

Technical Update Winter 2020/21: Get involved!

Myriam Maily writes about the latest information made available to INSOL Europe members on the INSOL Europe website



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Insolvency laws: increasing convergence of national laws to encourage cross-border investment

On Wednesday 11 November 2020, the European Commission began its work to improve convergence between national frameworks for corporate insolvency by publishing an inception impact assessment for an initiative that is expected in the second quarter of 2022.

According to the EU Commission ‘*Efficient insolvency laws are one of the key criteria for investors to decide on whether to invest across borders. Increasing confidence in cross-border financing will boost the Union’s capital markets.*’

The initiative which will take the form either of a **Recommendation** or a **Directive** (to be determined in the impact assessment process) proposes to address ‘*the main discrepancies in national corporate (non-bank) insolvency laws, which have been recognised as obstacles to a well-functioning Capital Markets Union. It will (also) consider the legitimate interests of all creditor groups, from investors and the public purse to employees and consumers.*’

In more detail, the European Commission aims at harmonising insolvency laws in a targeted manner and could consider aligning some features of insolvency regimes from the following non-exhaustive list, with the view of maximising value preservation of insolvent businesses:

- (i) prerequisites for when insolvency proceedings should be commenced (including a *definition of insolvency* and provisions on *who is entitled to file for insolvency*);
- (ii) conditions for determining *avoidance actions* and effects of **claw-back rights**;
- (iii) *directors’ duties* related to handling imminent/actual insolvency proceedings;
- (iv) *position of secured creditors* in insolvency taking into account specific needs for the protection of other creditors (e.g. employees, suppliers);
- (v) *court capacity* when it comes to expertise and necessary *training of judges*; and
- (vi) *asset tracing* which would be relevant, in particular in the context of avoidance actions.

The roadmap was open for feedback between 11 November 2020 and 9 December 2020 and INSOL Europe members were encouraged to share their views by using the opportunity to give feedback on an individual basis. That was an important first step as feedback is taken into account by the European Commission staff for further development and fine tuning of the initiative. Input received by the European Commission in that context is also summarised in a synopsis report explaining how the input is taken on board and, if applicable, why certain suggestions cannot be taken up.

The INSOL Europe feedback is available at www.insol-europe.org/eu-study-group-news

This initiative under the leadership of DG Justice A1 is

also the result of the call for feedback on the final report of the High Level Forum on Capital Markets Union (EU Survey for which INSOL Europe has sent its contribution and which is still available at www.insol-europe.org/eu-study-group-news

This consultation was followed by the CMU Action Plan which was published on 24 September 2020 by the European Commission at: https://ec.europa.eu/info/publications/200924-capital-markets-union-action-plan_en

Of course, INSOL Europe members will be also informed in due course of the next steps of this (non/-) legislative adoption process including the launch of an Impact assessment (in 2021), the views from the existing Insolvency Expert Group and the potential launch of a further study (to complete the Leeds study available from our website at www.insol-europe.org/technical-content/eu-draft-directive) in order to shed light on aspects on which the evidence base has not yet been developed sufficiently, such as on asset tracing and the role of data for increased market-based finance during all the phases of insolvency proceedings (pre-insolvency) and following insolvency proceedings.

A consultation of stakeholders through a public consultation or roundtables may also be issued on the desirability of convergence of insolvency laws and on important pre-insolvency or insolvency concepts and actions such as avoidance actions, the definition of insolvency tests or the ranking of claims.



INSOL Europe expressed the opinion that the EU cannot ignore any longer the issue of consumer insolvencies



INSOL Europe's contribution to the EU call for feedback on the 'New Consumer Agenda'

As the large numbers of individual debtors with limited assets and income throughout the European Union cannot be ignored, INSOL Europe has answered to the call for feedback in relation with the 'New Consumer Agenda', for which the European Commission has issued a public consultation on 30 June and which ended on 6 October 2020.

In its contribution still available at <https://www.insol-europe.org/eu-study-group-news>, INSOL Europe expressed the opinion that the EU cannot ignore any longer the issue of consumer insolvencies, in particular because in parallel, the European Commission has adopted a new CMU Action Plan which contains provisions or recommendations on business insolvency. Indeed, acting in that area may also serve the CMU New Action Plan objectives as a proper (minimum) harmonised personal insolvency regime in the EU may be of benefit to honest individual debtors and their families, which may in turn contribute to sustainable economic growth. In short, consumer over-indebtedness with appropriate control mechanisms in place to combat fraud and bad faith is a matter of great economic and social concern and is closely related to the reduction of the debt overhang.

In addition, with the current implementation of the EU Directive on Restructuring and Insolvency in the Member States and the various international initiatives in that field, INSOL Europe reminded the need for the EU institutions to address more fully the critical issues facing the large number of ordinary consumers suffering from financial distress by focusing on the appropriate principles applicable to honest individual debtors in order to complete and make coherent the EU insolvency

framework that is already in place.

At the very least, INSOL Europe was of the opinion that a constructive discussion of these issues might signal the desirability of some potential dangers of other approaches in view of producing durable solutions in the not-too-distant future, including relevant education and efficient communication strategies regarding available options and the accessibility of freely available and cost efficient independent debt advice and guidance.

EU Commission's revised notice to stakeholders in the field of civil justice and private international law in view of UK's withdrawal from the EU

The European Commission has published a revised "Notice to stakeholders concerning the withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law".

The new document replaces the notice to stakeholders, published on 18 January 2019, and the Q&A document, published on 11 April 2019.

You can consult the new document here: <https://ec.europa.eu/info/publications/civil-justice-judicial-cooperation-civil-and-commercial-matters>

Revised version of the EBRD core insolvency principles

The EBRD has recently published a revised version of the EBRD core insolvency principles, in relation to which INSOL Europe provided substantive feedback working to a tight deadline during the Summer.

The revised principles as at 1st September 2020 are available from our website at <https://www.insol-europe.org/eu-study-group-links> ■

COVID-19 Tracker

Please note that the **Lexis-Nexis & INSOL Europe COVID-19 Tracker of insolvency**

which has been published for free for all INSOL Europe members is still available from the INSOL Europe website at: www.insol-europe.org/technical-content/covid19

A table published by the European Commission which provides an overview of measures taken by Member States and other useful links related to measures taken in the COVID-19 context is also available at www.insol-europe.org/eu-study-group-links



Other Useful Links



COVID Coffee Breaks
> www.insol-europe.org/publications/web-series

Updated Insolvency Laws
> www.insol-europe.org/technical-content/updated-insolvency-laws

National Insolvency Statistics
> www.insol-europe.org/technical-content/national-insolvency-statistics

EIR Case Register
> <http://tinyurl.com/y7tf2zc4>

European Insolvency Regulation
> www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848

> www.insol-europe.org/technical-content/outcomes-of-national-insolvency-proceedings-within-the-scope-of-the-eir-recast

> LinkedIn
www.linkedin.com/company/insol-europe/

> www.insol-europe.org/technical-content/state-of-play-of-national-insolvency-data-by-outcomes-currently-available

> www.insol-europe.org/national-texts-dealing-with-the-eir-2015

EU Directive on Restructuring and Insolvency (2019)
> www.insol-europe.org/technical-content/eu-draft-directive

> www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

Brexit Publications
> www.insol-europe.org/technical-content/brexit-publications

USBC Chapter 15 Database
> www.insol-europe.org/technical-content/introduction

Academic Forum Publications
> www.insol-europe.org/academic-forum-documents

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