Approaches to Insolvencies of Wide Public Impact

Professor Rebecca Parry
Nottingham Trent University, UK

Abstract

Insolvency laws are often structured to protect the entitlements of creditors and avoid the incurrence of costs where ongoing trading is of no benefit. There is however growing recognition that in some insolvencies there are major public impacts, such as impacts on customers or on the environment, that must also be addressed. The most notable examples of these public impact cases have been in the financial sector and special approaches to insolvencies in this sector developed following the 2008 financial crisis, including under EU law.

Privatisation of some public services has been introduced in many countries to bring greater efficiency through exposure to market forces, whereas some essential services, such as those in the digital services sector, have always been provided by private companies. This has led to the emergence of socially important non-financial institutions, "SINFIs", supplying public services in market conditions. However, insolvencies are a natural part of the market forces that are harnessed by privatisation to bring efficiencies. This brings the prospect of an insolvency of a SINFI supplier of public services, threatening continuity of essential services. Inevitably in such a scenario there would be calls for public money to solve the problem but bailouts undermine market forces and bring inefficiencies, and in the EU are controlled under state aid rules. It is preferable to protect the services provided by an entity, not the entity itself, if moral hazard is to be avoided.

Primarily there should be a focus on crisis prevention and different sectors employ safeguards such as licensing requirements that work towards this. There have however been many illustrations that preventative mechanisms do not suffice, and insolvencies have occurred in highly regulated areas, including banks and airlines. The prospect of insolvencies of wide public impact is also arguably a factor that should be addressed by insolvency systems, including means for the functions of a service provider to be temporarily continued even where this is not in the interests of creditors. There are existing examples of this. Croatia enacted its "Act on Extraordinary Administration Proceedings in Companies of Systemic Importance for the Republic of Croatia". Although the aim of this Act was to enable a specific large-scale insolvency to be handled consideration might be given to a more general Act of this type. The UK, which in the 1980s embarked on a large programme of privatisations, has long had various special insolvency regimes to support this. There are special procedures in important areas with identifiable risks, the benefits of which have recently been illustrated by the continuity of supply to customers of insolvent energy supply companies.

The number of examples of in the UK of special insolvency procedures is only growing in recent years as new technologies emerge. Procedures in the UK have been added for e-money and payment institutions and stablecoins may yet add another. However, it is not only finance which presents emerging risks. In the age of disruptive technologies there is the risk of an insolvency of wide impact that national insolvency systems are unprepared for. This raises the question of whether a more general power to handle insolvencies of wide public impact can be established, based on broad principles rather than detailed rules, since in the

modern age insolvencies of potentially systemic risk cannot always be forecast and risks can outpace legislative capacity.