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I. Introduction

The mission of the **INSOL Europe** is to take and maintain a leading role in European business recovery, turnaround and insolvency issues, to facilitate the exchange of information and ideas amongst its members and to discuss business recovery, turnaround and insolvency issues with who are affected by those procedures. The association encourages greater international co-operation and communication within Europe and also with the rest of the world.

To that end, INSOL Europe gathers academics, judges, lawyers and insolvency practitioners from the European Union and beyond. It organises international meetings on topics related to national and international insolvencies. It also publishes the 'Eurofenix' magazine (quarterly) as well as a stand-alone series of comparative law texts (Technical Series) arising from events organised by the INSOL Europe Academic Forum and the Judicial Wing of INSOL Europe. It possesses a large network of institutional and private correspondents throughout the EU and beyond through its eleven working groups and committees covering a wide aspect of the work undertaken.

Within INSOL Europe, the standing **EU Study Group** is composed of a research team on comparative law, a majority of whose members are regular attendees at meetings organised by official European and other international bodies (e.g. UNCITRAL's bi-annual meetings). Members of this Group are active academics, lawyers, insolvency practitioners or national officers. In the course of 2020, some of their work has resulted in the publication of three Guidance Notes on Directive 2019/1023 on Restructuring and Insolvency with the aim of assisting EU Member States with putting the restructuring frameworks mandated by the Directive in place as soon as possible. The guidance notes offer technical insights and policy considerations relevant to national implementations of the EU Restructuring Directive on the key points of classification of claims, voting, and confirmation of restructuring plans, including by way of a cross-class cram-down (Guidance Note #1, April 2020), on the stay of individual enforcement actions to be enacted pursuant to Articles 6 and 7 of the Directive (Guidance Note #2, May 2020), and more recently on procedural features (Guidance Note #3, November 2020). The goal is to offer guidance by insolvency experts to national regulators where no similar restructuring frameworks exist or where equivalent restructuring frameworks do already exist, refining and adapting them to the Directive.

INSOL Europe has recognised experience as a regular contributor to the debate relating to the harmonisation of insolvency laws in Europe. Indeed, in 2014 and as a follow up to the 2012 Communication of the Commission on 'A new approach to business failure and insolvency', INSOL Europe provided a comprehensive and condensed report on restructuring mechanisms available at that time in the 28 Member States, together with recommendations by 28 national experts for an early preventive restructuring mechanism ('Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices'). This report followed the INSOL Europe report published in 2010 and entitled 'Harmonisation of Insolvency Law at EU Level' which was prepared at the request of the European Parliament. In particular, this report identified a number of areas of insolvency law where harmonisation at EU level was worthwhile and achievable, including an evaluation as to what extent harmonisation of insolvency law could facilitate further harmonisation of company law in the EU. INSOL Europe was also an invited non-governmental

organisation at the European Commission Insolvency Conference held in Brussels on 12 July 2016, entitled 'Convergence of insolvency frameworks within the European Union - the way forward'.

In the course of 2020, INSOL Europe submitted its contribution following the call for feedback in relation to the report of the ***High Level Forum on the Capital Market Union*** (June 2020) and in relation to the ***Consumer policy – the EU's new 'consumer agenda'*** (October 2020).

These are the reason why INSOL Europe would like to continue making submissions and to contribute to the forthcoming work of the European Union staff in relation to the new initiative entitled '***Insolvency laws: increasing convergence of national laws to encourage cross-border investment***' with the following attachment which is the result of our internal consultation lead by the INSOL Europe EU Study Group Working Group.

Respectfully,

Marcel Groenewegen
President of INSOL Europe

INSOL EUROPE CONTRIBUTION
TO THE EU CALL FOR FEEDBACK
ON INSOLVENCY LAWS INCREASING CONVERGENCE
OF NATIONAL LAWS TO ENCOURAGE CROSS-BORDER INVESTMENT

Please find below the INSOL Europe feedback on the Inception Impact Assessment in relation to the initiative entitled 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment' published by the EU Commission on 11 November 2020.

The INSOL Europe contribution is the result of an internal consultation of its Working Groups which were consulted on the basis of a questionnaire drafted by the EU Study Group.

This internal questionnaire lists the key points of the Inception Impact Assessment and comments of the INSOL Europe Working Groups members have been summarised in the '*comments*' boxes which follow each question.

PART A. Context, Problem definition and Subsidiarity Check

- A.1 On the context

Do you agree with the following assumptions?

1. Major ***discrepancies in national substantive insolvency laws*** can be recognised as obstacles for the establishment of a well-functioning Capital Markets Union (CMU).

Yes
No

Comments:

The disparities between national restructuring and insolvency laws can create obstacles and cause competitive advantages and/or disadvantages or difficulties for companies with cross-border elements (business activity, ownership structures etc.) within the EU. These disparities are likely, not only to cause obstacles to a successful restructuring of insolvent companies, but to stand in the way of creating a level playing field in the CMU.

2. ***Inefficient insolvency proceedings*** can delay the recovery of value, restructuring of corporate assets and liabilities with negative knock-on effects for productivity, jobs and growth.

Yes
No

Comments:

A well-functioning insolvency system helps protect the value of the assets of the estate, enhancing the prospects of recovery and potentially returning greater value to stakeholders (including creditors and shareholders). It can also assist in reducing the costs of the administration of the estate, leading to better outcomes for stakeholders and improving the chances of restructuring (including preventive restructuring). The preservation of employment is undoubtedly an important benefit of well-functioning insolvency processes, while leading also to the continued generation of tax and other contributions that help drive the economy.

Note that the question of what is efficient or inefficient should be preliminarily defined in order to assess the measures to be taken. As a suggestion, what constitutes an efficient proceeding could be a combination of: the time to overall conclusion (including distributions to creditors or effectiveness of restructuring agreement), the level of recovery of creditor claims, the costs of the proceeding and, specifically in the case of business restructuring, the viability of the restructured entity in the next 3 years after the adoption of the restructuring plan. In the absence of concrete benchmarks, the reference to just efficiency as a criterion might appear too abstract.

3. ***The efficiency of insolvency proceedings*** is one of several key criteria for investors to decide whether to make cross-border investments as more efficient and predictable insolvency frameworks and enhanced confidence in cross-border financing would help strengthen capital markets in the Union and thus become a steppingstone towards completing the CMU.

Yes
No

Comments:

The efficiency of restructuring and insolvency proceedings helps increase predictability from the perspective of stakeholders (especially creditors and shareholders), thus encouraging the maintenance of business activity, the provision of working capital (including any increased capital needs for restructuring purposes). It helps reduce the impact of financially troubled companies on economies and dissuades migration to jurisdictions with perceived advantages from limited stakeholder perspectives (i.e., only creditors or only the debtor). The predictability that ensues helps assist business investment decisions and offers a safe and certain framework for continued investment in business, including at the cross-border level. This can lead to increased job creation and security across the EU.

Note that the question of what is efficient or inefficient should be preliminarily defined in order to assess the measures to be taken. As a suggestion, what constitutes an efficient proceeding could be a combination of: the time to overall conclusion (including distributions to creditors or effectiveness of restructuring agreement), the level of recovery of creditor claims, the costs of the proceeding and, specifically in the case of business restructuring, the viability of the restructured entity in the next 3 years after the adoption of the restructuring plan. In the absence of concrete benchmarks, the reference to just efficiency as a criterion might appear too abstract.

4. As insolvency law is considered to be a cross-cutting area of civil law that always has to strike a delicate balance between the legitimate interests of creditors and debtors, as well as between those of different types of creditors, the initiative needs to take a holistic approach towards insolvency issues, taking into account the ***banking/investor perspective*** and other stakeholders' interests - including ***suppliers*** (often SMEs), ***employees***, the ***public purse*** and ***debtors*** to identify an adequate balancing of those interests.

Yes
No

Comments:

It is undoubtedly the case that a holistic approach is to be preferred, carefully balancing all stakeholders' interests.

5. There is a need to make appropriate cross-references to the work on ***consumer*** insolvency carried out in parallel.

Yes
No

Comments:

The consumer sector is the area least harmonised across the European Union, with a great diversity in the types of consumer-focused insolvency proceedings available across the EU.[1] The relationship more widely between entrepreneurial funding and consequent consumer debt and whether proceedings focused on the former adequately deal with the latter remains a difficult subject in many legal systems.

There is a very good reason why the proposed initiative should dovetail with work on the consumer aspects of insolvency: at the sharp end, personal debt is often incurred for, not just consumer needs, but also for business set-up and capital priming. In cases of financial difficulty, recourse to personal debt to top-up working capital and extra security taken out over property (including family homes) is seen, leading to potential default in personal insolvency as a direct consequence of business failure. Dealing with one side of this binary equation is insufficient. While procedures to deal with both personal and business debt could march in tandem, at the very least, consideration ought to be given to the very real link between corporate insolvency proceedings and their effect on personal guarantees given by managers for corporate debt, often entailing separate proceedings against the latter.

6. An optimal insolvency framework will ***maximize economic value*** in the economy as a whole adequately balancing the interests of the various groups of

[1] See T. Kadner Graziano, J. Boyars and V. Sajadova (eds), *A Guide to Consumer Insolvency Proceedings in Europe* (Elgar, 2019).

creditors/stakeholders.

Yes
No

Comments:

This is undoubtedly one of the potential benefits of efficient and effective insolvency processes, that value is retained and/or enhanced and waste is reduced. Many factors help in this, not just an optimal rules-based system, but also capacity building and adequate skills and knowledge amongst insolvency office-holders and judges tasked with decision-making so as to optimise outcomes.

7. A legislative or non-legislative initiative for minimum harmonisation or increased convergence in targeted areas of non-bank insolvency law would ***make the outcomes of insolvency proceedings more predictable***.

Yes
No

Comments:

The advantage of any initiative in this area may well be to increase predictability and certainty, which is greatest through harmonisation, but can also be stimulated through measures enhancing convergence. What is important is that the rules that are selected for inclusion in the initiative are those necessary to achieve greatest procedural and substantive synergies. In this regard, better outcomes are certainly facilitated through greater predictability.

Great care should be taken, nonetheless, to distil and include in the legislative proposal only such provisions as would be efficient across all or most of the Member States, so as to allow for flexibility for the local legislators in areas where certain measures could be beneficial for some of the Member States, but might be less efficient in others, due to varying local traditions, the workload of the judicial system as well as the skills of judges, insolvency practitioners and other stakeholders, thus requiring more considered transposition.

- A.2 On the Problem that the initiative aims to tackle

8. Do you agree with the assumption according to discrepancies between the Member States' insolvency laws create barriers to the free movement of capital in the internal market, in particular because it is ***difficult to anticipate (at reasonable cost) the outcome for value recovery***, making it harder to price risks (including for debt instruments) and leading to the risk that investment will not be made at all, ***due to:***

- ***diverging time-limits;***
- ***diverging lengths of procedures***
- ***and diverging overall procedural efficiency***

Yes (qualified)
No

Comments:

In themselves, divergent time-limits and/or duration of procedures are not difficult to anticipate. In that light, sophisticated creditors can price risks in different jurisdictions differently, a position that is not open to all creditors. There is undoubtedly a correlation between lengthy durations and time-limits on recovery prospects and returns to creditors. The diverse positions in member states with respect to the impact of procedures on the position of secured creditors, largely a result of differing public policy positions, could be worth revisiting for their impact in overall procedural efficiency.

And on the assumption that minimum requirements regarding the rules on insolvency would certainly ***contribute to preventing abusive relocations of companies***?

Yes
No

Comments:

The jurisdiction tests in the European Insolvency Regulation (Recast) have done much to corral the use of relocation techniques to maximise advantages in insolvency. To that extent, abusive relocations are less likely. It is not certain that the disparity in most domestic rules leads to the desire to maximise advantage by pursuing a relocation strategy. It is more likely that relocation is dictated by the availability of procedures (taken as a whole or with certain facets: e.g., cram-down or discharge for entrepreneurs/individual debtors) which present comparative advantages, a factor that the transposition of the Preventive Restructuring Directive 2019 will help reduce. As such, abusive procedures are even less likely. However, worth considering, in a limitative fashion, would be a definition of what constitutes an abusive procedure.

9. Do you think that a ***Recommendation*** would be the relevant instrument to reach the objectives set out by the IIA subject to this consultation in comparison with more ambitious measures trough a (new) ***Directive*** with the view that insolvency rules must be made to work better in a cross-border context?

Yes
No

Comments:

A Recommendation, though ideal as a method for sensitising opinion and persuading member states to undertake reforms, is perhaps sub-optimal to achieve meaningful change within a prescribed timeframe. It can also be problematic for civil law countries as lacking substantive guidance for a legislative initiative.

10. Do you think that the forthcoming instrument (whatever a Recommendation or a Directive) should cover the following ***core aspects of substantive insolvency law***, such as:
- a common definition of insolvency,
- the conditions for opening insolvency proceedings,
- the ranking of claims,
- avoidance actions,
- the identification and tracing of assets belonging to the insolvency estate

Yes
No

Comments:

Some of these are areas that have already been identified in (1) the Report on the Harmonisation of Insolvency Law at EU Level (2010),[2] authored for the European Parliament by INSOL Europe (opening conditions, ranking and avoidance); and (2) the work of the Group of Experts on Restructuring and Insolvency Law (E03362) (2016-present) (insolvency definitions and avoidance) as areas that could be considered for such an initiative. Identification and tracing are more recent issues that have been explored at international level, most recently in a colloquium at UNCITRAL (December 2019) and could also be considered.

Which other aspects do you think that this initiative should cover?

Other areas that were canvassed by the 2010 Report include:
- The general stay on the creditors' powers to assert and enforce their rights after the commencement of insolvency and reorganization proceedings.
- The rules with respect to the management of the insolvency proceedings.
- The rules on the process of filing and verification of creditors' claims.
- The responsibility for the proposal, verification, adoption, modification and contents of reorganization plans.
- The scope of the insolvency estate (to the extent not covered by the identification of assets theme mentioned above).
- The termination of contracts and the rules as to the mandatory continuation of the performance of contracts.
- The liability of directors, shadow directors, shareholders, lenders and other parties involved with the debtor.
- The provision of post−commencement finance.
- The practitioner's qualifications and eligibility for the appointment as insolvency representative, different rules regarding licensing, regulation, supervision and professional ethics and conduct (to the extent not already covered by Title IV of the Preventive Restructuring Directive 2019).

Of these, rules on post-commencement financing, the effect of stays, continuing contracts could be considered particularly worth considering, given they are highly

[2] Available at: https://www.insol-europe.org/download/documents/581.

topical issues in insolvency practice. Additional consideration could be given to an enumeration of the powers of the debtor-in-possession *vis-à-vis* practitioner-led procedures.

- A.3 On the basis for EU intervention (legal basis and subsidiarity check)

According to the IIA, two separate legal bases for this initiative could be used, in particular: Art. 292 TFEU (for a Commission Recommendation) or Article 114 TFEU (for a Directive). As regards subsidiarity and proportionality, the IIA mentions that the initiative should ***concentrate on key aspects of substantive insolvency law*** where action at EU level appears necessary in order to contribute to the creation of a true Capital Market Union.

Any comments or remarks on what should be qualified on key aspects of substantive insolvency law ?

The nature of the areas recommended above for consideration invites consideration of both substantive and procedural aspects of insolvency. To that extent, the legal basis would need to cover both.

PART B. Objectives and Policy options

- B.1 Objectives

According to the IIA, the ***general objective*** is to boost cross-border investment and the ***specific objective*** is to improve the preservation of value of insolvent businesses, thus increasing the levels of debt recovery.

Do you think that harmonisation of national insolvency laws would serve these objectives? In what extent?

Both general and specific objectives would be served by an initiative, provided its terms were measured and considered well. There would need to be good business cases made for the inclusion of particular areas for harmonisation and a limitative approach to only consider what is necessary can be justified.

- B.2 Policy options between:

1° Baseline 'no action scenario' where the Commission will continue to look at insolvency in the context of the ***European Semester*** aiming at correcting certain macro-economic imbalances, or
2° A ***Commission Recommendation***, or
3° A ***Proposal for binding measures***, or
4° A ***combination of both*** (namely, a gradual approach by a Recommendation, later followed by a proposal for binding measures if insufficient follow-up by Member States of the Recommendation, e.g., with the 2014 Commission Recommendation on 'restructuring and second chance' which was followed up by a Directive - proposed in 2016 and adopted in 2019).

In your views, which policy options would be the most appropriate to reach the objectives as described below (B.1)? and to what extent ?

A proposal for binding measures would be the most appropriate (for the reason given as the answer to question 9 above). Moreover, binding measures could be easier to draft on a consensual basis, with a flexible approach to facilitate transposition.

PART C. Preliminary Assessment of Expected Impacts

The Inception Impact Assessment lists a number of impacts expected by the initiative, namely economic and social impacts as well impacts on impacts on fundamental rights and on simplification and/or administrative burden.

In particular, the IIA mentions that '*The proposed initiative will aim* ***at further digitalisation and the related simplification of insolvency procedures*** *building on the Directive on Restructuring and Insolvency which - to further reduce the length of procedures and to facilitate better participation of creditors in insolvency procedures - obliged Member States to put in place provisions enabling the use of electronic means of communication in insolvency procedures, such as for the steps of filing of claims by creditors, notification of creditors, or lodging of challenges and appeals.*'

In your views, which additional actions may be required in that specific area (namely further digitalisation and simplification of insolvency procedures)?

Measures simplifying insolvency are highly desirable, particularly those that target the position of MSEs. The use of appropriate technology is to be recommended. Further progress in these areas, including as an outcome of the proposed initiative, can only be desirable.

PART D. Evidence Base, Data collection and Better Regulation Instruments

- D.1 Impact Assessment Process

According to the IIA, the impact assessment process *per se* will be launched in 2021 to help prepare this initiative and support the Commission's decision.

It is also mentioned that a ***soft law instrument to increase the transparency of national insolvency laws*** could be deemed relevant in areas which are not fit for approximation but nevertheless important for investors, for example the definition and consequences of insolvency, or the treatment of certain claims (employment, tax claims) in insolvency proceedings.

Any comments?

Given the background legal frameworks of many member states, a soft law instrument would be sub-optimal, given a possible lack of familiarity with this type of initiative and also the lack of potential impact within those systems (i.e., lack of legal effect; difficulties in transposition). To that end, soft law, while it is very useful in the work of some international organisations (e.g., UNCITRAL), this type of text might not be appropriate here.

- D.2 Evidence base and data collection

One of the aims of the European Commission consultation is to invite any stakeholders to make available any relevant information that they may have to feed the forthcoming steps of the Impact Assessment process.

Could you please list in the box below any ***materials (studies, reports, publications, webinars, surveys, quantitative data, statistics***, etc…) that you find relevant to feed the next steps of the Impact Assessment process

INSOL Europe Studies:

Study on a new approach to business failure and insolvency –
Comparative legal analysis of the Member States' relevant provisions and practices (2014)
https://www.insol-europe.org/eu-study-group-publications

Report on the Harmonisation of Insolvency Law at EU Level (2010) (opening conditions, ranking and avoidance).
https://www.insol-europe.org/eu-study-group-publications

INSOL Europe Website Materials:

European Insolvency Regulation Case Register
https://www.insol-europe.org/technical-content/european-insolvency-regulation

State Reports
https://www.insol-europe.org/technical-content/state-reports

National insolvency statistics:
https://www.insol-europe.org/technical-content/national-insolvency-statistics

How to become an IP across Europe?
https://www.insol-europe.org/technical-content/how-to-become-an-ip-across-europe

Other Studies of Interest:

JCOERE project is to 'Enhance Judicial Co-operation under the Recast Insolvency Regulation (EU 2015/848) supporting preventive restructuring (rescue) processes for European businesses.'
https://www.ucc.ie/en/jcoere/
including reports at: https://www.ucc.ie/en/jcoere/publications/

Contractualised Distress Resolution in the Shadow of the Law - Effective judicial review and oversight of insolvency and pre-insolvency proceedings (Final report as at September 2018)
The project deliverable consists in a Final Report addressing the main matters of restructuring proceedings (both in-court and out-of-court proceedings) and formulating guidelines and policy recommendations.

https://www.codire.eu/publications/stanghellini-mokal-paulus-tirado-best-practices-in-european-restructuring-contractualised-distress-resolution-in-the-shadow-of-the-law-2018-2/

European Law Institute's (ELI) Instrument on Rescue of Business in Insolvency Law (September 2017)
Study which contains some 115 recommendations, and was adopted with an overwhelming majority by the ELI Council and General Assembly on 6 September 2017.
https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf

Study on a new approach to business failure and insolvency - Comparative legal analysis of the Member States' relevant provisions and practices (University of Leeds - January 2016)
This report includes an analysis of the EC Recommendation on a new approach to business failure and insolvency and its implementation in Member States.
https://ec.europa.eu/info/sites/info/files/insolvency_study_2016_final_en.pdf

- D.3 Consultation of citizens and stakeholders

We agree on the need for citizens and stakeholders to be invited on several occasions to share their views before any decision to be taken by the European Commission.

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