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Harmonizing Insolvency Law in the Prism of European Investment Law

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- Meaning and scope of EU Investment Law against the background of principles, primary rules and secondary rules of EU Law
- The EC Communication *Protection of intra-EU investments* (18 July 2018)
- Freedom of establishment and free movement of capitals as pillars of the EU Law system designed to protect foreign direct investments ("FDI") of investors having seat in Member States ("MS Investors")
- Litigating investment claims: the CJEU's judgment in *Achmea* and the shift from arbitral to judicial venue

- International Investment Law: treatment of investors coming from third countries ("**TC Investors**")
- Notion of **investment** and **investors** (the Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union)

The selected perspectives of the interconnection between Insolvency (Law and Policies) and (EU-International) Investment Law:

1. Building a harmonized (if not unique) space for the attractiveness of the EU market to MS and TC investors. EU as a "Common Host Entity" in relation to FDI of TC investors (**perspective 1**)

2. Insolvency triggered by national measures and investment protection. National measures grappling with the pandemic crisis and resulting restrictions of investors' rights against the background of insolvency proceedings or restructurings (**perspective 2**)

Perspective 1

- General purposes of Restructuring Directive (2019/1023)
- Paradigm shift from *forum*/law competitiveness among MS to EU general interests in investment matters
- EC 2016 Proposal and Directive Preamble
- EC Communication *A Capital Markets Union for people and businesses-new action plan* (24 September 2020)

Perspective 1

- Investors and uncertain, cost-time consuming and complex national regimes
- Predictability of the outcome of insolvency proceedings (Action 11, EC Communication *A Capital Markets Union for people and businesses-new action plan*)
- Making the access to credit easier in all MS
- Efficiency in multinational groups insolvency and restructuring
- Fair and Equitable Treatment ("FET") standard compared with swift, smooth and efficient restructurings

Perspective 1

- Turning the *competition* between MS into a harmonized normative space of insolvency regimes
  - Harmonizing process in restructuring and insolvency and therefore levelling the playing field as means to set up a **Unique European Space of Investments** in the investors' perspective ... i.e. to make EU a **Common Host Entity** for MS and, especially, for TC Investors

Perspective 1

Questions to be answered

How should MS national insolvency legislations be revised so as to prove attractive for MS investors; and how should MS national insolvency legislations be revised so as for the EU space to prove comprehensively attractive for TC investors?

Are there reasons to address such topics in different ways? Probably not, insofar as the EU aims to harmonize insolvency and restructuring regimes to level the playing field among MS and set up a unique attractive market for TC investors.

Perspective 1

Questions to be answered

What are, if any, the inconsistencies between MS insolvency rules and investment law standards, such as *FET*, *denial of justice*, *full protection and security*, *national treatment*, when it comes to provisions or practices that affect investments ***of*** the debtor (investor being the debtor) or ***in*** the debtor (investors being creditors, shareholders and other qualified stakeholders)?

Perspective 1

Questions to be answered

Assuming that said inconsistencies (or, generally speaking, all regulatory shortcomings in insolvency matters) lead companies to "relocate" from one MS to another, might this "relocation" run against the process of forging the EU as a *unique market* for FDI?

Perspective 1

Questions to be answered

To what extent should national legislations be modified in order to make also sub-operations of restructuring or insolvency proceedings more certain and foreseeable (e.g. rules governing the effectiveness of the assignment of claims against third parties, or the enforcement of rights *in rem* and other priorities, as well as grounds relied upon in assessing the "best interests" for creditors and shareholders), so as for the EU market to be more attractive for MS and TC Investors?

Perspective 1

Questions to be answered

Should insolvency rules (especially those applicable to restructuring operations) be tailored to sustainable development policies, which mark all current and prospected EU policies, including the investment ones?

Perspective 2

- (EU/International) Investment Law - draconian national measures in the pandemic era – consequent crisis and insolvency for MS or TC investors
- May insolvency practitioners ("IP") make use of investment treaties to recover debtors' assets consisting in claims against the host State for infringements of investment standards?
- The *PNB Banka* and *Eskosol* ICSID cases

Perspective 2

- The question through the lens of insolvency: may the IP commence an arbitration, thereby representing the interests of the debtor/investor?
- Lacking an harmonized framework.... different answers depending on the applicable *lex concursus*