

# From Approximation to Harmonisation of the IPs' Education

Emmanuelle Inacio takes a closer look at the harmonisation of the education of Insolvency Practitioners across Europe



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**The issue related to harmonisation of law could be illustrated by referring to the following quote from the famous French geographer Daniel Faucher: “Europe is too big to be united. But too small to be divided. Her double destiny lies there”.**

As regards the issue of harmonisation of European insolvency law, and more specifically, harmonisation of the regulation of those who mainly apply insolvency law across the European Union – the insolvency practitioners according to the European terminology – the question is to assess whether harmonisation of regulation of insolvency practitioners at European Union level is worthwhile and achievable.

Indeed, the insolvency practitioners are a key part of an effective insolvency system<sup>1</sup>. As the Austrian Professor Ernst Jaeger underlined: *“the choice of the insolvency practitioner is the fateful question of the insolvency proceedings”*<sup>2</sup>.

At a European level, under the Recast European Insolvency Regulation of 20 May 2015, the insolvency practitioners are defined as *“any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii), or (v) supervise the administration of the debtor’s affairs”*<sup>3</sup>.

Therefore, it is essential that the insolvency practitioners are appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the insolvency proceedings but also that there is confidence in the insolvency regime<sup>4</sup>.

Comparative research on the role of insolvency practitioners was conducted by UNCITRAL<sup>5</sup>, World Bank<sup>6</sup>, European Bank for Reconstruction and Development<sup>7</sup>, University of Leiden<sup>8</sup> and University of Leeds<sup>9</sup> and it appears that the laws of EU Member States have different rules on the insolvency practitioners’ qualification, licensing, appointment, supervision and discipline, ethics, legal powers and duties and remuneration. Based on this research, Recommendations, Principles and Guidelines were although formulated on common key features.

If INSOL Europe’s 2010 Report on “Harmonisation of insolvency law at EU Level”<sup>10</sup>, presented to the European Parliament Committee on Legal Affairs, identified a number of areas of insolvency law that are apt for substantive harmonisation, however, regarding the qualifications and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives, because of the substantial differences between EU Member States, harmonisation was not deemed necessary until a further harmonisation of substantive insolvency law and company law

has been achieved.

In 2016, the INSOL Europe’s Working group “Insolvency Office Holders (IOH) Forum” presented a new comparative analysis on the issue under consideration and concluded that due to the heterogeneity of the regulation of insolvency within the European Union, only minimum standards should be set up<sup>11</sup>. The IOH Forum defined eight minimum standards based on the EBRD Principles (and recommended by the University of Leeds), concerning: (i) licensing and registration; (ii) regulation, supervision and discipline; (iii) qualification and training; (iv) appointment system; (v) work standards and ethics; (vi) legal powers and duties; (vii) transparency and (viii) remuneration. They have been submitted by the IOH Forum to the Directorate-General for Justice and Consumers of the European Commission on 25 July 2016<sup>12</sup>. But the IOH Forum emphasised that these minimum standards should not be imposed on the insolvency profession, whose diversity of regulation should be respected.

However, the IOH Forum recommended to enhance the approximation of the insolvency practitioners by the professionals themselves. According to the IOH Forum, the exchange of knowledge and best practice standards, peer reviews and cross-border training should be encouraged. To this end, any Continuing Professional Education (CPE) system in the Member States should be encouraged and even allowed to include theoretical and practical



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training in other Member States.

The approximation of the insolvency practitioners by the exchange of know-how would then lead to harmonisation on the long run instead of imposing rules that could affect the economic health and proper functioning of Member States.

On 22 November 2016, the European Commission has presented the long-awaited Proposal for a “Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures amending Directive 2012/30/EU”<sup>13</sup>. Included in Title IV of the Draft Directive are proposals aimed at increasing the efficiency of restructuring, insolvency and second chance which concern the qualification, training, appointment, supervision and remuneration of insolvency professionals.

The Proposal states that the Member States should ensure that the insolvency practitioners are properly trained and supervised in the carrying out of their tasks, that they are appointed in a transparent manner with due regard to the need to ensure efficient procedures and that they perform their tasks with integrity. Insolvency practitioners should also adhere to voluntary codes of conduct aiming at ensuring an appropriate level of qualification and training, transparency of the duties of such practitioners and the rules for determining their remuneration, the taking up of professional indemnity insurance cover and the establishment of oversight and regulatory mechanisms which should include an appropriate and effective regime for sanctioning those who have failed in their duties. The Proposal adds that such standards may be attained without the need in principle to create new professions or qualifications<sup>14</sup>.

The Proposal seems in fact to establish minimum standards very similar to those set up by INSOL Europe’s IOH Forum and to respect the diversity of existing regulations.

Regarding education, the Proposal states that the Member States shall ensure that mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters receive the necessary initial and further training which will indeed ensure that their services are provided in an effective, impartial, independent and competent way in relation to the parties<sup>15</sup>. Similarly, regarding the members of the judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters, the Member States shall ensure that they receive initial and further training to a level appropriate to their responsibilities which will ensure that they have the necessary expertise and specialisation<sup>16</sup>.

The Proposal explains that given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases set up by the Recast European Insolvency Regulation of 20 May 2015, the professionalism of all actors involved needs to be brought to comparable high levels across the Union<sup>17</sup>.

Thus the Proposal puts the emphasis on education, which has also been highlighted by our IOH Forum.

### High-level training

In line with the IOH Forum’s conclusions and the EC Proposal regarding education of insolvency practitioners and of the members of the judiciary and administrative authorities, the INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions was launched in 2016. This ambitious educational course aims to assist Eastern European Jurisdictions’ transition to a fully modern, efficient and best practice-compliant insolvency system.

For its first edition, the High-Level Course is being held in Romania and is receiving the full support and cooperation of the Minister of Justice and the National Institute of Magistracy.

The National Institute for the Training of Insolvency Practitioners also offered full support to the High-Level Course on Insolvency Law and decided to grant 20 CPE points – which is the maximum – for the more than 60 Romanian lawyers, lenders, insolvency practitioners, auditors, judges, representatives of the National Institute of Magistracy who are attending the Educational course and exchanging their knowledge and experience.

The Director of the Programme of the High-Level Course – Prof. Ignacio Tirado (Universidad Autonoma de Madrid, Spain) - and the Local Director – Radu Lotrean (CITR, Romania) – formed panels of national and international experts who will deliver a one-year programme, with three on-site training rounds in Bucharest in order to help the professionals to acquaint themselves with international standards and best comparative examples from restructuring and insolvency practice as well as with detailed insights on the local insolvency system.

This INSOL Europe Educational Course received the support of Mihaela Carpus-Carcea, Legislative Officer of the European Commission, who not only provided the audience with the presentation of the Proposal of the European Commission for a Directive on preventive restructuring frameworks but will analyse the compliance of the current Romanian System with the mentioned Proposal in a workshop.

Driven by this success, INSOL Europe intends to reiterate the “INSOL Europe High-Level Course on Insolvency Law” in Budapest next year.

No doubt that harmonisation of education of insolvency practitioners and members of the judiciary and administrative authorities is worthwhile and achievable and we are proud that INSOL Europe contributes to bring all actors involved to comparable high levels of education across the Union. ■



**THE PROPOSAL SEEMS IN FACT TO ESTABLISH MINIMUM STANDARDS VERY SIMILAR TO THOSE SET UP BY INSOL EUROPE’S IOH FORUM**



#### Footnotes:

- 1 Tirado, I., *Issues Note on Insolvency Representations* (draft), The World Bank, 2011.
- 2 Jaeger, E., *Konkursordnung Grosskommentar*, 1901.
- 3 Article 2(5).
- 4 UNCITRAL, *Legislative Guide on Insolvency Law*, 2004, p. 174.
- 5 Idem.
- 6 WORLD BANK, *World Bank Principles for Effective Insolvency and Creditors’ Rights Systems*, 2016.
- 7 EBRD, *Assessment of Insolvency Office Holders: Review of the profession in the EBRD region*, 2014.
- 8 INSOL Europe, *Statement of Principles and Guidelines for Insolvency Office Holders in Europe*, 2015 (available at: [www.insol-europe.org/download/resource/167](http://www.insol-europe.org/download/resource/167)). The INSOL statement is based on research conducted by Leiden University (available at: <http://www.tri-leiden.eu/project/categories/ioh-project/>).
- 9 University of Leeds, *Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States’ relevant provisions and practices*, Study requested by the European Commission (Directorate-General for Justice and Consumers), Tender No. JUST/2014/JCOO/PR/CIVI/0075, 2016.
- 10 INSOL Europe, *Harmonisation of Insolvency Law at EU Level*, Study requested by the European Parliament’s Committee on Legal Affairs (Directorate General for Internal Policies, Policy Department: Citizens’ Rights and Constitutional Affairs), Note PE 419.633, 2010.
- 11 <https://www.insol-europe.org/ioh-forum-introduction-and-members>
- 12 Cf Inacio E., *Issues and challenges facing insolvency office holders in Europe*, Eurofenix 2016 Autumn Edition, pp 8-9.
- 13 [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=50043](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043).
- 14 Recital 40, articles 24 to 27.
- 15 Article 24.
- 16 Article 26.
- 17 Recital 39.