



EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
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Opinion

Title

DG JUST - Impact Assessment on a new approach to business failure and insolvency

(draft version of 28 November 2013) *

(A) Context

In 2012 the Commission put forward a proposal for broadening the scope of Regulation 1346/2000 on insolvency proceedings (EIR) to include pre-insolvency and debtor-in possession proceedings as well as certain personal insolvency proceedings. However, the EIR proposal deals with laws and jurisdictional rules applicable to cross-border insolvencies and does not affect the content of national insolvency proceedings. The Commission also adopted in 2012 a Communication on a new approach to business failure and insolvency which outlined several areas where action at European Union level could be taken in order to diminish the uncertainty created by the disparities between national insolvency laws and create a more business-friendly environment. While almost all Member States have fully in-court restructuring proceedings, the possibilities for less formal, hybrid restructuring procedures are limited in several of them. Therefore, the current initiative proposes certain minimum standards for (i) a preventive restructuring procedure of firms and (ii) giving a second chance to honest entrepreneurs who once failed.

(B) Overall opinion: NEGATIVE

The report needs to be significantly improved in a number of important respects. First, it should better explain the extent to which the problems identified are cross-border i.e. derive from different legal frameworks in the Member States or from inadequacies/gaps in the current national regimes for ensuring an effective insolvency procedure. Second, given the limited evidence of significant cross-border issues presented, as well as the sensitivity of imposing measures on Member States' legal systems and recent reform trends, the report should better justify the initiative on subsidiarity grounds. It should explain how the proposed minimum standards have been identified and why other options were not considered, for instance special arrangements for SMEs. Third, the report should assess impacts on domestic justice systems and on the protection national legal frameworks provide to creditors. The soft law option should be analysed in greater detail and compared to the preferred one in terms of efficiency and coherence. Fourth, stakeholders' and Member States views should be better presented, particularly in the problem definition, EU right to act and impacts sections. Finally, the report should propose clear and operational

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

monitoring and evaluation arrangements.

Given the nature of these concerns, the IAB requests DG JUST to submit a revised version of the IA report on which it will issue a new opinion.

(C) Main recommendations for improvements

(1) Strengthen the problem definition and the baseline scenario. The report should better explain the extent to which the purpose of this initiative is to address cross-border problems deriving from different and inadequate legal frameworks in the Member States or simply from inadequacies/gaps in the current national regimes for ensuring an effective insolvency procedure. A clearer link with the EIR should be established, further explaining what problems are likely to be solved by the recent proposal. The report should provide a more detailed overview of the situation in the different Member States and provide a benchmark of best practice, using for instance data from the World Bank report. It should then better explain, using more concrete evidence, why, if they are so effective, some Member States do not have national hybrid procedures in place and how exactly differences in the systems contribute to additional costs for cross-border creditors and obstacles to the reorganisation of groups of companies. The report should explain in more detail on what basis the issues that should be subject to minimum standards for a preventive restructuring plan have been identified and why they are considered to provide an optimal insolvency regime, providing examples of what is in place in other countries (e.g. US). Concerning the 'forum shopping' issue, it should better explain why encouraging a private resolution through contractual terms and conditions is not considered suitable. Finally, a more robust and complete baseline scenario should be developed, considering in particular recent developments (for instance trends in Member States that have changed their laws or that are considering legislating for reforms) and the impact of relevant legislation linked to this proposal.

(2) Strengthen the subsidiarity analysis and better present the options. The report should discuss in more depth the necessity and added value of EU action given the relative lack of concrete evidence of cross-border problems (e.g. low cross-border debt level of 0.45% of all debts, lack of evidence on the scale of forum shopping) and the sensitivity of imposing measures on Member States' legal systems. In that context the evidence base should be further strengthened (such as stakeholders'/experts' views) to support the case that differences between approaches in Member States have serious negative consequences. Moreover, the report should explain how proportionate legislative measures are given the level of intrusion into Member States' legal systems and the recent reforms by some Member States of their insolvency frameworks. It should better explain why no further consideration was given to certain issues raised in the public consultation, for instance early warning tools, specific arrangements for SMEs and developing a common understanding and definition of the concepts of honest and dishonest entrepreneurs. Moreover, the report should better present the content of the options, for instance concerning the safeguards foreseen.

(3) Better assess and compare options. The report should provide an order of magnitude for the costs foreseen for the reporting obligations for Member States and training for courts and insolvency practitioners. It should describe what will be the expected impact on domestic justice systems, including their internal consistency, and should ideally include a summary of the expected impacts across individual Member States. The assessment of the options should be underpinned with stakeholders' views or other available evidence. The

report should better assess the effectiveness of the option on discharge periods, and explain how it will fulfil the objective of reducing the incentive to relocation, given that the preferred option does not seem to not fully harmonise the discharge periods (and consequently might not solve the forum shopping issue). The report should further demonstrate how the measures contained in the proposed Directive are broadly sufficient to achieve a second chance culture for viable businesses encountering temporary financial difficulty. When comparing the preferred option against the baseline, the report should highlight how the balance is achieved between giving a second chance to firms or entrepreneurs while preserving the rights of the creditors. Given subsidiarity concerns and existing pressures for further national reforms incorporating elements of the proposal, the report should better assess the impacts of the soft law option, notably by comparing options in terms of efficiency and coherence and not just effectiveness. It should mention if micro-enterprises are included in the scope of this initiative and should better assess impacts on employment. It should elaborate on the transposition and compliance issues, considering possible consequences on conflicting provisions of national legislations.

(4) Better present stakeholders' views and propose clear monitoring and evaluation arrangements. The report should integrate the results of the recent round of experts consultation and identify which category of stakeholders support or do not support an initiative in this area, including Member States and experts, and whether or not they agree with the identified problems, the identification of the proposed minimum standards, the need and value added of EU legislative action and the impacts. The monitoring arrangements should propose indicators linked to the objectives and clearly identify how regularly the data is to be collected and who will be responsible for this in the Member States. The report should propose operational evaluation provisions, setting out the timing and the main criteria on which the success of the initiative will be evaluated in line with the set objectives.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

The report should more clearly present the extent of differences between Member States hybrid procedures, summarizing information for each Member State (possibly in a table format). The glossary should be more comprehensive and include specific terms to insolvency proceedings.

(E) IAB scrutiny process

Reference number	2013/JUST+/082
External expertise used	No
Date of IAB meeting	17 December 2013