6th European Insolvency & Restructuring Congress 29 & 30 June 2017, Brussels

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The 6th European Insolvency & Restructuring Congress took place in Brussels on 29 & 30 June 2017. The congress was organised by the Insolvency Law and Restructuring section of the German Bar Association (DAV) through its Working Group Europe and in cooperation with INSOL Europe.

The congress started with a keynote speech of Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality. Firstly, the Commissioner reminded the added value of the EU action in insolvency matters, in particular with the entry into force of the (recast) insolvency Regulation on 26th June 2017. Secondly, emphasis was put on the main themes and on the main objectives of the European Commission's Directive proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures published on 22 November 2016 (hereafter the 'Directive proposal'). The Commissioner also informed the audience that the Council of the European Union made a call for more flexibility on certain aspects of the Directive proposal while considering it at the same time as a priority.

Prof. Dr. Reinhard Bork then delivered a lecture to put the Directive proposal into the context of the 'rescue culture' adopted by almost all Member States in the European Union. Prof. Dr. Bork first considered that the Directive proposal was focusing on a 'high-speed' harmonisation of national procedures applicable to solvent entities. Then, he described the core features of the Directive proposal and its core deficits, in particular the lack of justification for interference in creditors' legitimate rights in the restructuring (not insolvency!) world. Prof. Dr. Bork deplored also the deficit of the Directive proposal in terms of concepts and definitions of key concepts such as 'likelihood of insolvency'. Prof. Dr. Bork also underlined that some explanations would be necessary to justify the suggested changes in the priority rights in national laws (the goal of 'economic efficiency' being not sufficient) and to make clearer that some options were included into the Directive proposal to save the company and not the debtor (e.g. sell of assets). Prof. Dr. Bork deplored finally the risk of a race to the bottom due to the time pressure on the legislative process, and especially with regard to the high degree of divergence in national laws.

It was then the turn of Dr. Andreas Stein, Head of the Civil Justice Unit at DG Justice to update the audience on the adoption process of the Directive proposal, and in particular following the outcomes of the last meeting of the Council of the European Union. More precisely, the audience was told that the Council made a call for more flexibility on certain aspects of the Directive proposal (regarding the appointment of IPs on a case-by-case basis and the involvement of courts) while expressing its main support to the 'debtor-in-possession' principle. Dr. Andreas Stein also highlighted the fact that the Council was considering the Directive proposal as a priority and that the legislative text could be adopted under the Bulgarian presidency (January-June 2018). Bearing in mind the deficits underlined by Prof. Dr. Bork, Dr. Andreas Stein informed the audience that more time for substantive discussions would be allocated as priority

has been attributed to this project as well by the Estonian presidency (July-December 2017). Dr. Andreas Stein also referred to the agenda of the European Parliament which held a meeting on 12 July 2017 and to the draft report of the Rapporteur which would be available in September 2017. The debate within the European Parliament could then start early 2018. Following this agenda, a political agreement could be reached under the Bulgarian presidency in June 2018.

When entering into the debate on the benefits and the weaknesses of the Directive proposal, Dr. Andreas Stein reminded that the Directive proposal was drafted following the results of the discussions of a group of experts and a group of stakeholders and on the basis of the outcomes of both an economic and a legal study mapping national insolvency laws. In response to the ground of the lack of philosophy, Dr. Andreas Stein considered that the aim of the Directive proposal was not to build a European philosophy of restructuring but instead to promote the philosophy of pragmatism at a national level. This is why the proposal was built on national efficient proceedings and did not aim to cover all aspects of national insolvency laws. In short, Dr. Andreas Stein defended the view that the European legislator focused on minimum standards which could work in practice (e.g. avoid value destruction) rather than simply designing a 'good law' on paper. Indeed, the European Commission services did not want to interfere with national insolvency laws which work well but rather to act where there was a room for improvement. This is why there was no proposal for a common definition of insolvency at EU level due to the high divergence between Member States on that point. By contrast, the Directive proposal would aim at overriding the academic debate and to ensure that rights of both creditors and debtors are equally protected (e.g. debtor can access a procedure while not insolvent and creditors can be ensured of the protection of new financing).

In conclusion, Dr. Andreas Stein confirmed that the European Commission services are constantly open for discussion aiming at implementing a European 'rescue' approach in all Member States.

After the coffee break, the participants were updated on the pending legislation in Italy. The new piece of legislation complied already on many aspects with the major principles of the Directive proposal that is, itself, mainly based on the 2014 European Commission Recommendation. This is the reason why the Directive proposal was very welcome in Italy, in particular with regard to the intention of its authors to solve the non-performing loans (hereafter 'NPLs') problem. Rita Gismondi explained that this issue was critical due to the fact that banks still remain an importance source of financing for companies in Italy. While the legislative reform process has started since 2005, new pieces of legislation were adopted in Italy on a regular basis to stick to the European rescue approach. Rita Gismondi gave some examples, namely an automatic stay (60 to 120 days) available to distressed debtors or to debtors in crisis, the delay for sending the insolvency declaration and the introduction of different preventive remedies (such as out-of-court restructuring plans subject to judicial validation, the -quick and confidential - intervention of an independent expert (mediator), new exceptions in relation to avoidance actions or the protection of new and interim financing…). Another feature of the rescue approach adopted by the Italian legislator was the use of the 'composition with creditors' to ensure business continuity whereas it was mainly used in the past for liquidations only. In conclusion,

Italy has adopted new regulations following the need to update its national legislation from a legal and an economic standpoint to attract investments but also to improve the quality of credit.

The emphasis was then put on the current discussions in Germany which involved financial institutions, insolvency practitioners (hereafter 'IPs') and the German legislator. It was explained that the main concern was to explore the reasons why lenders would create NPLs and how the Directive proposal could introduce relevant provisions to solve them (e.g. by limiting the scope of the stay or by limiting its length). Peter Hoegen welcomed the intention of the authors of the Directive proposal to encourage the amicable sale of a company as a going concern as part as the restructuring process. However, he also deplored some inconsistencies in the Directive proposal, and in particular the one in relation with the best interest test used for the valuation process (liquidation or rescue value). On that point, Peter Hoegen wondered whether this was the best applicable value test. In addition, he made some observations regarding the lack of details in the text with regard to the confirmation of the plan by a court, and especially on the form and conditions that a court has to examine to confirm a preventive restructuring plan. Uncertainties were also highlighted on the need for an independent expert to be involved for the protection of transactions or/and finance and the interpretation of 'fraud' or 'bad faith'. Peter Hoegen also deplored missing provisions in the Directive proposal in relation to the international jurisdiction and the treatment of group guarantees. In conclusion, Peter Hoegen called for some propositions to be (re)considered and for the extension of some proposals already included into the Directive proposal.

Before the closure of the morning panel session, Dr. Andreas Stein reminded that the scope of the Directive proposal was not limited and that, for example, the door was not closed for debtors suffering from difficulties other than the financial ones only. It was also reminded to the audience that relevant or efficient safeguards should be included as the more complex the situation is (trade creditors, landlords, workers…) the more delicate the balancing exercise will be. In addition, Dr. Andreas Stein made it clear that the Directive proposal aimed mainly at ensuring that the Member States have minimum standards in their legislation while keeping sufficient flexibility to adopt the adequate solution under their own national law. Dr. Andreas Stein then underlined that the Directive proposal contained enough flexibility to ensure that common principles are to be adopted by all Member States while the details still remained at the discretion of each national legislator. In that connection, it was reminded that the provisions relating to the extension of the stay (general or targeted) will remain the sole decision of each Member State.

The congress continued in the afternoon by three workshops which gave a chance for the delegates to initiate an interactive discussion.

The first workshop aimed at identifying and discussing the key features and principles included into the Directive proposal, namely efficiency, transparency, fairness and sustainability. On efficiency, the main conclusion reached by the panellists was that the Directive proposal would be an efficient tool for companies and in particular for SMEs. On transparency, the discussion focused mainly on its meaning in particular in the UK in relation to the licencing and professional conduct of IPs and the twilight zone for directors. By contrast, it was expressed that a certain degree of

confidentiality was needed for preventive restructurings. On fairness, it was pointed out that such a principle was not included *per se* in the Directive proposal while it should be discussed in line with the cross-class cram down mechanism and how to improve that mechanism. Then was evoked the statement of the Association of Insolvency Office Holder's National Organisations ('EIP') to put emphasis on sustainability which is facilitated by the Directive proposal as the debtor is to be solvent to benefit from an early restructuring process.

The second workshop focused on the chances and risks of virtual secondary proceedings under the European Insolvency Regulation (recast). It began first with an overview of the new functioning of secondary proceedings under the recast EIR which was followed by a discussion on practical issues. The view was expressed that the scope of the 'virtual' proceedings were adequate only for bigger companies, in particular for a global sale of assets. The successfulness of such mechanism would imply however a well prepared petition for filing for the opening of main insolvency proceedings. The panellists drawn indeed the attention of the practitioners on the necessity to have in their hands the book value so as to deliver crucial information for the creditors. The objective is to obtain in a very short period of time (one-two months) the approval of local creditors who are subject to their national law (priority rights). Emphasis was also put on the need for local representatives to be informed on the (transparent) process to prevent any undue risk for the implementation of the designed strategy. Consequently, the question arose whether art. 36 EIR recast would be applicable in the absence of any distributions (restructuring plan) and to what extent the insolvency practitioners would be liable at EU level under the paragraph 10 of that article.

The third and last workshop highlighted the differences in terms of functions between insolvency administrators and restructuring professionals in preventive restructuring proceedings. The view was expressed that there is a future role for insolvency administrators through an extension of their traditional function at national level. Such professionals should not be put aside considering their great knowledge in relation with insolvency proceedings, which can be highly beneficial in preventive restructurings. The role of creditors was also underlined as well as the involvement of courts. In addition, a plea was made for more concentration or improvement in the Directive proposal regarding the valuation issues. During the workshop, a lively debate also took place about the efficiency of insolvency laws with a comparison between the EU and the US. Finally, it was concluded that lawyers would mainly benefit from these changes while creditors would mainly pay for it.

The first part of the second day of the congress was dedicated to the last CJEU case law. Lucas Kortmann made first a presentation in which he critically commented the most important cases delivered by the CJEU. Questions were raised in particular with regard to the case on employees' rights where prepacks have been designed to produce effects after a declaration of insolvency (*Federatie Netherlandse Vakvereiniging*, C-126/16). In that case, the CJEU sought to ascertain whether the Council Directive 2001/23/EC of 12 March 2001 must be interpreted as meaning that the protection of workers was maintained in a situation in which the transfer of an undertaking took place in the context of a 'pre-pack' prepared before the declaration of insolvency but put into effect immediately after that declaration. To that question,

the CJEU answered to the positive in considering that in such a situation employees' rights may be maintained. In other words, the CJEU considered that a declaration of insolvency in the context of a 'pre-pack' may not satisfy all the conditions required by the Directive, and in particular (1) the requirement of a procedure leading to a liquidation of the assets of the transferor compared with a 'pre-pack' procedure aiming (only) at maximising satisfaction of creditors' collective claims and (2) the requirement of a supervision of the insolvency procedure by a competent public authority compared with a 'pre-pack' procedure involving only a public authority at an ultimate stage. The debate focused then on the distinction of a liquidation process involving a company *as per* a legal person compared to situations where viable units of a business were given the possibility to survive by a global or partial sale of assets. It was also argued that such an approach would be in line with the one contained into the Directive proposal (art. 2(2)) which included into the meaning of 'restructuring' "*the sales of assets or parts of the business, with the objective of enabling the enterprise to continue in whole or in part*" and not only the restructuring of financial debts. Lucas Kortmann then commented the interpretation of Article 13 EIR by the CJEU in the context of an Italian case (*Vynils Italia SpA*, C-54/16) and in particular concerning an action to set certain transactions aside and for the repayment of sums which were paid in the six months preceding the declaration of insolvency. In that case, if Article 13 EIR was broadly interpreted by the CJEU, it was however reminded that the application of this article could not in any case circumvent the rules on insolvency for abusive or fraudulent ends.

The update on CJEU and other landmarks decisions on European Insolvency Law was then followed by the banks' view on the changes in insolvency laws. To that end, Dr. Thomas Bauer focused on the latest developments on Swiss restructuring law which aimed at enhancing the prevention of debtors' crisis as well as at facilitating the recognition of foreign procedures (re the requirement of reciprocity). Dr. Thomas Bauer offered also a Swiss financial market restructuring law overview and raised the question of the need for special insolvency rules for banks as regards the complexity of banking regulations. It was concluded that the 'common' insolvency law should have an eye on banking insolvency and *vice-versa* bearing in mind that 'bankruptcy' can still remain a clean option to exit the market. Dr. Thomas Bauer concluded on the need to create a dialogue between authorities and practitioners through the contribution of academics to complete the Basel III standards and to ensure a stable financial system.

The conference ended with a focus on the potential effects of Brexit on European cross-border insolvency law and possible solutions in the case where will be no agreement by May 2019. In such a case, the reciprocity between Member States will no longer exist unless otherwise agreed between the UK and the EU. However, other solutions were suggested by the participants. Other tools that could be used to handle cross-border insolvency procedures involving the UK were indeed evoked. Putting aside the political controversy, Mr Justice David Richards first underlined the long lasting tradition in the UK with regard to the recognition of foreign proceedings. In addition, the adoption of the UNCITRAL Model Law (hereafter the 'Model Law') permitted to enlarge the possibilities which would not have been possible on the basis of the sole Common Law while the universalism principle was reaffirmed recently by the UK Supreme court on the basis of the IA s.426. Although the 2006 Cross-Border Insolvency Regulations ('CBIR') implemented the Model Law into the UK

legislation, the discretion of the UK courts remained however possible for foreign proceedings not qualified as main foreign proceedings. In other words, the fact that proceedings would be opened in a country which had not adopted the Model Law would not have any incidence on the recognition of those proceedings in the UK. By contrast, as far as other Member States did not have the same tools in their national legislation (IA s.426 or Common Law) and that only some of them have adopted the Model Law, uncertainty remained for the UK proceedings to be recognised on the continent. Joining the EFTA or being part of an agreement like the one existing between Ukraine and the EU were other options which were put on the table (WTO rules being unanimously excluded). Besides, Mr Justice David Richards was of the view that there was no certainty with regard to a preventive restructuring scenario depending whether those proceedings fall or not into the scope of this international instrument. For Chris Laughton, twenty-seven separate agreements would be necessary to deal with cross-border situations involving the UK. Following this statement, the participants discussed the problems that IPs and other stakeholders would face from such a one-by-one solution. As far as Germany was concerned, Frank Tschentscher made it clear that recognition of foreign proceedings would be possible under the scrutiny of the German courts so as to ensure that German private international law requirements or the five procedural civil tests were met. Robert Van Galen reminded that there were no legislative provisions on recognition in the Netherlands but only a practice based on case-law of the Supreme court which was rather restricted but which has been more flexible since the *Yukos* case (especially in relation of the violation of the public policy). In short, every action would depend on a decision of a court delivered a number of years after the opening of the litigious insolvency proceedings, which did not act in favour of legal certainty when recognition of foreign proceedings were foreseen in the Netherlands.

At this stage, Frank Tschentscher reminded the reason why there were still remaining countries which have not adopted the Model Law: it is just because the European regulations had already ‘done the job’. Then the main question which arose was whether the Lugano Treaty or any other agreement could ‘do the job’. The question turned on the meaning of a ‘bilateral agreement’ (UK/EU or UK and each Member State) and the difficulties to ensure a common interpretation in the EU in such conditions. The debate then focused on the recognition of UK insolvency proceedings in the EU after Brexit, and especially schemes of arrangements. Almost all the participants recognised that schemes were an efficient international solution for international problems (for groups aboard and for the protection of the sophisticated financial creditors). Then participants disagree on whether such schemes would be recognised either under the Lugano Treaty, either the European Regulations (Brussels/Rome) or under each national private international law, relying in the latter case on a strengthen court-to-court cooperation and communication.

Daniel Fritz closed the conference in expressing the view that the EU would certainly need more solidarity after the Brexit episode and that the priority attributed to the Directive proposal by the European Council was welcomed to improve both international and national law and practice.

More information about the Congress is available at:
http://arge-insolvenzrecht.de/de/aktuelles