

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

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The Preventive Restructuring Directive (PRD) and the Commission's subsequent legislative initiatives show that the harmonization of national restructuring and insolvency laws is on the EU's agenda. A key goal of harmonization in this area is to reduce transaction costs associated with cross-border transactions by eliminating uncertainty as to the content of the laws of other EU member states.

Several commentators have noted that PRD contains many instances of member states being left to choose between two or more rules. Among other things, member states may choose between different options when determining what type of priority rule a restructuring must observe to satisfy the conditions for a cram down of a dissenting class. The PRD's default rule is the so-called *relative priority rule*—that members of a dissenting class must be treated at least as favourably as any classes comprising creditors who would rank with the same priority in insolvent liquidation and better than any junior class. Member states may opt to instead apply an *absolute priority rule*—which makes a cram down of a class conditional upon members of classes with lower priority not retaining any claims or equity interests post restructuring. It is also permissible to adopt *relaxed absolute priority rules*—roughly speaking, rules requiring absolute priority unless deviations are necessary to achieve the goals of the restructuring.

One would intuitively be inclined to think that eliminating transactions costs deriving from uncertainty over the laws of other members states would require full harmonization, that is, requiring all member states to apply the same rule. It therefore appears as less than ideal that PRD contains several provisions that allow member states to choose between different rules, as this will allow for differences to persist within the EU.

Given that political realities may prevent one single rule from receiving sufficient support within the EU's legislative bodies, it is of both practical and theoretical interest to consider when optionality—a directive leaving member states to choose within a set of different rules—would nonetheless contribute towards reducing uncertainty as to the law of other member states. The paper develops two theories for when directives with optionality could be conducive to this end. First, that directives could facilitate learning about the laws of other member states if the options are of a limited number and precisely worded. Secondly, that the transposition of a directive in national law requires the allocation of legislative resources to that area and could thus serve as a catalyst for long due reform. This could promote convergence towards internationally recognized best practices, thereby also facilitating the future adoption of directives involving a higher degree of harmonization (less optionality).

To test whether these conditions hold in practice, the paper uses as a test case the choices select member states (Denmark, Germany, Ireland, the Netherlands and Sweden) made when transposing PRD in national law. The paper identifies the priority rules opted for in the member states examined, the reasons given for their choices and to what extent the rules chosen differ from national approaches in pre-PRD times. The paper argues that the PRD's requirements for priority rules are too open-ended to make it easier to learn about the rules of other member

states. The transposition in the member states examined shows that there has been some convergence but that important differences remain in place.