Adopting the Directive: Member States "in particular difficulties"

Prof. Reinhard Bork provides a timely update on the position of Member States in the adoption of the EU Directive on Restructuring and Insolvency

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According to Art. 34(1) of the Directive (EU) 2019/1023 on Restructuring and Insolvency, and subject to some minor exceptions, Member States:

> "shall adopt and publish, by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with this Directive".

However, Art. 34(2) of the Directive states that,

> "*by way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.*"

Rumour has it that most Member States have made use of this option but an official list of those States is not available and the European Commission keeps it to itself. At any rate, some information is available[1] and it is interesting to cast a glance to the reasons for playing the extension card.

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Subject to further developments after the completion of this article (mid-May) and with the caveat that reliable information is difficult to obtain, the picture can best be drawn by pooling Member States in four groups.

Member States who have already implemented the Directive

The first group is made up of a few states which have already implemented the Directive. To this group belong Greece (law No. 4738/2020) and Germany (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts*, including the *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen - StaRUG* as its centrepiece).

Although no longer a Member State of the EU, the United Kingdom can also join the ranks of this group, since it passed its Corporate Insolvency and Governance Act 2020 (CIGA 2020) on 26 June 2020 which meets most, albeit not all[2], demands of the Directive.

Member States in which the implementation is on its way

The second group consists of Member States in which the implementation is on its way and which are expected to pass a respective bill before 17 July 2021.

This concerns Austria (*Restrukturierungsordnung*), France (Act N°2019-486 of 22 May 2019 ['*Loi Pacte*'], Art. 196[3]), Luxembourg (Bill No. 6539), and Romania (Bill amending the Romanian Insolvency Act No. 85/2014), possibly also Lithuania (Bill Nr. XiVP-362[4]).

In these countries, draft laws have been presented to parliaments and the public and it is currently very likely that they will be passed in time – or have already been passed when readers take note of this article.

Member States which require an extension option

The third group is the largest one. It is composed of at least 17 states which have notified the European Commission that they will make use of the extension option as provided for in Art. 34(2) of the Directive. To my knowledge, members of this group are Belgium, Bulgaria, Croatia, Cyprus, The Czech Republic, Denmark, Estonia, Finland, Ireland, Italy, Latvia, The Netherlands, Poland, Portugal, Slovakia, Spain, and Sweden.

However, this is not a homogenous group. Among them are States which have most of the instruments provided for by the Directive already in their law (e.g. Italy, Ireland, Poland, Portugal, The Netherlands), either already before the Directive required so or in reaction to the Directive.

A good example are The Netherlands which, on 26 May 2020, have amended their insolvency law through the *Wet homologatie onderhands akkoord* (WHOA) which covers most but seemingly not all of the means regulated in the Directive.

Others are on their way but not far enough to finishing the legislative work before the expiry of the deadline. Finally, there are also Member States which are still at the first setout.

Member States about which there is no information

The fourth group is constituted of Member States for which there is no information at all (Hungary, Malta, Slovenia).

Particular difficulties

Looking at the reasons for the delay – or the "*particular difficulties*", as Art. 34(2) of the Directive puts it – various circumstances play a role. It does not come as a surprise that the most frequently mentioned cause is the crisis provoked by the COVID-19 pandemic. It made legislative work more cumbersome. On a personal level, many ministerial employees were bound to work from home or even contracted an infection, and everything took longer, in particular coordination between teams and ministries involved and public consultations. On a more substantial level, all workforce available was occupied with *ad hoc* legislation reacting to the entirely new challenges and needs caused by the pandemic. This was a particular problem in smaller countries and made it necessary to focus on the more urgent COVID-19-related legislation and leave other things unprocessed.

In some states, the Directive was used as an opportunity for (e.g. in Estonia), or implemented in the context of (Italy), a fundamental insolvency law reform. This cannot be done in two years. Not only that the drafting of a new insolvency act takes more time than the implementation of a Directive in an already existing insolvency law. Insolvency professionals – such as judges, insolvency practitioners, lawyers – also need sufficient time to get acquainted with the new law. In general, it is reported from various countries that their governments have opted for a thorough rather than a rapid transformation process and have accepted that the deadline will be exceeded. This is understandable, given that the Directive requires decisions on some 70 options.

However, there are other, more general and fundamental causes. In many Member States, one can hear complaints that the Ministry of Justice or even the government itself are not sufficiently staffed and that the existing personnel does not have sufficient expertise in harmonisation techniques and in the transposition of Directives, let alone in insolvency law. This sometimes leads to a rather low priority being given to the implementation of the Directive and in some states (e.g. Latvia, Slovakia) to the utilisation of the EU structural reform support program as provided by the Directorate-General for Structural Reform Support (DG REFORM). There are other commitments that make heavy demands on scarce resources, e.g. Finland's presidency of the EU Council (as the duties of the presidency occupy all the resources for six months entirely) or natural calamities (such as earthquakes, e.g. Croatia). Another obstacle to the timely implementation of the Directive are elections (e.g. Croatia, Spain). They often lead not only to a change at the top of the ministry but also to a replacement of the responsible personnel, with the result that the new persons in charge do not have the necessary expertise and experience in the field of insolvency law. Further, elections can lead to new coalitions or even to a minority government, making new compromises both necessary and difficult to reach where the implementation of the Directive is not only technical but concerns politically controversial issues (such as the treatment of tax claims etc.).[5]

In summary, it turns out that most Member States of the EU have failed to implement the Directive in time and have notified the European Commission that they need another year as provided for in Art. 34(2) of the Directive. When accounting for whether this is a good thing or a bad thing, whether the reasons put forward are sufficient and Member States are indeed "in particular difficulties", there is no simple answer. However, the following can be said.

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Minor relevance

In light of the challenges and burdens caused by the pandemic, one could argue that the implementation of a Directive on restructuring and insolvency seems of minor relevance. With more than one million dead in Europe, there are probably more important things than the implementation of a Directive.

One should consider that, in the light of more than one million businesses facing insolvency, the pandemic has led many States to enact special laws to avert the threat of insolvency for businesses that had to close for longer periods because of the pandemic, or at any rate have suffered significant losses. One

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could ask whether the energy invested in these COVID-19-related laws would not be better used in the implementation of a Directive which aims at enabling the timely rescue and restructuring of enterprises on the verge of insolvency and could also be used for fighting COVID-19-related insolvencies.

However, this question must be answered in the negative. Near-term legislation reacting to the pandemic could be content with suspending or amending certain rules of current insolvency law (e.g. regarding the director's liability, statutory duties to file for insolvency, definition of substantive insolvency, etc.). This can be done on short notice, whereas the implementation of a complete framework for pre-insolvency restructuring needs thorough deliberations and sufficient time for shaping a convincing and coherent law. Against this background, a delay of the implementation seems like a rather small sacrifice.

Structural problems

The fundamental structural problems that are revealed and exemplified by the transposition issue discussed here must be of greater concern. It follows from the above, that many Member States have inherent difficulties to keep pace with the European Union.

The combination of a multitude of legal acts, the complexity of regulations, and short implementation deadlines seems to overwhelm many national governments. They sometimes lack the necessary manpower and material resources, the demandable expertise, and occasionally the required sense of the importance of the task at hand. Seen from this angle, one could argue that a Regulation seems to be preferable to a Directive, because the former applies directly and requires, unlike the latter, no transforming act from the part of national legislators.

However, it seems not advisable to impose a Regulation on the Member States where it concerns a topic that is particularly marked by national cultures and customs. This holds true for issues of procedural law in particular, including the law of restructuring and insolvency proceedings.

To be clear, the harmonisation of restructuring and insolvency laws is worth striving for, but it should be pursued cautiously, thoroughly prepared, and with sound judgement. This is neither compatible with short deadlines for the development of European legal acts, nor with short implementation deadlines for national legislators.

Looking ahead

Looking ahead, we can see another example of astonishing haste. On 11 November 2020, the European Commission – based on the new Capital Markets Union Action Plan of 24 September 2020[6] – published the initiative "*Enhancing the convergence of insolvency laws*".[7] It has therefore reactivated the Group of experts on restructuring and insolvency law (E03362) and intends to submit a proposal for the harmonisation of insolvency laws by the end of June 2022. The "non-exhaustive list" of relevant features includes:

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

For anyone familiar with the field, this is an impressive catalogue and it is probably safe to say that this list cannot be solidly worked through in one year or at least might be perceived as being rather ambitious. It is difficult to understand why the European Commission is exerting such massive time pressure on such an important and complex issue.

For the avoidance of doubt, harmonisation in this field of law deserves support! However, we all know, haste makes waste… ■

Footnotes:

1 I am particularly grateful to the members of the working group on harmonisation of transactions avoidance laws in the EU (chaired by *Michael Veder* and myself) and to the national reporters of INSOL Europe's EIR Case Register (administered by *Kristin van Zwieten* and myself) who provided me with information regarding their national laws.

2 For example, it follows from sec. A6(1) Insolvency Act 1986 that the appointment of a monitor is mandatory if the debtor company strives for a moratorium. This is in contrast to Art. 5(3)(a) of the Directive which requires the judicial or administrative authority responsible for the moratorium to decide on a case-by-case basis that such a practitioner is necessary to safeguard the interests of the parties. Further, the Directive applies also to natural persons who are entrepreneurs (Art. 1(2)(h) of the Directive) whereas English law restricts the application of the moratorium rules to companies (sec. A1(1) Insolvency Act 1986).

3 This Act authorises the French government to implement the Directive through an *Ordinance*. The government is still aiming at doing so before the deadline expires.

4 Cf. *Heemann/Juškys*, Eurofenix Spring 2021 p. 38.

5 Similar effects can be registered for The Netherlands, where the government has resigned and is only administering the most important matters as a caretaker government.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Capital Markets Union for people and businesses-new action plan, Brussels, 24.9.2020, COM/2020/590 final, p. 13.

7 European Commission, Inception Impact Assessment Initiative "*Enhancing the convergence of insolvency laws*", available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws- (last accessed 04 May 2021), at B.