the European Parliament, the Council and the European Parliament, A new European approach to business failure and insolvency of 12.12.2012, COM(2012) 742 final *(hereinafter Commission's Communication of 12.12.2012, 742),* p. 2

2 Kawano Masanori, Transnational Cooperation for Cross-Border Business Bankruptcy, in Stürner Rolf & Kawano Masanori, Cross Border Insolvency, Intellectual Property, Litigation, Arbitration and Ordre Public, Vol. V., 2011, Mohr Siebeck, p. 4

as well found in Regulation 1346/20003.

The lack of unified provisions regarding the restructuring of enterprises leads to many inequalities, given that enterprises facing the same financial difficulties may be able to resort to certain proceedings in one country, whereas in another country they do not have the same options4. Another crucial issue caused by the absence of unification in this sector is that the effects of many pre-insolvency proceedings are not recognized in other member states5. Moreover, many companies choose to move their COMIs in order to take advantage of the restructuring proceedings of different states[6], which is not illegal according to the ECJ, however by no means does it act in favour of the internal market.

Eight years after the entry into force (2002) of the Regulation, the Commission reviewed its operation. It came out of the review, that the Regulation lacked competence to comply with modifications of domestic origin and ongoing EU targets especially with regard to the effort of rescuing enterprises[7]. The lack of restructuring proceedings is the main issue addressed by the Commision's Proposals.

3.The proposed amendments

3.1 Overview

Overall, the evolution of the proposed amendments for the new European restructuring framework began with the proposals of the Commission of 12.12.2012, where the Commission highlighted – among others – the existent differences of restructuring proceedings among member states and proposed for some unified rules. The most recent initiative was the Commission's Recommendation of 12.03.2014, which constitutes a summary of the previous proposals and writes several additional provisions regarding restructuring that should be included in a revised Regulation. It also proposes for a broadening in scope of the provisions regulating European insolvency[8], including – among others – the

3 Stadler Astrid, International Jurisdiction under the Regulation 1346/2000/EC on Insolvency Proceedings, in Stürner Rolf & Kawano Masanori ibid., p. 14

4 Commission's Communication 12.12.2012, 742, p. 6

5 Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings of 12.12.2012, COM(2012) 743 final *(hereinafter Commission's Report of 12.12.2012, 743),* p. 6

6 Commission's Report of 12.12.2012, 743, p. 10

7 Commision, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings of 12.12.2012, COM(2012) 744 final *(hereinafter Commission's proposals of 12.12.2012, 744),* p. 2

8 Commission's Recommendation on a new approach to business failure and insolvency of 12.3.2014, C(2014) 1500 final *(hereinafter Commission's Recommendation of 12.03.2014, 1500),*

pre-insolvency/restructuring proceedings[9].

The main differences between the national rules of member states regarding restructuring refer to the entities, which can propose the plans, to the adoption, the formation and the proceedings for acceptance of the proposed plans[10]. According to the Commission, these discrepancies constitute – among others – a disincentive for enterprises willing to establish in other member states, consequence which affects negatively the proper functioning of the internal market[11]. The aim of the new proposals is to provide European businesses with tools able to make their early recovery feasible. Additionally, the proposals act as a stabilizing and supportive factor of the internal market, given that they give incentives for business initiatives, provided that the creditors become more willing to invest when they feel that their money will not be easily lost[12].

3.2 Analysis of the proposals

According to the Commision's text, enterprises should have the ability to restructure at an early stage, before recourse to formal insolvency proceedings and without costly and time-consuming procedures[13]. The restructuring plan should be thorough enough, providing for all the necessary elements needed in the relevant procedure[14].

According to the proposed provisions, the debtor will be able to request a stay of individual enforcement proceedings for a four-month period – able to be prolonged by twelve months[15] – so that he can build his restructuring plan and enforce it effectively[16]. Member states – in case of adoption of the Proposals – will be obliged to facilitate the effort of the restructuring plan, aiming both at the saving of the business and at securing the rights of debtors and creditors.

The Commission suggests that debtors should be able to launch their restructuring without recourse to court proceedings, in order to avoid additional costs and time-consuming procedures[17]. However, the court confirmation of a restructuring plan is obligatory when rights of the creditors may be hampered[18]. The Com-

Recital 15
9 Commission's Proposals of 12.12.2012, 744, p. 5
10 Commission's Communication 12.12.2012, 742, p. 7.
11 Commission, Recommendation of 12.03.2014, 1500, p. 2 .
12 Commission's Communication 12.12.2012, 742, p. 3.
13 Commission's Recommendation of 12.03.2014, 1500, Recital 18 & para. 6.
14 Commission's Recommendation of 12.03.2014, 1500, Recital 19 & para. 15.
15 Commission's Recommendation of 12.03.2014, 1500, para. 13.
16 Commission's Recommendation of 12.03.2014, 1500, paras 10ff.
17 Commission's Recommendation of 12.03.2014, 1500, Recital 17 & para. 8.
18 Commission's Recommendation of 12.03.2014, 1500, Recital 19 & para. 7 & paras 21ff.

mission's Recommendation provides that creditors should be provided with the capability of questioning the restructuring plan, by issuing an appeal, the appeal not suspending the enforcement of the restructuring plan notwithstanding[19].

As far as the competences of the liquidators[20] are concerned, the Commission provides for several initiatives that they can undertake with a view to restructuring. In particular, the Commission provides for the ability of the liquidators either of a group of companies[21] or of the same company before main and secondary proceedings[22] to cooperate with regard to proposed restructuring plans, so as the restructuring of the group as whole to become feasible. Moreover, according to Recital 20a[23] and Art 42d(1)c[24] a liquidator is able to propose rescue plans in court proceedings even for another member of the same group of companies. In this context the "intervening" liquidator, which holds the biggest interest for restructuring of the companies concerned can propose a restructuring plan that may become adopted by the court even in case the liquidator before court is opposed to that plan[25]. However, the provision sets as a prerequisite that the national law of the debtor allows for such a proposal. It is submitted that this provision does not work efficiently towards the unification of insolvency law, since recourse to national rules is required.

As far as the participation of creditors in the procedure under examination is concerned, the Commission suggests that creditors are as well able to propose for a restructuring plan either they are secured or not[26]. It is provisioned, though, that creditors with different rights should be treated in a different manner. In particular, they should be separated into classes according to the securities they hold[27].

To end with, according to the Regulation now applied, when a court of a member state is seized for secondary proceedings, in case it accepts its jurisdiction, the secondary proceedings shall be winding up proceedings[28]. The latter does not apply in the Commission's proposals, since according to them, the court second seized is able to choose among all the procedures available at the member state

19 Commission's Recommendation of 12.03.2014, 1500, para. 24.
20 For the content of the liquidator's competence, recourse to the relevant Annex (Annex C) of the existing Regulation is necessary. It is crucial to note, though, that the term refers to people intervening before or after the launching of formal insolvency proceedings.
21 Art 42a(2)b, Commission's Proposals of 12.12.2012, 744, p. 31
22 Art 31(2)b, Commission's Proposals of 12.12.2012, 744, p. 27
23 Commission's Proposals of 12.12.2012, 744, p. 17
24 Art 42d(1)c Commission's Proposals of 12.12.2012, 744, p. 33
25 Commission's Proposals of 12.12.2012, 744, p. 9
26 Commission's Recommendation of 12.03.2014, 1500, Recital 19 & para. 16ff.
27 Commission's Recommendation of 12.03.2014, 1500, Recital 19 & para. 17
28 Art 3(3) Reg 1346/2000

having jurisdiction, including restructuring[29].

The appointment of a mediator or a supervisor is also provided as a capability for the smooth evolution of a restructuring procedure[30].

The effects of the adopted restructuring plans differ according to the procedure they were adopted with[31].

Overall, the Commission's proposals aim at the creation of a «business-friendly» environment, since they provide enterprises with a «second chance». In the same time, they work in favour of creditors, who will not face the same peril of losing their money easily, given that bankruptcies will be limited[32]. Nowadays there are a lot of domestic jurisdictions which provide for the ability of a negotiation between debtors and creditors for the rebuilding of the functions of an enterprise so that its bankruptcy to be abolished[33]. In that sense, it is normal that the European Parliament supported the Commission's Proposals by a remarkable majority on 5 February 2014[34]. The latter means that one of the two European co-legislators has accepted the proposals and what remains is the joint adoption by the Parliament and acceptance by the heads of states within the European Council.

4. The Commission's stance towards restructuring proceedings of national origin

The Regulation – as it is now or as it will evolve after the adoption of the amendments – is supplemented by Annexes. Those Annexes refer – among others – to the naming of the insolvency proceedings in each member state. Recital 31[35] of the Commission's proposals writes that, when the member states adopt certain insolvency proceedings, the Commission should be able to adapt the Annexes by amendments to the Regulation by way of delegated acts under Art 290 TFEU. It lies with the Commission to verify whether those national proceedings, incorporated in the Regulation, fulfill the criteria set in the Regulation.

Among the procedures, which will be named in the Annexes, are those regulating restructuring. It is submitted that the unification aimed will be at a large extent developed through this procedure, since national proceedings of each member

29 Commission's Proposals of 12.12.2012, 744, p. 8
30 Commission's Recommendation of 12.03.2014, 1500, para. 8ff.
31 Commission's Recommendation of 12.03.2014, 1500, p.9, paras 25-26
32 European Commission, Memo: Insolvency: European Parliament backs Commission proposal to give viable businesses a 'second chance', 05.02.2014, *http://europa.eu/rapid/press-release_MEMO-14-88_en.htm* (accessed in 17.12.2012)
33 Commission's Proposals of 12.12.2012, 744, p. 6
34 European Commission, Memo of 05.02.2014 ibid
35 Commission's Proposals of 12.12.2012, 744, p. 18

state regarding restructuring of enterprises will be put under the same umbrella. Hence, the peril of non-recognition of restructuring plans in different member states will be abolished, or at least limited.

5. Final remarks

It comes out of the above analysis that the European Commission tries to promote the appropriate legal framework for the survival of viable businesses, regardless of the member state they are situated. It is submitted that the unification of insolvency rules within the internal market constitutes an absolutely necessary step towards a stable environment for enterprises, either they act solely on a national level, or – and most importantly – they operate in more than one member states. The European Institutions should adopt the provisions as quickly as possible so that the enterprises and other entities connected with them, such as their creditors, to be able to re-launch their normal functioning.