

Are improvements to EU insolvency law required?

The European Commission has recently launched a consultation examining the current EU insolvency regime, ten years on from the introduction of the EU Insolvency Regulation (EUIR). This initiative is taking place in the context of the Commission's wider measures to promote "Justice for Growth". The consultation seeks input from stakeholders on how the EUIR is operating at present and seeks suggestions on how it can be improved. The consultation provides stakeholders with an excellent opportunity to participate and influence the development of insolvency law at an EU level.

Whilst the consultation recognises that the EUIR has already improved legal certainty and encouraged cooperation in cross border cases, it also recognises that there has been a considerable number of changes in the economic and political environment since its introduction. In particular, the consultation notes that, at a national level there has been an increase in the use of and a development of pre-insolvency techniques in many EU member states which focus more on protecting the debtor and seeking to rescue the business, as opposed to formal liquidation style proceedings. In addition, the consultation points to the changing business environment, including the recent financial crisis and the globalisation and relocation of businesses which international groups have to contend with. It highlights the fact that the current regime under the EUIR framework has created problems in its application as it tries to strike a balance between the universality of a debtor's insolvency, the territorial aspects of proceedings

and the disparity that arises from different national insolvency laws.

Key aspects

The consultation focuses on assessing the current effectiveness of the EUIR and highlights a number of issues as follows:

- it seeks views on the general effectiveness of the EUIR in facilitating cross-border insolvency proceedings, including whether they should be extended to govern parallel proceedings taking place inside and outside the EU;
- whether the scope of the EUIR is sufficient or needs to be expanded to include pre-insolvency proceedings and/or those where the management remains in place so that they benefit from recognition across the EU;
- whether the jurisdiction for opening main proceedings ought to be determined by the location of a company's "centre of main

Key issues

- Consultation on European Insolvency Regulation
- Is the current framework working?
- Is there room for improvement and modernisation?
- Responses due by 21 June 2012

interest" (COMI) and the fact that this is case-law driven at present and is sometimes problematic in practice;

- whether there are problems with the interaction between the EUIR and the Brussels Regulation;
- how the EUIR works in a multinational company group situation, focusing on whether the system of secondary proceeding has been helpful to protect local creditors or facilitate the administration of complex groups, and in particular whether the

duties for liquidators to co-operate go far enough, or whether a different approach to groups should be addressed in any revisions to the EUIR;

- how the EUIR interacts with other aspects of law, such as recognition, enforcement and national regimes, in particular do the protections for rights in rem and provisions on detrimental acts operate satisfactorily in practice;
- whether there are inefficiencies in national insolvency law;
- whether the absence of a mandatory publication of the opening of the procedure creates a problem in practice, or if other practicalities such as lodging of claims in foreign insolvencies have resulted in delays and high costs;
- whether the costs of cross border restructuring or reorganisation are disproportionate; and
- seeks suggestions for simplified insolvency procedures for small businesses at EU Member State level.

As it can be seen from the summary above, the consultation seeks out stakeholders' practical experiences of the current framework, and asks

respondents to consider some quite radical revisions to make cross border insolvencies more efficient and appropriate to deal with the demands of businesses operating on an international basis. But will this come at the expense of legal certainty and a potential erosion of creditors' rights?

As mentioned above the consultation provides stakeholders with an excellent opportunity to participate in and influence the development of insolvency law at an EU level. Clifford Chance with its global network of offices, will be calling on its specialists from around Europe to prepare a response to the consultation. We are also working with other professional bodies on their responses.

The consultation closes on 21 June 2012 and is available via the attached link: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=Insolvency>

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