UEAPME[1] Position Paper on the Future of the European Insolvency Law

Please find below UEAPME's reply to the consultation on the future of the European Insolvency rules.

Types of proceedings covered

According to our experience, the fact that the Insolvency Regulation does not in principle apply to pre-insolvency or hybrid proceedings and that the effects of such proceedings are therefore not recognised EU-wide has not created problems so far. Moreover, UEAPME does not see the need for the Insolvency Regulation to accommodate national legal procedures which provide for the restructuring of a company at a pre-insolvency stage or which leave the existing management in place. We do not support the applicability of the Insolvency Regulation to over-indebted private individuals and self-employed persons.

International dimension of insolvency proceedings

According to our experience, the fact that the Insolvency Regulation does not contain provisions for the recognition of insolvency proceedings outside the EU or the coordination between proceedings inside and outside the EU has not created problems in practice.

Competent court to open insolvency proceedings

The Regulation makes it clear that forum shopping is considered undesirable. The wording of the Regulation on the point that proceedings should be possible only in the state of the debtor's COMI (the court of the centre of the debtor's main interest) caused considerable uncertainty after its introduction in 2000. The main reason for this is the desire of debtors to choose the jurisdiction that they considered most convenient or beneficial to them. Article 3.1's reference to the presumption that a company's COMI will be the location of its registered office has led in particular to many cases of contrived re-structuring and migration, as well as to conflicting interpretations on how much weight to attach to the simple fact of location of the registered office.

Judgements of the ECJ in Eurofoods[2] ,Staubitz-Schreiber[3] and Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA[4] have brought helpful certainty to how the Regulation should be interpreted. Though these judgements have clarified the way the courts are to interpret the Regulation, it would be helpful to update the definition of COMI for the acquired legal understanding. The Eurofoods decision in respect of the COMI appeared at the same time to strengthen the status of the presumption regarding the registered office, while at the same time stressing the importance of 'objective and ascertainable factors' to the determination of the factual situation. It would be helpful if an expanded definition could bring these two aspects together. It would also be helpful in this context if there were to be some reference in the definition to whether it is necessary for a COMI to be an 'establishment' (as opposed, potentially, to an 'address of convenience').

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

[2] Case C-341/04

[3] Case C-1/04

[4] Case C-396/09

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While it is evident that the Regulation discourages forum shopping and wishes to eliminate it, the question must still be addressed as to why debtors in one country should feel motivated to try to relocate or restructure their business so as to initiate insolvency proceedings in one country rather than another. A belief that procedures in one country are likely to be less punitive and transparent than elsewhere may well be one reason, but other reasons for carrying out migrations in the past have included less challenging approval thresholds (e.g. 75% in the UK as opposed to 95% for a comparative procedure in Germany[5]), attractive rescue options such as debt-equity swaps being available in another jurisdiction, and the desire to cover a series of group companies within a related procedure. An increase regarding forum shopping has been noticed also in Austria. An increasing number of debtors initially based in Austria use the possibility of this charge of residual debt though the UK insolvency proceedings. The experiences have been showing that several agencies offer packages in order to achieve discharge of residual debt in UK.

Given that company law in the EU is making it progressively easier for companies to re-locate their registered offices, both under the Mergers Directive and the SE Regulation, the issue of forum shopping in cross-border insolvency is not likely to go away. It would therefore be sensible to consider whether the various reforms which are being made to insolvency laws at national level are sufficient to address this issue, or whether there are still matters that need be dealt with at the EU level.

Groups of companies

It is right that the law should acknowledge the fact that group companies have a close legal and operational relationship with each other. There are likely to be, in group situations, many intra-group financial transactions, a unified management structure and internal control systems, and a single corporate culture. All of these factors will be relevant to the administration of an insolvent group. But we would not advocate that groups should be dealt with as a single entity in insolvency. Every limited company is a separate legal entity and unless the parent company guarantees the debts of the subsidiaries, their financial obligations to creditors will invariably be independent of the parent company and the other group companies, meaning that the administration of each should be dealt with separately. However, we would be in favour in principle of practical measures to reflect the special character of the group structure and to encourage or require the administrators of the parent company and the subsidiaries to communicate with and support each other.

Coordination between main and secondary proceedings

According to our experience, the system of secondary proceedings in general has been helpful to protect the interests of local creditors or to facilitate the administration of complex cases. Also the coordination between main and secondary proceedings can be considered as satisfactory overall. The duty to cooperate between insolvency practitioners works efficiently and effectively. UEAPME has not recognised any problems in respect of the fact that the Insolvency Regulation does not contain a duty of cooperation between the insolvency practitioners and foreign court or between the relevant courts themselves. However, this does not mean that the introduction of the duty as such would not improve the system.

With respect to main and secondary proceeding UEAPME sees the need to mention the cost issue. Article 18(1) provides that the liquidator in main proceedings is entitled to exercise all the powers he has under the law of the state of the opening of those main proceedings (as long as no secondary proceedings have been opened in that other state). Article 18(3) goes on to say that the liquidator must nevertheless comply with the law of each member state in which he operates. It is evident that this situation results in cross-border liquidators incurring substantial additional costs, since they are obliged to obtain legal advice in each of the states in which they

[5] Source : ACCA

operate, especially in relation to issues of employment law. Obviously, liquidators must comply with provisions of domestic law. But the cost issue must be seen as significant, not least because it reduces the returns for creditors, and suggests that attention must be given to ways of curbing administration costs in other ways.

Applicable law

UEAPME does not have particular remarks on provisions of *in rem* and detrimental acts. However, we would like to highlight some points when it comes to the issue **combating abuse**. In this respect, it can be said that the insolvency of a business will always result in losses to creditors, whether employees, trade suppliers or other agencies such as the state. Depending on the materiality of the losses they incur, the insolvency of a debtor entity can have a serious financial impact on the financial situation of the creditor. Many SMEs in particular tend to be heavily dependent on one or a small number of larger customers, so when that larger customer becomes insolvent it is common for the insolvency to trigger a chain effect on its supplier businesses. While it is reasonable to pursue policies which aim to give entrepreneurs a second chance, it should at the same time be borne in mind that a more lax regulatory attitude towards business owners could be abused.

Therefore, any reforms which are introduced, that aspire to encouraging a more rescue-orientated legal framework and culture should be accompanied by safeguards to ensure that the responsibility of directors and entrepreneurs is controlled, and that legal remedies are available to deal with those that take advantage of more lenient rules to the detriment of creditors. In this context there should be co-operation at the EU level to ensure that those convicted of insolvency related offences and disqualified from managing businesses in any one state are not able to do so in others.

The special nature of insolvency work also means that those supervising insolvency administrations should be competent and qualified to do this work. As well as taking steps to increase the efficiency of the administration of cross-border cases, the EU should consider introducing a requirement that those who take on insolvency cases have demonstrated competence in insolvency issues, are insured in respect of the assets they assume responsibility for and are regulated appropriately.

Recognition and enforcement

UEAPME members have not recognised any problems of recognition of the decision opening the proceedings or with the recognition and enforcement of further decisions during the proceedings. They are also not aware of cases where Member States has refunded to recognise insolvency proceedings or to enforce a judgment on the ground of public policy. However, it would be useful and future looking (either through amending the definition of “opening insolvency proceedings” or through other means) to clarify the problem what time the opening of insolvency proceeding is to be recognised in other EU Member States in case the national procedure provides the nomination of a provisional administrator prior to the opening of insolvency proceeding.

Publication of insolvency proceedings and lodgement of claims

UEAPME see the need to improve the situation on the publication of the decision opening insolvency proceedings.

We would support a solution where Member States are required to register the opening judgment in an insolvency register based on a common set of entries to facilitate cross-border searches and the interconnection of national insolvency registers. An EU wide register in form of an electronic portal which brings together the various national registers containing information in this respect would an appropriate mean.

UEAPME members have also experienced problems in general with the lodgement of claims in another Member State or with respect to the treatment of foreign creditors and also regarding the rules of the Insolvency

Regulation on the language issue. It is often not clear to especially smaller SMEs how they exactly have to proceed in case of an insolvency procedure of a foreign debtor, especially if the information on it is provided in the language of the Member State of the opening proceedings. Moreover, SMEs may be asked to provide a translation of their claim in the language of the foreign court, which obviously can lead to high costs. For this reason, UEAPME is in favour of the development of **a standardised form** (in combination with automatic translation based on the SOLVIT technology) that the court or insolvency practitioner can provide to foreign creditors with information on the conditions to lodge their claims. Similarly to this, the foreign creditor should be able to provide their claim in their own language, as it is foreseen today, or in English.

With respect to the costs of cross-border insolvency proceedings, the debt is considered as disproportionate. As already stated above, for SMEs it is difficult to know what their rights and obligations are under foreign law. Regarding smaller claims SMEs never take lawyers' advice. For this reason a comprehensive information note sent by the court or insolvency practitioners can provide foreign creditors with the necessary information on the conditions to lodge a complaint. Since the language issue is considered as one of the most costly, information notes in other languages, as already explained, would be a big step forward.

UEAPME would support an insolvency regime at reduced costs for certain debtors, in particular self-employed and SMEs.

Where rescue schemes sanctioned by the domestic legislation of one state are not covered by the Regulation, the debtor and creditors in other member states may not benefit from the protections that that legislation affords. This situation has the potential to prolong the debtor's state of financial uncertainty and to make it less likely that it will be able to re-structure itself and continue. The Commission would be entitled to view this as an issue which should be addressed in the context of encouraging entrepreneurial activity and safeguarding jobs. We see no reason in principle why the scope of the Regulation could not be extended to cover rescue procedures for individuals and businesses that are available under national law. It should be noted though that in some countries, such procedures are increasingly being initiated via non-court procedures in order to speed up recourse to insolvency protection and to reduce costs. Accordingly it would not be sufficient for any amended Regulation to cover only court-approved arrangements.

Other remarks

There are some sector-specific issues related to insolvency. In some countries some sectors which are often confronted with insolvency (e.g. construction sector) are benefiting from an "action directe". An in depth analyse of this principle, looking into all circumstances, would be useful in order to get a clear picture of the (positive) effects and to explore the possibility of extending this to other sectors.

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