DeutscherAnwaltVerein

Position Paper

of the German Bar Association (DAV) by the Legislative Committee "Insolvency Law" and the European Affairs Working Group of the Section of "Insolvency and Restructuring Law"

on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on Insolvency proceedings COM(2012) 744 final

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Introduction

The German Bar Association (Deutscher Anwaltverein – DAV) is a professional body comprising more than 67,000 German lawyers. Being politically independent, the DAV represents and promotes the professional and economic interests of the German legal profession.

I. Summary

The German Bar Association welcomes the proposed amendments of the European Insolvency Regulation as set out in the "Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings". As the German Bar Association agrees with the concept of broadening the scope of the regulation the Regulation should as well be used as a tool to harmonize national insolvency laws and to set standards on a higher level but not in a "catch-all" approach. With respect to the new rules on groups of companies, secondary proceedings and the effect on arbitration proceedings the German Bar Association recommends certain amendments of the draft in order to enhance the amended Regulation's efficiency.

II. General remarks

The German Bar Association welcomes the great efforts of the European Commission and the Vice-President of the European Commission, EU Justice Commissioner Viviane Reding and her team with regard to the modernization of the European Insolvency Law as set out in the "Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings".

As insolvency practitioners and counsels on insolvency law matters, we appreciate this as a great next step towards an EU-wide "rescue and recovery" culture in order to help companies and individuals in financial difficulties.

To reach this goal the German Bar Association agrees with the general areas in which the proposal foresees changes in the insolvency regulation:

The German Bar Association welcomes the proposals to clarify the jurisdiction rules, and for the improvement of the procedural framework for determining jurisdiction.

The European Commission is on the right path when looking for a more efficient administration of insolvency proceedings by abolishing the requirement, that secondary proceed-

ings must be winding-up proceedings, by improving the cooperation between main and secondary proceedings and by providing rules enabling the courts to refuse the opening of secondary proceedings, if this is not necessary to protect the interests of local creditors.
Although not of that high importance in Germany, the German Bar Association deems the enhancement of the publicity of proceedings and the legal framework for the lodging of claims as another step in the right direction.
Finally, the German Bar Association is very happy to see a new set of regulations for groups of companies in insolvency in the draft proposal. The German Bar Association totally agrees with the general concept of the European Commission introducing rules for coordination and cooperation only, but not for material consolidation.

III. Detailed remarks

In light of this the German Bar Association would only recommend the following alterations of the draft proposal:

a. Scope of the Regulation and COMI

The German Bar Association agrees with the approach of broadening the general scope of the regulation in order to allow automatic recognition within the European Union for new kind of hybrid and pre-insolvency proceedings, including debt discharge proceedings and debtor in possession proceedings.
Here, the current amendments should be understood in the context of the harmonization of insolvency law on national levels as proposed by the European Parliament[1]. In this context they could work as a tool to set the right framework for national lawmakers, which have currently already or will in the future introduce new variations of rescue proceedings. It would not help the harmonization approach to set the standards for such proceedings to low. Insofar, the German Bar Association sees it as an absolute minimum requirement that insolvency and/or rescue proceedings, which always affect constitutional rights of all parties involved, are in a sufficient way under the supervision or control of a court, at least a governmental body. Therefore, the German Bar Association recommends to delete the last sentence of the proposal's new recital 9 a) and subpara. 2 of the proposal's new Article 3

[1] REPORT of the European Parliament with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Page 11

b). If these clauses would enter into force the debtors could be totally free to establish their COMI, wherever they want, without proper control of courts and sufficient remedies for harmed creditors. Although subpara. 3 of the proposal's new Article 3 b) foresees the possibility to challenge the opening decision, it is not clear where a harmed party may be able to submit such a challenge, if no court is actually involved. If the European member states want their rescue proceedings to be included in the scope of the regulation they can easily take care that their national insolvency regimes include a minimum of court control or supervision as it is typically defining insolvency proceedings. This would help to harmonize the insolvency laws and their reception by involved companies and citizens of the EU.

If the Commission, the Parliament or the Council do not want to keep up the court involvement as a minimum standard of insolvency or rescue regimes, the German Bar Association highly recommends in this case at least the introduction of an independent court appointed expert who could assess the question whether the debtor had chosen the correct jurisdiction, the correct COMI resp.

In order to enhance the efficiency of the proposal, the German Bar Association would recommend limiting the right of challenging the COMI only to creditors which have a real interest in the opening of the proceedings and are not excluded from exercising their voting rights or any other creditor's rights due to their specific creditor's position in the commenced proceedings. Otherwise such creditors and other parties could obstruct the efficient opening of proceedings. Insofar, Subpara. 3 of the proposal´s new Article 3 b) should read: "Any *non-subordinated creditor according to the lex fori of the opening decision* who has…"

As the draft regulation is now introducing a new remedy for the potential challenge of a (wrong) COMI this should not lead to an uncertainty for the validity of the proceedings' opening decision. Insofar, a creditor should only be allowed to challenge the COMI within two weeks after the opening decision has been duly published in the relevant register and/or gazette. In this context it should be clarified in the definition of Art. 2 e) that "the time of the opening of insolvency proceedings" means the time at which the judgment opening insolvency proceedings becomes effective regardless whether the judgment has been challenged (i.e. Art 3 b) subpara. 3) or not.

The German Bar Association understood that the second part of the proposal's new Art. 3 subpara. 1 shall define the COMI in line with the current ECJ rulings on COMI. This goal will be reached clearly and already by this new Article 3. However, the German Bar Association does not see that the new recital 13 a) does effectively clarify the COMI in light of

the common understanding of COMI. Although the Commission makes reference to the ECJ's Interedil-decision it must be seen that this was one of several decisions defining the COMI in a singular case and to avoid any misunderstanding at least the last sentence of the new recital 13 a) should be deleted.

b. Groups of Companies

The German Bar Association appreciates the approach of the Commission to refrain from material consolidation and procedural consolidation, i.e. the introduction of a European Group-COMI on European level, but to keep it open to the national insolvency regimes to introduce a Group-COMI, procedural consolidation on national level resp. In this context the new regulation should be clear and not introduce a national COMI superimposing the concept of the local COMI in the member states. Here, the German Bar Association recommends to change the draft proposal's new recital 20 b), 1. sentence, as follows:

"The introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interest is located *in its national and local jurisdiction."*

The rules for the stay of proceedings as set out in the new Art. 44 d) subpara. 2 should include clarifying language in order to request that the liquidator making such application provides sufficient evidence (cf. Secondary Proceedings below).

c. Secondary Proceedings

Again not for general reasons but for the purpose of enhancing the efficiency and clarity of the draft proposal, the German Bar Association would recommend to change the draft proposal's new Art. 29 a) as follows:

"2. Upon request by the liquidator in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings, *in each case* if *the liquidator in the main proceedings provides evidence that* the opening of such proceedings is not necessary to …

…

4. The liquidator in the main proceedings …shall have the right to challenge that decision *within two weeks after receipt of this notification. In justified singular cases the*

court opening secondary proceedings may abbreviate this period to three working days after receipt of the notification."

Here, the first alteration shall make clear that the burden of proof lies with the administrator in the main insolvency proceedings. The second alteration shall introduce a period for this challenge in order to avoid uncertain situations for the secondary insolvency proceedings.
With regard to the undertaking as set out in the new Art. 18 paragraph 1 it should be clarified that (i) the new article overwrites the substantive laws of the member states not allowing such undertakings (yet) with immediate effect of the new European Insolvency Law except for national from requirements, if any; and (ii) as a consequence such undertaking will be binding and enforceable on the estate immediately upon the date such undertaking has been entered into by the relevant liquidator subject to national form requirements.

d. Arbitration proceedings

The German Bar Association would recommend that the effects on arbitration proceedings (Art. 15) are governed by the *lex fori concursus*. It is very easy to establish a forum of such arbitration proceedings in a country which has nothing to do with (a) the COMI or (b) the law applicable on the arbitration proceedings. This could lead to the complicated situation where the jurisdiction of the COMI (*lex fori concursus*), the jurisdiction of the arbitration proceeding and the jurisdiction of its seat may differ widely and in particular where the latter two jurisdictions do not properly fit into the *lex fori concursus'* system.