INSOL EUROPE

Academic Conference

AMSTERDAM

11-12 October 2023

MAIN SPONSOR

EdwinCoe LLP
LAW FIRM

The Preventive Restructuring Directive and national choices of priority rules: Sparking convergence or entrenching past approaches?

Sjur Swensen Ellingsæter
Associate professor
Department of Law and Governance
BI Norwegian Business School

- The Preventive Restructuring Directive (PRD) requires EU Member States to have in place debt restructuring frameworks.
- Such frameworks shall provide for class-based voting, at least in cases where the debtor is not an SME.
- As a main rule, a restructuring proposal being adopted following class-based voting requires the approval of all classes.
- Exception: Cross-class cram down. Conditional upon the proposed restructuring observing the applicable priority rule.

- Priority rules concern the treatment of creditors or shareholders relative to other creditors/shareholders with equal or inferior priority in the event the debtor would be subject to liquidation proceedings.
- As regards the treatment of creditors vis-à-vis shareholders, PRD allows Member States to choose between three priority rules (somewhat simplified):
  - The relative priority rule (RPR): Cram down of dissenting classes of creditors is conditional upon such creditors receiving treatment better than shareholders.
  - The absolute priority rule (APR): Cram down of dissenting classes of creditors is only possible if shareholders do not retain value.
  - Relaxed APR: APR but with exceptions that are (i) necessary to 'achieve the aims of the restructuring plan' and (ii) ensures that the restructuring plan 'does not unfairly prejudice the rights of interests of any affected parties'.

- EU policy documents suggest that there are two prominent rationales for harmonizing national restructuring and insolvency laws:
    1. Promoting cross-border investments and lending by reducing uncertainty as regards the content of the laws of other Member States
    2. Levelling the playing field between non-financial businesses by ensuring that they all have access to efficient restructuring frameworks

- Overview of the paper
  - Motivating question: When is leaving Member States with optionality when transposing EU directives compatible with the objective of reducing uncertainty regarding the content of the laws of other Member States (and resulting transaction costs)?
  - The paper develops two theories for when directives with optionality could be conducive to this end.
  - The paper then examines choices made when transposing PRD in five Member States (Denmark, Germany, Ireland, the Netherlands and Sweden) and the reasons given for the national choices.
  - These findings are discussed in light of the theories developed.

- When is optionality compatible with the rationale of promoting cross-border investments and lending?
  - First possible mechanism: If options are of a limited number and clearly defined, it becomes easier (cheaper) to learn about the laws of other Member States.
  - Second possible mechanism: If Member States when transposing the Directive converge towards similar approaches, this could facilitate future harmonization with less (or no) optionality.

- Choice of priority rules post transposition (with regards to 'vertical' priority):
  - Relaxed APR with clearly defined exceptions: Germany
  - Relaxed APR with general exceptions: the Netherlands and Sweden
  - General fairness test: Ireland
  - No (explicit) priority rule: Denmark

- Changes in approaches (with regards to ‘vertical’ priority)
  - From no priority rule to relaxed APR: the Netherlands and Sweden
  - Softening of previous APR: Germany
  - No change: Denmark and Ireland

- Could PRD’s requirements better facilitate learning about the priority rules of other Member States than no harmonization?
  - The answer is likely no.
  - Issue: PRD permits several versions of the relaxed APR
  - Several Member States have chosen vaguely formulated priority rules

- Convergence following the transposition of PRD?
  - Some convergence towards relaxed APR (in particular, Dutch and Swedish law)
  - Differences in thinking can be traced in national policy documents prepared in connection with the transposition of PRD
  - Different perceptions of ‘best practice’?
  - Different rationales regarding what priority rule best serves creditor interests?