International Insolvency Law

16. Harmonisation of substantive insolvency law in the EU and worldwide

Dr Marek Porzycki

Why harmonise?

- similarity of economic mechanisms related to insolvency, winding-up, "recycling" of assets, restructuring and corporate rescue --> usefulness of comparative approach in insolvency law (copying efficient solutions from other jurisdictions) --> harmonisation as a logical next step
- more legal certainty in cross-border business relations if insolvency laws operate according to similar principles

Obstacles to harmonisation

- divergent private law systems, in particular regarding security interest and rights in rem
- divergent organisational and procedural cultures in the court system (insolvency proceedings are usually court proceedings)
- divergency of existing substantive insolvency laws --> unwillingness of some jurisditions to accept models from other jurisditions, rivality between jurisdictions

UNCITRAL Legislative Guide on Insolvency Law

- Ongoing work by Working Group V (Insolvency Law) https://uncitral.un.org/en/working_groups/5/insolvency_law
- Parts one and two published in 2004, part three (treatment of enterprise groups) in 2012, part four (director's obligation in pre-insolvency period) in 2013
- Texts available on https://uncitral.un.org/texts/insolvency
- Intended as a handbook for national legislators reforming insolvency laws in their jurisdictions.
- Includes many alternative options, suggests issues to be covered but does not usually propose specific solutions.

International associations

- The International Insolvency Institute, https://www.iiiglobal.org/ (global)
- INSOL International, https://www.insol.org/ (global)
- INSOL Europe, https://www.insol-europe.org/ (European)
- The Conference of European Restructuring and Insolvency Law (CERIL), http://www.ceril.eu/ (EU)

Principles of European Insolvency Law

- An early European initiative, published in 2003
- Authored by a team of academics coordinated by the University of Nijmegen, Holland
- Objective: to identify core principles of insolvency law common to all European jurisdictions
- Only selected Western European jurisdictions represented
- Results published as W.W. McBryde, A. Flessner, S.C.J.J. Kortmann, Principles of European Insolvency Law, Kluwer 2003

Harmonisation as by-effect of the EIR

- Provisions on insolvency registers (Art. 24-27 EIR) – minimum requirements for Member States' national insolvency registers, in order to allow for their interconnection
- Requirement to provide grounds for jurisdiction to open proceedings and to allow judicial review of the opening decision on grounds of jurisdiction (Art. 4-5 EIR)
- Indirectly: the definition and concept of COMI, including presumptions (Art. 3 EIR), used also for jurisdiction of a specific court within national territory (cf. Art. 19 Polish BL)
- Indirectly: proceedings against members of a group of companies (Art. 56-77 EIR)

European Parliament resolution of 2011

- European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0484+0+DOC+XML+V0//EN
- Included specific recommendations to the Commission on harmonising some aspects of insolvency laws.
- Served as a starting point in a discussion rather than a ready proposal, some recommendations lacked a deep comparative background.

Communication of the Commission of 2012

- Communication from the Commission to the Institutions "A new European approach to business failure and insolvency", COM(2012) 742 final, 12.12.2012
- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0742&from=en
- A call for approximation of some aspects of national insolvency laws in order to create a more business-friendly environment:

- "second chance"
- restructuring
- discharge of honest enterpreneurs

EU Directive on Restructuring and Insolvency (2019)

- Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

- work started in 2016, adopted in 2019

Objectives (recital 1)

- removing obstacles to the exercise of fundamental freedoms resulting from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications
- Ensuring that:

– viable enterprises and entrepreneurs in financial difficulties have access to effective national preventive restructuring frameworks which **enable them to continue operating**;

– honest insolvent or overindebted entrepreneurs can benefit from a **full discharge of debt** after a reasonable period of time, thereby allowing them a **second chance**;

– the **effectiveness** of procedures concerning restructuring, insolvency and discharge of debt is improved

Logic behind the objectives

- Reaction to long-term effects of the euro area crisis of the 2010s → just in time for the next crisis caused by Covid 19 pandemic
- Effective early restructuring to avoid insolvency and unnecessary liquidation
- Preventing job losses and the loss of know-how and skills
- Maximising the total value to creditors
- Preventing the build-up of non-peforming loans
- Reducing legal uncertainty for creditors and investors resulting from differences between Member States --> reducing costs needed to assess risks related to cross-border investment or activity.
- Principles of subsidiarity and proportionality (Art. 5 TEU) taken into account and considered as justifying the adoption of a directive.

Relation between the directive on restructuring and insolvency and the EIR

- The Directive **goes beyond the EIR**, covering matters of judicial cooperation, to **establish substantive minimum standards** for preventing restructuring and discharge procedures (recital 12)
- The Directive should be without prejudice to the scope of the EIR. It aims to be fully compatible with, and complementary to the EIR. It does not change the approach taken in the EIR of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to the EIR. Although the Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures (recital 13).

Scope of application (Art. 1)

- **preventive restructuring frameworks** available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;
- procedures leading to a **discharge of debt** incurred by insolvent **entrepreneurs**;
- FACULTATIVE: application of procedures leading to discharge may be extended to natural persons who are not entrepreneurs (**consumer insolvency**)
- measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt

Preventive restructuring framework (Art. 4 et seq.)

- may consist of one or more procedures
- may include a viability test
- additional restrictions possible for debtors who have breached accounting or bookkeeping obligations
- to be available on application by debtors, optionally also by creditors but subject to agreement by the debtor
- debtor-in-possesion arrangements to apply in principle (Art. 5)
- stay of individual enforcement actions to apply in principle (Art. 6)

Discharge of debt

- Natural persons – enterpreneurs should have access to at least one type of proceedings allowing for full discharge (Art. 20(1))
- Proceedings may involve the liquidation of assets (the estate) or a repayment plan, or both
- The duration of the proceedings or the duration of the repayment plan should not exceed 3 years (Art. 21)
- Dishonesty or bad faith of the debtor to exclude discharge or justify a longer period to obtain discharge (Art. 23(1)); a number of other restrictions can be applied by Member States.

Improving the efficiency of proceedings

- Requirement of sufficient training and expertise for members of judicial and administrative authorities (Art. 25)

- Requirements regarding practitioners (Art. 26-27) --> include general professional requirements, case-specific requirements and requirements on supervision and control

- Use of electronic means of communication (Art. 28)

Entry into force, transposition and review clause

- Entry into force: 16 July 2019
- Transposition deadline (Art. 34) – 2 years after entry into force (5/7 years for provisions on electronic means of communication), a one year extension possible
- Review clause (Art. 33) – a report on application and impact of the Directive to be prepared 7 years after its entry into force and lead to proposal for an amendment, if needed

Further step: draft Directive on insolvency, Dec. 2022

- Proposal for a **Directive harmonising certain aspects of insolvency law** (COM(2022) 702 final), 7.12.2022
- Focus on winding-up insolvency (bankruptcy)
- Includes provisions on:
  - transactions avoidance (based on an academic project);
  - asset tracing;
  - pre-pack proceedings;
  - duties of directors;
  - simplified winding-up for microenterprises

Draft Directive on insolvency (2022)

- Text of the draft Directive:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0702

- R. Bork, M. Veder (eds.), Harmonisation of Transactions Avoidance Laws, Intersentia 2022 – academic project at the background of the provisions of the draft Directive covering transactions avoidance