

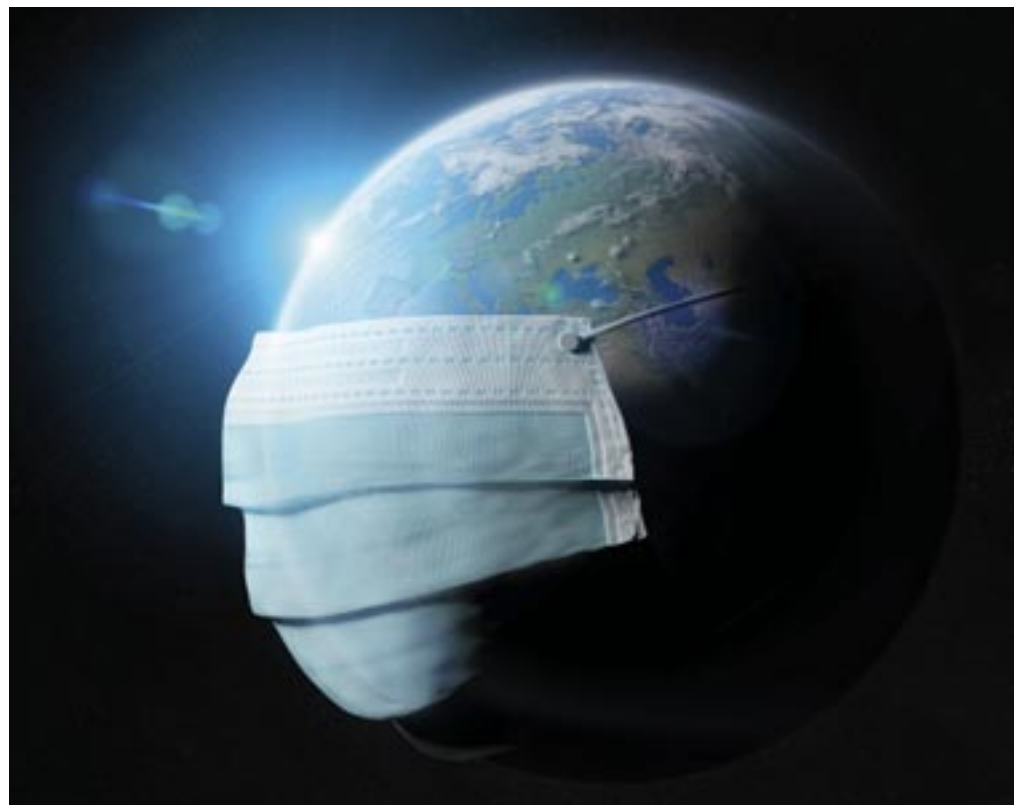
# A closer look at... The remedy of (pre-) insolvency law to the COVID-19 crisis



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**A**t the time of writing, European countries have emerged from long and massive nationwide COVID-19 lockdowns to restart their economies, which were in an induced coma<sup>1</sup>.

## Temporary national insolvency reforms

After adopting aid packages to prevent viable businesses affected by the COVID-19 pandemic to go insolvent, most European countries have adopted new provisions amending or impacting their respective insolvency laws.

These temporary national reforms are aimed to increase the success of the regulatory measures and affect mostly insolvency proceedings and the rights of creditors. In most of the countries, the national insolvency reforms are the result of a declared state of emergency and mainly suspend the possibility for creditors to file for the insolvency of their debtor, suspend the debtor's duty to file for insolvency and correlated debtor's liability, extend the time limits of insolvency proceedings and/or grant the debtor a moratorium.

In this regard, **INSOL Europe** is collaborating with

**LexisNexis** on a **COVID-19 tracker of insolvency reforms globally**<sup>2</sup>, which is regularly updated and already covers 35 jurisdictions in Europe and beyond. Moreover, **INSOL Europe** in partnership with **LexisNexis** is organising weekly 20-minute webinars titled "**COVID Coffee Breaks**"<sup>3</sup> for members and non-members of **INSOL Europe**. In these webinars, **INSOL Europe** Country Coordinators and contributors to the **INSOL Europe/LexisNexis** tracker of insolvency reforms globally are invited to share their personal experiences and views on the

current COVID-19 crisis and give highlights of reforms and challenges of national restructuring and insolvency law framework to address the current crisis in their own jurisdictions.

The national lockdowns are being lifted, but declared states of emergency are being extended, and correlatively so are the national provisions amending or impacting restructuring and insolvency law. Indeed, after being at the trough of the wave, businesses hit hard by the COVID-19-related economic peril will need time to recover.

### Future European restructuring and insolvency reforms

As in past financial crises, after the end of the temporary national insolvency measures, massive numbers of insolvencies are expected. The question of how to deal with these huge number of insolvencies will be raised. National formal insolvency legislations will need to be adapted and convergences certainly will arise. Flexible formal proceedings will be necessary to facilitate restructuring and preserve business value. Simplified liquidation proceedings will also be necessary for non-viable businesses. The intervention of the European legislator would be necessary to achieve the harmonisation of restructuring and insolvency law.

Similarly, courts dealing with insolvency cases will have to be prepared for the flow of insolvencies and avoid an overload which could compromise successful formal restructurings of viable businesses. The efficiency of the restructuring proceedings will not only depend on the judiciary skills and expertise but also on the reactivity of the appointed insolvency practitioners, especially in countries where the profession is regulated. Indeed, national associations of insolvency professionals are also expected to anticipate the increased number of businesses that will need to be restructured or liquidated.

### European prevention of insolvency

Very few legislatures have adopted temporary reforms encouraging preventive treatment of businesses' difficulties along the lines of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency as France did<sup>4</sup>.

However, it is urgent to implement a rescue culture in all Member States – adapted to prevent insolvency related to the COVID-19 pandemic<sup>5</sup>. Indeed, preventive restructuring frameworks could address financial distress in the short-term and also help avoiding overburdening the courts with out-of-court arrangements.

Preventive restructuring frameworks must be available for debtors to enable them to address their financial difficulties when it appears likely that their insolvency can be prevented, and the viability of the business can be ensured. In order to enable the debtor to continue his business operations and preserve the value of his business during the pending negotiations on a restructuring plan, a general stay of individual enforcement actions should automatically be granted and majority-driven restructurings via pre-insolvency proceedings should also be facilitated. New financing and interim financing should always be protected if its aim is to prevent liquidity problems resulting from the COVID-19 pandemic.

### Action from INSOL Europe

INSOL Europe will publish several **Guidance Notes on the Implementation of the EU Restructuring Directive on Restructuring and Insolvency**<sup>6</sup> with the aim of assisting EU Member States with (i) putting the restructuring frameworks mandated by the Directive in place as soon as possible, where no similar restructuring frameworks exist and in a manner that will be useful to other markets under

strain from the COVID-19 crisis; or (ii) where equivalent restructuring frameworks do already exist, refining and adapting them to the directive.

In April 2020, INSOL Europe published its first guidance note on the key points of classification of claims, voting and confirmation of restructuring plans, including by way of a cross-class cram-down. The second guidance note was published in May 2020 and it deals with the stay of individual enforcement actions to be enacted pursuant to articles 6 and 7 of the Directive.

Over the course of 2020, INSOL Europe plans to publish more guidance notes, which will offer technical insights and policy considerations relevant to the implementation of the EU Directive on Restructuring and Insolvency.

Faced with the COVID-19 crisis' effects on the health of businesses, not only a formal but an informal insolvency restructuring remedy should be part of each legal framework. ■



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#### Footnotes:

- 1 See E. Inacio, *Legislating out of lockdown in Recovery 2020* Summer Edition, available at: [www.3.org.uk/technical-library/recovery/recovery-magazine/](http://www.3.org.uk/technical-library/recovery/recovery-magazine/)
- 2 The LexisNexis PSL/INSOL Europe Tracker of Insolvency Reforms is available at: [www.insol-europe.org/technical-content/covid19](http://www.insol-europe.org/technical-content/covid19)
- 3 The INSOL Europe COVID Coffee Breaks are available at: [www.insol-europe.org/publications/web-series](http://www.insol-europe.org/publications/web-series)
- 4 The emergency law n° 2020-290 of 23 March 2020 empowers the French government to take inter alia, by ordinance, any measure modifying the insolvency law contained in Part VI of the Commercial Code. The French Government adopted the ordinance n° 2020-341 of 27 March 2020 which provides temporary amendments to the insolvency law in order to mainly promote the access to preventive proceedings and extend statutory time limits of insolvency proceedings. The ordinance n° 2020-596 of 20 May 2020 mainly precise and extend the provisions previously adopted.
- 5 See E. Inacio, *A closer look at... The impact of COVID-19 on (pre-)insolvency in eurofenix*, 2020 Spring Edition, n°79, available at: [www.insol-europe.org/publications/about-eurofenix](http://www.insol-europe.org/publications/about-eurofenix)
- 6 The Guidance Notes on the Implementation of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency is available at: [www.insol-europe.org/publications/guidance-notes](http://www.insol-europe.org/publications/guidance-notes)