

SPANISH PARLIAMENT

REPORT 2/2017 BY THE JOINT COMMITTEE ON THE EUROPEAN UNION, DATED 6 MARCH 2017, ON COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY BY THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PREVENTING RESTRUCTURING FRAMEWORKS, SECOND CHANCE AND MEASURES TO INCREASE THE EFFICIENCY OF RESTRUCTURING, INSOLVENCY AND DISCHARGE PROCEDURES AND AMENDING DIRECTIVE 2012/30/EU (TEXT WITH EEA RELEVANCE) [COM (2016) 723 FINAL] [2016/0359 (COD)] {SWD (2016) 357 FINAL} {SWD (2016) 358 FINAL}

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality annexed to the 2007 Lisbon Treaty, in force since 1 December 2009, laid down a procedure for scrutiny by the national Parliaments to ensure that European draft legislative measures comply with the principle of subsidiarity. Spain implemented this Protocol by amending Law 8/1994 of 19 May 1994 through Law 24/2009 of 22 December 2009. More specifically, the legal basis for this report can be found in the new Articles 3(j), 5 and 6 added to Law 8/1994 by that amendment.

B. The Proposal for a Directive of the European Parliament and of the Council on preventing restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, and the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU of the European Parliament and of the Council as regards the ranking of unsecured debt instruments in insolvency hierarchy, have been approved by the European Commission and forwarded to the national parliaments, which have a period of eight weeks, until 8 March 2017, to check whether the proposal complies with the principle of subsidiarity.

C. On 16 February 2017 the Bureau and Spokespersons of the Joint Committee on the European Union decided to examine the proposal, appointed Senator María del Mar Moreno Ruiz as rapporteur and requested from the Government the report referred to in Article 3(j) of Law 8/1994.

D. The report, stating that the proposal complies with the principle of subsidiarity, has been received from the Government. Documents have been received from the Parliaments of Catalonia, Cantabria, La Rioja and Galicia stating that they have taken note of the proposal, have concluded their scrutiny and will not be issuing a reasoned opinion.

E. At its meeting on 6 March 2017 the Joint Committee on the European Union approved the following

REPORT

1. Article 5(1) of the Treaty on European Union states that 'the use of Union competences is governed by the principles of subsidiarity and proportionality'. Article 5(3) of the same Article states that 'under the principle of subsidiarity the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

2. The legislative proposals under examination are based on Articles 53 and 114 of the Treaty on the Functioning of the European Union, which runs as follows:

‘Article 53

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States. ‘

‘Article 114

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the European Parliament and the Council, by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain

national provisions on grounds of major needs referred to in Article 36 or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission undertakes to approve or reject, within six months of the notifications referred to in paragraphs 4 and 5, the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure. ‘

3. The immediate background to this Proposal is the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency. Following the reviews by the Commission in 2015 and 2016, it was concluded that the differences in the way in which this recommendation was implemented in the Member States generated a high degree of legal uncertainty for transnational investors, which was making capital markets less liquid and hampering the restructuring of viable undertakings.

4. This initiative is a key deliverable under the Capital Markets Union Action Plan and the Single Market Strategy. It will contribute to removing important barriers to the development of capital markets in the EU by providing legal certainty to cross-border investors and companies operating across the EU. The new rules will help attract investors, and create and preserve jobs by helping economies absorb economic shocks. Currently, too many viable companies in financial difficulties are steered towards liquidation rather than early restructuring and too few entrepreneurs get a second chance.

5. This Proposal contains six sections dealing with three themes: preventive restructuring frameworks, second chance for entrepreneurs and measures to increase the efficiency of restructuring, insolvency and discharge procedures. Some important new features are included, for instance access for undertakings in financial difficulty, in particular SMEs, to early warning tools, making it possible to restructure at an early stage; simplification of complex and costly judicial proceedings; suspension of enforcement cases for the payment of debts; exemption from debt, under certain conditions, following a period of three years; training and specialisation of members of legal professions and the judiciary, and the use of online technology, while ensuring full protection for creditors and in particular for the workers in the undertakings concerned.

6. Progress made on legislative harmonisation tends to be positive as regards legal certainty, in particular as far as undertakings are concerned. Properly functioning insolvency arrangements and company restructuring are important in underpinning economic growth and job creation. This Proposal will make it easier for undertakings in financial difficulties to restructure at an early stage, hence preventing many impending insolvencies and the resulting redundancies. It will ensure that entrepreneurs get a second chance to do business after a bankruptcy. It will also lead to more effective and efficient insolvency procedures throughout the EU.

7. Lastly, it is worthwhile pointing out that the current Spanish legislative framework contains detailed regulation of the mechanisms laid down in the Proposal for a Directive, therefore adapting it to the new Directive will not pose any major problems for the Spanish legislator.

CONCLUSION

For the above reasons, the Joint Committee on the European Union is of the opinion that the proposal for a Directive of the European Parliament and of the Council on preventing restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU complies with the principle of subsidiarity laid down in the current Treaty on the European Union.