



Ref : 2016 / 0359 (COD)

Mr Andreas STEIN
European Commission
DG Justice and Consumers
Civil Justice Policy

February 28 , 2017

Dear Mr Stein ,

I have the honor and the privilege to write you as the President of the EIP .

EIP is an independent , self funding Association of European Insolvency Practitioners' organizations .

Today EIP counts 11 National Insolvency Practitioners organizations members , i.e. more than 5000 individuals , representing fairly our practice in the various states of the EU.

The creation of the EIP in 2016 was motivated by the clear belief of the various members of the importance of improving procedures efficiency .

EIP has the primary goal to represent and promote the activity of Insolvency Office Holders organizations and their interest within the EU . EIP helps enhance the professionalism of European Insolvency Practitioners by suggesting and monitoring standards and best practice guidelines thus defining and supporting the profession of European IPs .

The EIP is also working in perfect coordination with the local organizations of our practices in the various countries .

As the spokesperson of this large association , where every single member demonstrates every single day its commitment and its professionalism to deliver the best services , I believe it is of interest for you that we share our preliminary comments and recommendations on the European Directive Proposal related to Pre Insolving Proceeding , dated November 22 , 2016 (hereinafter to be abbreviated as "DD PreIP")

You will find below a summary of our main comments regarding the topics raised by the New Directive :

1) Re. Stay

EIP is deeming the **Moratorium** as a very helpful tool and which EIP is generally welcoming.

EIP , after having consulted internally but as well hearing the positions of other stakeholders such as banks and trade unions , sees the risk that a moratorium to be granted too easily, for too long and too extensively may have an adverse effect.

Under such circumstances It might jeopardize its underlying idea and not help to create a safe harbor for successful negotiations but even create mistrust.

EIP is therefore highlighting that beside the necessity of **limited confidentiality** , there must be sufficient **transparency and safeguard** for all parties affected by the moratorium.

Insofar, EIP is recommending that the Member States (hereinafter abbreviated as **"MS"**) may take care for provisions that should avoid the misuse of the moratorium. Furthermore, and in order to avoid the creation of NPL the moratorium should be limited to **three months**.

In the opinion of EIP , the MS shall entrust skilled and Independent Professionals (**"IP"**) to **supervise during the moratorium** the situation of the debtor and the status of the restructuring negotiations in order to take care for an early warning if the moratorium is only used for delaying or even deepening the crisis but not likely to be successful and/or the debtor is already illiquid. In such case the IP shall inform the restructuring court accordingly.

Insofar EIP is proposing:

- MS shall take care that **moratorium** is only **to be granted** in case it is
 - (i) backed by vast majority of creditors and/or
 - (ii) the business is viable (apart from the debts) and a relevant part of the creditors is backing the restructuring.
- The **moratorium** shall only have **effect** with respect to creditors that shall be affected by the plan, but not to third parties.

- The European Commission is correctly assessing that **third parties** should be encouraged not to stop their collaboration with or delivery to the debtor while in restructuring.

EIP, after having consulted internally but as well hearing the positions of other stakeholders such as banks and trade unions, is of the opinion that this should however not be enforced against the will of such parties by (automatic) effect of such a moratorium. This only may lead to even stricter termination clauses and will prevent the free market and mutual trust. EIP is therefore preferring to grant not only the debtor but those trusting in the success of the restructuring a certain **safe harbor**.

- Third parties should therefore be protected when continuing their trade with a debtor in restructuring under the DD PreIP
 - (i) If the debtor is supervised and
 - (ii) If payments and transactions are made under congruent conditions as already agreed and/or generally agreed under normal business conditions and
 - (iii) If the negotiations are still promising to be successful.

Under such circumstances the debtor shall be deemed to be solvent and/or the **avoidance action** aimed against such transactions and payments should be **limited** to cases of fraud and bad intent.

2) Re. Restructuring Plan

According to the experience of EIP members and regarding the negotiation related to and the drafting of the **restructuring plan**, an early involvement of a professional and the competent court would enable early engagement, support and transparency and could therefore lead to more successful restructurings.

In order to make sure that the process is fair and transparent, it is a requisite that the **claims granting votes** for the adoption of the restructuring plan have been revised independently. An independent examination of the claims regarded as acceptable by the debtor and a confirmation of the voting groups proposed by the debtor should be undertaken prior to the voting.

Otherwise these two important factors might be used by the debtor for too “creative design” of their plan proposal or be challenged after the proceedings in lengthy lawsuits.

With respect to the **cram-down** , it is not understandable and fair if one group can overrule a majority of other groups. Although it makes sense to make a distinction between equityholders and creditors here, a relevant majority of groups should be needed for a cram-down.

With respect to the various points where a **valuation** is needed , we recommend to stay with one comparison value. This should always be the **going concern value** to be applied in the various test.

The reason is that these proceedings take place at an early stage prior to material insolvency and grant safe harbors for various parties (exemption from claw back, exemption from directors liability , etc...). This can only be fair if the entity is not already ripe for liquidation. And if this is not yet in a stage of liquidation, the liquidation value cannot be used.

3) Re.Restructuring Practitioners within the Framework of early Restructuring

These are just a few examples highlighting the benefit and need for an **independent supervision** of the PreIP, insofar EIP is missing a clear description that the professional taking this position must be skilled, integer and independent.

The mixed role of the **Restructuring Professional in the PreIP (“RP”)** be it as restructuring advisor, expert or mediator, is heavily based on the various different concepts serving as roots for the DD PreIP, which are e.g. the so “independent advisor “in the UK (which is chosen by consent of the major creditors only), the French concept of Mediators in the conciliation procedures and German IP not only administering the case but serving as an expert for the court. Here, EIP asks the European Commission to be aware that at least such IP which are regularly appointed by courts or the majority of creditors in case of a filing for insolvency already meeting all requirements under the PreIP, are

- independent
- supervised by courts or other competent bodies or self-regulated organizations
- have the experience to serve as intermediate and mediator bringing together the various stakeholder

- have the knowledge and skills to supervise proceeding and to detect abuse to the detriment of the general body of creditors or third party and
- have the knowledge and skills to serve as experts for the court.

With regard to Art. 5 subpara 3 DD PreIP , it should be made clear that the two **cases, where RP can be appointed** are not conclusive. Thus MS can foresee a role for the IP in other situations not mentioned in Art. 5 subpara 3 DD PreIP so far as far as they want to avoid abuse and take care for better transparency.

4) Re. Practitioners in the field of Restructuring, Insolvency and Second Chance

Art 25 provides for all **Practitioners in the field of Restructuring, Insolvency and Second Chance**, may they act in restructuring, pre-insolvency, rescue or liquidation proceedings (“IP”) to be trained in impartiality and independence.

EIP suggests that training only is not sufficient and that Member States shall provide for IP to perform their job in an impartial way and that they shall be independent from all influence by and conflicts with stakeholders in the proceedings.

With regard to the rules in relation to IP , the EIP is welcoming the concept that a **code of conduct** should be introduced for this profession. EIP is seeing the differences of and in the MS.

Therefore, the details should be left for the MS and the national bodies and organization. On the EU level , EIP is sharing the view that such code of conduct should be guided by three pillars:

- (i) Independence
- (ii) Fairness of Proceedings
- (iii) Transparency

In order to protect the affected parties MS shall take care that only such IP shall be appointed in restructuring and insolvency cases that have in addition to the principles already laid out in the DD PreIP as well sufficient **insurance cover** granted by a reputable insurer.

I do thank you to have taken time to read carefully this document and to pay attention to the constructive and positive remarks and recommendations EIP members have formulated .

I would be pleased , as the President of our association, to meet you in the coming days .

Please let me know what is the most convenient for you . I will make myself available for a meeting in Brussels , Paris or the place you find the most appropriate .

My only concern is that the EIP association remains proactive and reactive in this current process which is key for our practices .

I truly appreciate the time you could dedicate to discuss these fundamental points for our practices .

I look forward to meet you in the coming days .

Yours sincerely

Béatrice Dunogué-Gaffié

