

# Love me tender: How a project rocked INSOL Europe

Michael Thierhoff presents to us an eyewitness account of the machinations behind tendering for and successfully delivering a report for the European Commission



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## The idea

The European Commission in Brussels engaged in the reform of the European Insolvency Regulation in 2012. The goal of the reform was to adapt the Insolvency Regulation to the changes that had occurred over the last 10+ years and to strengthen the rescue culture in Europe. The Commission was unhappy however that the European Insolvency Regulation was limited to cross border insolvencies.

With the implications of the financial crisis of 2008 still being unresolved in the majority of Member States, the Commission felt that pre-insolvency and rescue proceedings or personal insolvency proceedings ensuring that a business and an entrepreneur can have a fresh start and a discharge of debt within a reasonable amount of time should exist in all Member States. This was driven by the idea that a business rescue culture permitting to deal with corporate financial difficulties efficiently and consistently across Europe would clearly have a stabilising effect on the economies and would assist a speedy recovery of the economies across the European Union.

In an effort to chart the legal situation in the Member States and to determine potential benefits of a common approach of giving honest businesses a second chance, the Commission launched a consultation, expert hearings and a study on the matter.

## The project

As a consequence, the European Commission decided to commission a study which it somewhat unwieldy labelled: "Study on a new approach to business failure and insolvency - Comparative legal analysis of the Member States' relevant



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provisions and practices”. The information provided with the tender documents asked for two tasks to be completed.

#### **Task 1**

The contractor shall collect comparative legal data from Member States (it will not be imperative to cover all 28 Member States but as many Member States as possible taking into account different legal systems, recent reform trends, as well as population size. The number of such Member States and their representativeness will be criterion for awarding the contract.

#### **Task 2**

On the basis of the information set out above, the contractor shall make recommendations supported by arguments for establishing minimum standards for pre-insolvency proceedings.

Task 1 was accompanied by a list of almost 30 questions providing guidance of what information on legislation and actual application should be gathered. The tender was due to be submitted by lunch time on 20 September and the timeline given for the project was that a first draft

of the report was to be made available by 20 October and the final report was due on 20 November. During the term of the project, the successful bidder had to provide regular interim reports and to be available for weekly telephone conferences with the representatives of the DG Justice of the European Commission.

#### **Getting started**

It was on 5 September that the ball started rolling with INSOL Europe. On that day our then Vice President Robert van Galen advised the Executive and myself that the outgoing head of our academics group Prof. Stefania Bariatti had been approached by the DG Justice that the Commission was inviting interested parties to tender for a study on the Member States provisions and practices in dealing with reorganisations and insolvencies. The expression had to be received by the DG Justice no later than 9 September. With just 4 days to go, we looked around, exchanged a number of mails, had the odd telephone conference and in the end it was Stefania Bariatti, Robert van

Galen, Caroline Taylor and myself, Michael Thierhoff, assuring ourselves we do want to do it and we can do it.

Turnaround time was fast and on 11 September we received a full blown package labelled as an “Invitation to tender” from the Commission. It was then that we learned about the above identified tasks 1 and 2 and the timeline which called for the tender to be submitted on 20 September.

In INSOL Europe September is a busy month. With the Annual Congress rushing towards us, the 10 days given did not seem that long especially with the weekend in between and left with a task of motivating 28 experts. Experts, busy anyway and from 28 different jurisdictions. To attract their attention to join the team, committing to work on a project to further increase the profile of our organisation and with the little appealing prospect of receiving a fee that most of those high profile experts would likely view as a mere gratuity. I believe it was much to everyone’s surprise that the job turned out to be quite easy as the vast majority of those approached instantly agreed and already at this phase showed great enthusiasm.

Alongside with getting a team of 28 on board the steering committee made up of Stefania Bariatti and Robert van Galen together with project management in the persons of Caroline Taylor and I drafted and compiled a tender document that ended up having 92 pages. Needless to say, we had a lot of help from people around us, one needs to be named, which is Paul Newson who assumed the task of turning all of the very unique and individually looking CVs into a most presentable and uniform shape. As one may expect, it was the literal 5 minutes to 12 when we finally mailed our tender to the Commission, just in time to make the deadline. It was a quiet weekend with us keeping fingers crossed and quite a wait until on Wednesday, 25 September we finally learned from the DG Justice that we had been awarded the contract. This proved to be

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perfect timing by the Commission as on that night the Executive and Council of INSOL Europe had just gathered in the run-up of the Annual Congress in Paris to have dinner together.

**Team work**

We were aware of the challenging deadlines of the project, but it was of course the Annual Congress in Paris that drew all of our attention. Having lost four valuable days, it was on Monday 30 September when we hit the ground running and got the project going. In a staggered sequence we mailed out four questionnaires to all our team members in the 28 jurisdictions, collected and collated the responses. With the experience of other projects with a team that size we were anticipating some problems in collecting the responses on time and in due form. It was a welcomed surprise to see that this just did not happen. Post-due responses were really isolated exceptions and could all be collected with marginal efforts. And the responses we received were comprehensive and well prepared again requiring little follow-up. Still it was an enormous amount of information that we received and that our technical leaders Stefania Bariatti and Robert van Galen had to make their way through. At the end of the day we were looking at what made up 288 pages of fine print in the annexes to the final report of responses and remarks provided by the team members on the questions.

We maintained a close line of communication with the representatives of the DG Justice of the European Commission, namely Mihaela Carpus-Carcea and Jérôme Carriat, in telephone conversations and email exchanges. We shared the input received from the team with them, addressed their suggestions and comments to consider our clients expectations. To further assist this process we exchanged drafts of the report at a very early stage, participated in an expert hearing



on the subject matter on 18 November in Brussels and took the opportunity to have a face-to-face discussion on our project and its progress.

To assure that input from the several jurisdictions was properly reflected and also to encourage the full team to table their ideas and make use of their wealth of experience, an early draft of the report was circulated to all team members for review and comments.

To give the report a state-of-the-art-look and to have it properly edited and laid out we again relied on the assistance of

our chief eurofenix designer, Paul Newson.

Finally we very much appreciated that our client extended the deadline for the report to be submitted to 27 November. Just before the finishing line our translator delivered the requested French translation of the executive summary of our report. And as one would expect from a team of committed professionals we delivered our report on time late on 27 November. To be fair to the world there was a bit of sweat on all of our foreheads by that time.

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## The Closing

It is one of life's irritating logics that following a great rush there is a longer wait. Having submitted our final report we entered a much slower process of discussions with the recipients that resulted in two rounds of editing and slightly revised versions of the report being submitted on 18 December and finally on 19 February. The report was now finally accepted and approved by the DG Justice on 5 March. The details of our study together with the input received from the consultations and the expert hearings have been brought together by the team at the DG Justice to formulate a recommendation that has been adopted by the College of Commissioners on 12 March. Robert van Galen had the honour of presenting the study to the Greek Presidency Conference on the very day in Athens. The EU Commission took the decision to formulate a recommendation

rather than a directive against the background of a quite sizable number of Member States being in the process of revising their rules on restructuring and insolvency and considered it unwise to interfere with or interrupt such processes.

## Epilogue

Now that the sweat is dry, the reminder is not that hint of salt on our skins but rather the 335 page document containing the 40 pages of report and the 288 pages of collected responses right in front of us. A great achievement and the result of excellent team work. It felt good to be part of this enthusiastic team and everyone can be proud of what was accomplished. As part of the contractual agreements the copyright of the report lies with the EU Commission. We will however be allowed to use the report for internal purposes. The report will therefore be available on the INSOL Europe website in

full and a print version will be made available to members and attendees at the upcoming Congress in Istanbul. The report is a unique, condensed and comprehensive document providing insights into the current rules and laws and their application in the restructuring and insolvency world of the jurisdictions of all the 28 Member States of the European Union. Having completed all of that I think we all look jointly forward to similar projects and to occasions where we can show the strengths of our organisation and the wealth of skill and experience we can bring to bear in working with legislators in Brussels or elsewhere in Europe. ■



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