

Towards a greater level of harmonization at European level

Giorgio Corno and Andreas Stein summarise their presentation at the conference in Alba (Italy) on 21 November 2021 organised by the Associazione Albese Studi di Diritto Commerciale*



ANDREAS STEIN
Head, Civil Justice Unit,
Directorate General for Justice,
European Commission

The transposition of Directive (EU) 2019/1023 by EU Member States and transposition control by the Commission

The European Commission is supervising the implementation of Directive (EU) 2019/1023 by Member States. As at 20 November 2021, only three Member States have officially notified a complete transposition within their jurisdiction. The remaining 24 Member States have taken advantage of the possibility to extend the deadline for implementation of 17 July 2021 by a year in accordance with Article 34(2) of the 2019 Directive in case of particular difficulties, generally invoking the Covid-19 pandemic as a reason for such difficulties. However, even a number of the latter Member States have already implemented at least certain aspects of the 2019 Directive, for instance in relation to early warning mechanisms (as in Germany and Italy). Nonetheless, delay in the implementation of the 2019 Directive is not expected to have a significant impact on the harmonization process.

The Commission is responsible for making sure that all EU Member States properly transpose and apply EU law. In its role as ‘guardian of the treaties’, the Commission has enforcement powers wherever an EU Member State does not incorporate, whether fully or at all, a directive into its national law by the set deadline or has not applied EU law correctly in its transposing legislation. To the extent

appropriate, the Commission takes advantage of the various committees and expert groups already in place, as well as the valuable support of European agencies, to foster implementation and assess how legislation is implemented in practice. In many cases – and this will also include the 2019 Directive – the Commission also contracts out an evaluation of the transposing legislation in all Member States to serve as a basis for its own assessment.

The Commission may open an infringement procedure for ‘non-communication’ (where no transposition of a directive, or of parts of it, has been notified at all) as well as in the case of an incorrect transposition of a directive, in accordance with Article 258 ff. of the TFEU.

The possible impact of the 2019 Directive on Regulation (EU) 2015/848 and recent amendments to Annexes A and B

The 2019 Directive requires Member States to put in place preventive (pre-insolvency) restructuring procedures which comply with certain minimum principles of effectiveness. It is without prejudice to Regulation (EU) 2015/848 (“EIR (Recast)”) whose scope also extends to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency and to proceedings which leave the debtor fully or partially in control of its assets and affairs.¹

The 2019 Directive does not

change the approach taken in the EIR (Recast) of allowing Member States to maintain or introduce pre-insolvency restructuring procedures which do not fulfil the conditions for notification under Annex A to the Regulation, for example because they do not meet the publicity requirements. However, although the 2019 Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments under the EIR (Recast)² and therefore encourages Member States to transpose their obligations by means of national procedures which also qualify for Annex A to the EIR (Recast).

That said, currently legislative proceedings are underway to amend Annexes A and B to the EIR (Recast) for a number of Member States in view of recent changes to their domestic insolvency law introducing new types of insolvency proceedings or insolvency practitioners, partially also introducing preventive restructuring procedures following Directive 2019/1023 which meet the requirements of the EIR (Recast).

After an assessment of the compliance of the changes notified by certain Member States (the Netherlands, Italy, Lithuania, Cyprus, Poland, Germany, Hungary and Austria) with the requirements for being included in Annexes A and B of the EIR (Recast), the European Commission adopted a proposal for a Regulation on 11 May 2021

aimed at amending the annexes accordingly. Regulation (EU) 2021/2260 was thus adopted by the co-legislators on 15 December 2021 and was published in the Official Journal on 20 December 2021. It became effective from the twentieth day following its publication in the Official Journal, therefore on 9 January 2022.

As soon as other Member States implement the 2019 Directive within their domestic laws, further notifications are expected to be requested and, therefore, further amendments of Annex A and B are certain to follow.³

Furthermore, by 2027, the entire EIR (Recast) on cross-border insolvency will be subject to review on the basis of a Commission report on its application.⁴ A study on the issue of abusive forum shopping, which was due on 27 June 2020,⁵ is currently in progress.



Towards further harmonization of substantive insolvency law within the EU

A further initiative aimed at harmonizing insolvency law is currently under preparation in the context of the efforts to complete the so-called capital markets union (CMU).⁶ The legislative and non-legislative measures of the 2020 CMU Action Plan⁷ included one specifically dedicated to making the outcomes of insolvency proceedings more predictable through a legislative or non-legislative initiative for minimum harmonization or increased convergence in targeted areas of non-bank insolvency law.⁸

Following a public consultation on insolvency laws, on 25 November 2021 the Commission announced⁹ that it will propose an initiative by the third quarter of 2022 that will seek to harmonize targeted aspects of the corporate insolvency framework and procedures. Subject to an impact assessment, the Commission will propose a directive whose exact scope will be subject to further discussions with Member States

and the European Parliament. This directive proposal could be complemented by a Commission Recommendation.

An independent Group of Experts has been assisting the Commission in the preparation of a potential legislative proposal containing minimum standards for a harmonized insolvency law in the EU. The Group is helping the Commission to consider, *inter alia*, the following issues: the scope of the new instrument, in view of the objective of facilitating the free movement of capital in the internal market; common definitions; common principles and rules in the area of formal insolvency procedures (e.g. filing of claims, conditions for accessing the procedures, avoidance actions, ranking of claims, special rules for micro and small enterprises); duties of directors in the vicinity of insolvency; other measures aiming at enhancing the efficiency of insolvency proceedings and reducing their costs and length, including in relation to the training and qualification of judges and insolvency practitioners. The results of the

work of the Group will feed into the process of the Commission selecting the issues considered appropriate for harmonization and setting out proposed rules for common standards. ■

Footnotes:

* This article is based on a speech at the Conference in Alba (Italy) on 21 November 2021 organised by the Associazione Albe Studi di Diritto Commerciale, as well as on the official documents available on the EU Commission web site. This article expresses the views of the authors and, with regard to Mr Stein, does not reflect the official position of the EU Commission. An extended version of the article has been published in www.dirittoellacrisi.it

1 Recital 10, EIR (Recast).

2 Recital 13, 2019 Directive.

3 Because of the heavy legislative process the Commission attempts to bundle as many notifications as possible.

4 Article 90(1), EIR (Recast). A similar review clause can also be found in Article 33, 2019 Directive.

5 Ibid., Article 90(4).

6 See: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union_en

7 COM(2020) 590 final.

8 Action 11, 2020 CMU Action Plan.

9 COM(2021) 720 final.

“

The entire EIR (Recast) on cross-border insolvency will be subject to review on the basis of a Commission report on its application

”