

# Business Rescue in Europe: Strengthening the role of practitioners and courts

Stephan Madaus and Bob Wessels report on their latest research in this area



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## Preventive restructuring frameworks

An important legislative development in Europe dates from around a year ago. In November 2016, the European Commission presented its ‘Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU’ (‘Proposal for a Restructuring Directive (2016)’).<sup>1</sup>

Recital 1 of the Proposal Restructuring Directive (2016) sets out its goal: ‘The objective of this Directive is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. This Directive aims at removing such obstacles by ensuring that viable enterprises in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; that honest over indebted entrepreneurs have a second chance after a full discharge of debt after a reasonable period of time; and that the effectiveness of restructuring, insolvency and discharge procedures is improved, in particular with a view to shortening their length.’ The Proposal contains an Explanatory Memorandum (23 pages) and the text with 47 recitals and 36

Articles. In contrast, the earlier Recommendation of March 2014, on which the Proposal is based, had a total of 20 recitals and 36 recommendations.<sup>2</sup>

The Proposal is based on seven ‘... key principles in order to ensure insolvency and restructuring frameworks are consistent and efficient throughout the EU:

- (i) Companies in financial difficulties, especially SMEs, will have access to early warning tools to detect a deteriorating business situation and ensure restructuring at an early stage.
- (ii) Flexible preventive restructuring frameworks will simplify lengthy, complex and costly court proceedings. Where necessary, national courts must be involved to safeguard the interests of stakeholders.
- (iii) The debtor will benefit from a time-limited ‘breathing space’ (or: stay) of a maximum of four months from the enforcement action in order to facilitate negotiations and successful restructuring.
- (iv) The dissenting minority creditors and shareholders will not be able to block restructuring plans but their legitimate interests will be safeguarded.
- (v) New financing will be specifically protected increasing the chances of a successful restructuring.
- (vi) Throughout the preventive restructuring procedures, workers will enjoy full labour law protection in accordance with the existing EU legislation.
- (vii) Training, specialisation of

practitioners and courts, and the use of technology (e.g. online filing of claims, notifications to creditors) will improve the efficiency and length of insolvency, restructuring and second chance procedures.

## European-wide research

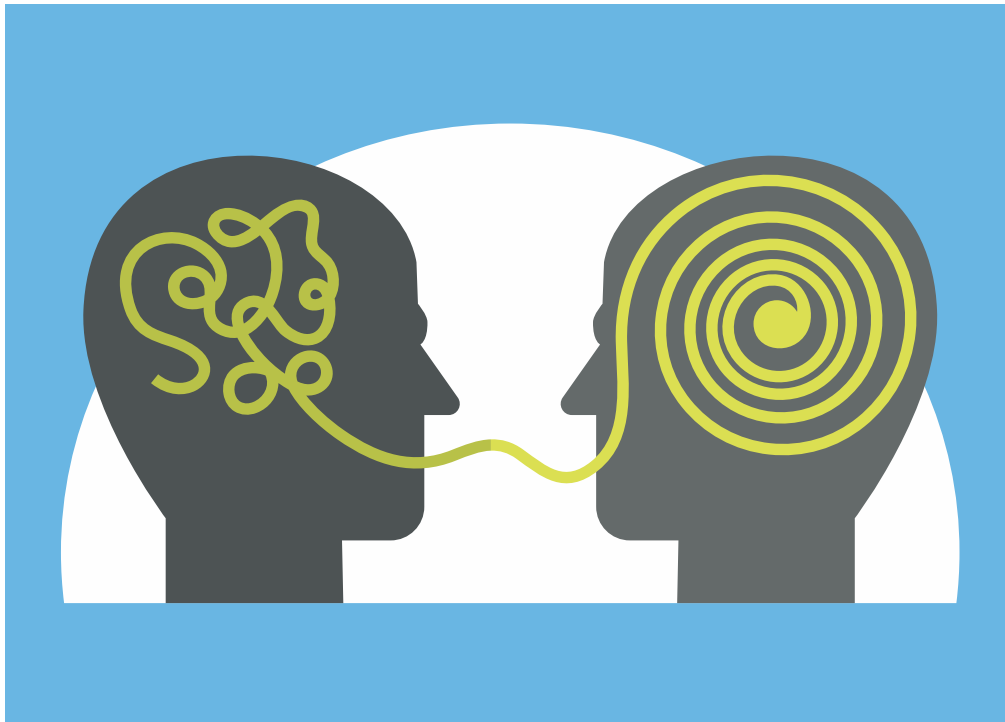
Under the auspices of the European Law Institute (ELI) the authors have conducted research on the topic of Business Rescue in Insolvency Law. ELI is an independent non-profit organisation established in 2011 to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development.

In early 2014 we started a two-stage project. The first stage comprised the drafting of National Inventory and Normative Reports by National Correspondents (NCs) from 13 EU countries. The Reporters decided that it would be impractical and unnecessary to generate reports on all 28 EU Member States. Instead, we selected 13 EU jurisdictions to be a representative sample of the legal traditions and range of insolvency and restructuring laws and practices across Europe.

The sample includes all major EU economies (Germany, France, UK, Italy, Poland, Spain, The Netherlands, Belgium, Austria), a representative of the Nordic States (Sweden), the Baltic States (Latvia) and representatives of smaller economies (Hungary, Greece). The selection was approved by the Advisory Committee and the Board of ELI.



**PROBLEMS  
IN THE  
HANDLING OF  
RESTRUCTURING  
OR INSOLVENCY  
CASES OFTEN  
STEM FROM THE  
WAY PEOPLE  
UNDERSTAND  
(OR NOT) AND  
USE (OR MISUSE)  
THE LAW**



Developments in non-selected EU Member States have, of course, not been ignored. In this regard, we have studied national laws and comparative studies from nearly all EU Member States, therefore, including states in the Northern and Eastern region of Europe, which are absent in the National Reports. Fortunately, there has been a significant amount of recent literature offering detailed analysis of national insolvency laws across Europe.

The relative weak presence in the set of National reports of EU Member States in Central- and South-Eastern Europe and in the Nordic countries was compensated by further study of general national insolvency law overviews (particularly those focused on restructuring regimes) of Central-Eastern European Member States or Northern Europe. In addition, an Inventory report on international recommendations from standard-setting organisations, such as UNCITRAL and World Bank, was prepared.<sup>3</sup>

The second stage consisted of drafting the ELI Instrument on Business Rescue with recommendations for a legal

framework enabling the further development of coherent and functional rules for business rescue in Europe. During the Academic Forum's Annual Conference on 21 and 22 September 2016 in Cascais we were able to discuss several themes.<sup>4</sup> It resulted in our 'ELI Business Rescue Report', which was approved by the respective bodies of ELI at their Annual Conference in Vienna (Austria) on 6 September 2017. The report consists of 115 recommendations which are developed on more than 375 pages.<sup>5</sup>

The Report presents recommendations on a variety of themes affected by the rescue of financially distressed businesses. The Report's ten chapters cover:

1. Actors and procedural design
2. Financing a rescue
3. Executory contracts
4. Ranking of creditor claims; governance role of creditors
5. Labour, benefit and pension issues
6. Avoidance transactions in out-of-court workouts and pre-insolvency procedures and possible safe harbours
7. Sales on a going-concern basis

8. Rescue plan issues: procedure and structure; distributional issues
9. Corporate group issues, and
10. Special arrangements for small and medium-sized enterprises (SMEs) including natural persons (but not consumers).

### Actors in restructuring and insolvency

From our National Correspondents we have taken that inefficiencies or problems in the handling of restructuring or insolvency cases often stem from the way people understand (or not) and use (or misuse) the law rather than from the legal framework itself. The law in the books is only one aspect of a functioning legal system, with the law in practice being the more important other one. In matters of restructuring and insolvency it is many times the actors (e.g. insolvency practitioners, turnaround managers, courts) and their behaviour that shape the outcome of a legal framework which is why we looked at actors first and we recommend lawmakers to do the same.

The way people act can, of





**PRACTITIONERS ARE WELL ADVISED TO PARTICIPATE IN THE DETERMINATION OF THE RULES WHICH APPLY TO THEIR FUTURE WORK**



course, be influenced by legal rules. Here, duties to act in a specific way are important, professional and ethical standards in particular. But even more important is a legal framework which includes the right incentives for all stakeholders, meaning that lawmakers should also consider factors like conflicts of interest, remuneration, reputation, integrity, developing and maintaining skills and experience. In our Report, we have set out our views in relation to courts, mediators and supervisors, insolvency practitioners and – a rather new actor in the restructuring arena – the debtor (in possession).

The ultimate goal of our European-wide research was to design (elements of) a legal framework that will enable the further development of coherent and functional rules for business rescue in Europe. This includes certain statutory procedures that could better enable parties to negotiate solutions where a

business becomes distressed. Such a framework also comprises rules to determine in which procedures and under which conditions an enforceable solution can be imposed upon creditors and other stakeholders despite their lack of consent.

The topics addressed in the report are intended to present a tool for better regulation in the EU, developed in the spirit of providing a coherent, dynamic, flexible and responsive European legislative framework for business rescue. Addressees, generally, are Member States and/or the European Commission. And, may we add, practitioners themselves. They should be invited the take into account our recommendations when discussing professional rules in national professional bodies for insolvency practitioners, turnaround professionals or judges or during INSOL Europe’s conferences.

Where the substantial rules are changing, the profession will

change too, and practitioners are well advised to participate in the determination of the rules which apply to their future work. ■

**Footnotes**

- 1 See (COM/2016) 723 final (‘Restructuring Directive’). See for all related documents [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=50043](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043).
- 2 For an overview, see Stephan Madaus, The EU Recommendation on Business Rescue – Only Another Statement or a Cause for Legislative Action Across Europe?, in: 27 *Insolvency Intelligence* 2014, no. 6, p. 81 et seq.; Bob Wessels, Rescue on the rise’, *eurofenix* Autumn 2014, p. 12-15; Emmanuelle Inacio, The European Commission’s Proposal for common principles and rules on preventive restructuring frameworks, insolvency and second chance, *eurofenix* Winter 2016/2017, p. 12-13.
- 3 By Gert-Jan Boon, University of Leiden, under the supervision of the Reporters.
- 4 See Myriam Maillé, Harmonisation of the European Insolvency Law, *eurofenix* Winter 2016/2017, p. 18-20.
- 5 The full report will be published by Oxford University Press soon. The source of the report and the suggested citation is: Wessels, Bob and Madaus, Stephan, *Business Rescue in Insolvency Law - an Instrument of the European Law Institute* (September 6, 2017). Available at SSRN: <https://ssrn.com/abstract=3032309>, or alternatively: Wessels, Bob and Madaus, Stephan, *Business Rescue in Insolvency Law - an Instrument of the European Law Institute* (September 2017). Available at [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Instrument\\_INSOLVENCY.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf).

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