#95 · Spring 2024

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Second Chance Directive in Poland

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Welcome from the Editors

EDVĪNS DRABA

JOSÉ CARLES

William Shakespeare wrote that "*From you have I been absent in the spring, When proud-pied April, dressed in all his trim, Hath put a spirit of youth in everything.*" With this "spirit of youth in everything" that Spring has brought with it, and having you all very present, our Council met in the Italian city of Monza in which we continued shaping our future with a lot of love and care.

As a European organisation, our Spring edition addresses further developments in the implementation of the **Restructuring Directive.** Some countries such as Austria have seen no case law on restructuring plans yet, despite its introduction three years ago (p. 39-40). Poland has still not implemented the Restructuring Directive despite alternative bills proposing its transposition and the risk of financial penalties for the delay (p. 20-21). Ukraine (with candidate status to the European Union) is currently considering its implementation (p. 24-26). We also cover the second chance and discharge of debts under Portuguese law (p. 28).

This issue includes several articles that refer to the need and importance of **harmonisation** of cross-border insolvency regimes in the current global scenario of crisis-upon-crisis. Nowadays, harmonisation is one of the recurrent trends of all international organizations, as it would indeed help build a higher level of resilience of the financial systems (p. 10-11). In this respect, UNCITRAL's Working Group V is working on harmonising the applicable law in insolvency proceedings. INSOL Europe, as one of the international observers to Working Group V, is taking part in the progress of its discussions (p. 32-33). For example, in the application (or not) of the *lex fori concursus* when the collateral is located outside of the country in which a bankruptcy proceedings is declared. In this regard, the EU has slightly changed its position on *rights in rem*, which could lead to changes also to the European Insolvency Regulation (p. 11). Further news from the developments on the toolkit on asset tracing and recovery that will be made in New York in May will be duly addressed in future editions.

Some of our country reports highlight the impact that the proposal for Harmonisation Directive would have in their countries, such as pre-pack sales in Portugal (p. 41)

Our Spring 2024 edition also analyses other tendencies such as a European upward trend and a **peak in bankruptcy declarations** in 2023, which almost brings us to the level of openings of 2015 (p. 18-19).

From the other side of the Atlantic Ocean, our US column analyses case law on the potential liability of managers and officers from the insolvency of US affiliates or investments entities (p. 36-37), which should be taken into account when European companies invest in the United States.

What next? Join us in the end of the Spring at the Eastern European Countries Committee Conference in Krakow (13-14 June) and begin the summer with us at the INSOL Europe & R3 joint international insolvency conference (27 June)! In addition, start thinking of the refreshing breeze and lemon trees of the Italian coast in Sorrento that will accompany us in our Annual Congress in the beginning of October (2-3 October for the Academic Conference and 3-6 October for the Annual Congress). See you all there in this perfect occasion to make this year's summer last a bit longer!

José

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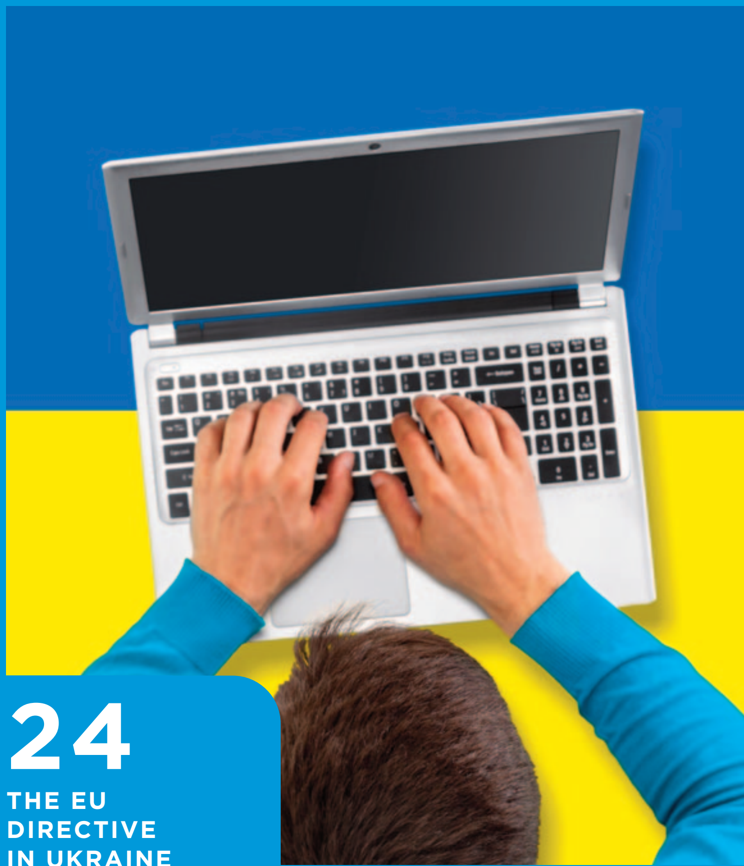


Working towards the future of INSOL Europe

GIORGIO CORNO
INSOL Europe President

Giorgio Corno outlines our current plans and future events for members

> *One of the first key tools to start us on our journey to a new Strategy will be to roll out a series of short surveys to all our members*

I'm pleased to share with you some updates regarding our association's activities during my current presidency of INSOL Europe. We are confident that you will appreciate the significant work which is being done by the Executive, the Council as well as the entire staff to make this organization compliant with its goals and to reach its objectives within the European scenario.

INSOL Europe Council meeting in Monza, Italy

Your Council had a very well attended and intense in-person meeting in Monza, north of Milan, at the beginning of March, in a beautiful location in front of the Villa Reale and not far from the F1 racetrack. Amongst other topics, we acknowledged the largest membership growth in 10 years with an additional 51 members. Ireland has seen the biggest increase of 15, followed by The Netherlands at 11 and Luxembourg at 10. We also discussed the significant work done by our Country Coordinators (CCs), which have led to the 11 agreements with national organizations in place, and the healthy financial status of our organization, thanks to the increase in membership as well as the valuable support of our sponsors.

Strategic Taskforce 2025/2030

The kick-off meeting of the Strategic Taskforce took place online under the guidance of an expert whose appointment has been approved by the Council. During our Monza meeting we confirmed the following goals of our Association, as determined by the strategic Taskforce 2020/2025 (*see table below*).

One of the first key tools to start us on our journey to a new Strategy will be to roll out a series of short surveys to all our key stakeholders, including our sponsors, Council, CCs and of course, our members themselves. We do hope you engage with the process when you receive such an invitation. A schedule of monthly meetings has been planned to track the development of the new Strategy and I will keep you informed of all the developments via our monthly newsletter.

Recent joint events

I was honoured to represent our association at the conferences organized on 11th December 2023 by Università del Piemonte Orientale in Novara (UPO) (Italy) as well as on 9th of April 2024 by Financial Intelligence

INSOL EUROPE — Our Goals & Aims

- To Lead the study, evaluation and development of restructuring and insolvency law, techniques and practice in Europe.
- To Be acknowledged by European and international bodies as the first port of call for all matters regarding restructuring and insolvency in Europe.
- To Disseminate technical and topical information on restructuring and insolvency.
- To Facilitate business development and the exchange of professional experience among its members; and
- To Further the technical and training of members, their staff and others

(*https://financialintelligence.ro/*), one of the most important economic media outlets in Romania, on Restructuring. At the UPO conference, I discussed, together with Prof. Ignacio Tirado of Unidroit, about the implementation in Italy of Directive 2019/1023 provisions on early warnings, access to information and directors' duties. At the Financial Intelligence conference, after having explained the advantages of being member of INSOL Europe, I discussed with our member Alina Popa of CITR Romania about the implementation in EU Member States of the 2019 directive on preventive restructuring frameworks, making the audience aware that a consolidated table produced by Lexis+ UK as at 15 March 2024 is available, together with individual contributions on the INSOL Europe website for INSOL Europe members: *www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023*; as well as on the EU Commission directive proposal of December 2022, focusing on the rules on pre-packs, which are currently not regulated by the many EU Member States.

Cooperation with other associations active in our industry

At the beginning of this year, we entered a new cooperation agreement with INSOL International. This agreement allows a mutual cooperation framework between the parties with a view to advancing our shared goals and serving the interests of our respective members in accordance with the objectives.

Furthermore, our cooperation with R3 is growing stronger. A Joint Fraud Advisory Panel/ INSOL Europe/R3 Fraud Conference took place on 29th February at the Royal College of Physicians in London and had a successful outcome of attendees. A joint International Restructuring Conference will take place in London on 27th June. We hope we will be able to confirm the successful outcome of last year's conference on the same topic. Finally, INSOL Europe will be in charge of a panel at R3's Annual Conference which takes place at the Fairmont Hotel in St Andrews, Scotland, on 1st – 3rd May. Under the topic "EU passports to the right, UK to the left – Pathways in EU post-Brexit" this will be a fantastic opportunity for myself and other Council members (Alice van Schee, Frances Coulson and Barry Cahir) to share with attendees coming from the United Kingdom the knowledge which we have accrued in dealing with cross-border and international issues in insolvency and restructuring.

Upcoming INSOL Europe Events

Our EECC Conference will be held at the Sheraton Grand hotel in Krakow on Friday 14th June, with the pre-conference dinner happening the evening before. Registration opened in mid-February with the early bird price ending on 18th April. I will introduce our association to the attendees. I will have the pleasure to share, together with other speakers, our views on the implementation of the 2019 Directive in Member States, and we hope to be able to provide our Polish hosts some useful insights, to be considered in the implementation of the said Directive in Poland, the only Member State where such directive has not been implemented so far.

I am pleased to report that registration for our 2024 Annual Congress in Sorrento (Italy) will be live imminently. I am confident that due to the ongoing work of our excellent Technical Committee, led by our Chief Technical Officer Emmanuelle Inacio, together with the technical co-chairs Rita Gismondi and Bart de Moor, that there will be something of interest to everyone.

Further details of these events and more (and how to register!) can be found on our website: *www.insol-europe.org/events*

Please do take a look, put your name down and I look forward to catching up with you at one of these events in the near future. ■

> **"Our EECC Conference will be held at the Sheraton Grand hotel in Krakow on Friday 14th June where I will introduce our association to the attendees"**

Navigating the perfect storm: Reflections on cross-border corporate insolvency regimes in the EU by a relative outsider

Jasper Aerts gives his view on cross-border corporate insolvency regimes in the EU

JASPER AERTS
Deputy General Counsel of the European Stability Mechanism

In the world of international finance, the complexities of corporate insolvency regimes, particularly in a cross-border context, are akin to navigating a treacherous sea.[1]

With the increasing likelihood of further insolvencies and bankruptcies, we are bracing for a perfect storm. As a former insolvency practitioner and trustee, someone who has been at the helm of the legal restructuring team in a global commercial bank, and now leading the legal division of the European Stability Mechanism ('ESM'), my panel discussion at the occasion of the 2023 Annual Congress of INSOL Europe on the harmonisation of cross-border insolvency regimes in the EU struck a chord with me.[2] As a relative outsider to the active corporate insolvency practice, it may be worthwhile to paint the broader picture of why this is important.

The complex world of cross-border insolvency

Cross-border insolvency is a multifaceted issue. When a business or individual is facing financial distress that crosses national boundaries, it becomes a complex legal puzzle. The laws and regulations governing insolvency differ significantly from one EU member state to another. This diversity can often lead to inefficiencies and legal complications that make it difficult to achieve fair and consistent outcomes for all stakeholders involved.

As an insolvency practitioner, I would often find myself indeed grappling with the intricacies of different national insolvency laws when dealing with cross-border cases. This patchwork of rules can impede timely resolutions and the recovery of assets. Harmonisation could streamline these processes, making it easier to administer insolvency proceedings, ensuring equitable treatment of creditors and enhancing the prospects of rescuing viable businesses. It is furthermore widely acknowledged that commercial banks strategically utilised forum-shopping and COMI-shifts as necessary to achieve the most financially advantageous restructuring outcomes.

The EU's harmonisation efforts aim to create a more stable, predictable, and efficient insolvency framework. This is invaluable for insolvency practitioners, creditors, and debtors alike, as it simplifies the process and minimises uncertainties, ultimately reducing costs. And although full harmonisation in the EU may seem Utopian, plus we should also reflect on actual implementation and enforcement of the rules ('*capacity building*'), minimum harmonisation would be imperative. It is time we conclude harmonisation efforts.

The need for harmonisation

The past decade has seen a global economy that appears to be perpetually on the brink of yet another crisis. The International Monetary Fund (IMF) has repeatedly emphasised the seriousness of these "*crisis-upon-crisis*" scenarios,[3] underscoring the need for effective mechanisms to address the financial turmoil that has become a norm. With the world economy hanging by a thread, and with the '*higher for longer*' interest rate risks,[4] one could expect to see more insolvencies, not just in the corporate sector, but also in households. Many businesses are indeed still reeling from the effects of the COVID-19 pandemic, and the increasing cost of living (did someone say inflation?) is putting households under more and more pressure. And then we also have geopolitical tensions and raging wars to complicate things even further.

It is in this tumultuous environment that harmonising the cross-border insolvency regime within the EU takes on heightened significance.

The importance of harmonisation

Reflecting on the above, finalising the harmonisation of cross-border insolvency laws within the EU is therefore essential for several reasons:

1. **Enhanced economic resilience:** harmonised insolvency frameworks would promote financial stability and economic resilience. It can help expedite the recovery of distressed companies, protect creditors and maintain trust in the financial system;
2. **Cross-border cooperation:** in a union like the EU, where cross-border investments and trade are common, a consistent approach to insolvency is imperative. This streamlines the process and reduces the risk of forum shopping and legal conflicts;
3. **Encouraging investments:** harmonisation provides legal certainty to investors, but also credibility and predictability. This is especially crucial for attracting foreign investment, which can be a lifeline for economies during crises; and

"The past decade has seen a global economy that appears to be perpetually on the brink of yet another crisis"

4. **Efficient crisis management:** harmonisation allows for swift, efficient, and transparent crisis management, which is crucial in the financial distress environment we find ourselves in today.

Safeguarding financial stability

At first glance, the ESM may appear disconnected from corporate entities or corporate insolvency. Established amidst the "height" (or perhaps "depth") of the euro debt crisis, the ESM's primary mandate is to safeguard the financial stability of the countries of the euro area. Endowed with a capital base exceeding EUR 700 billion, it stands as the world's largest capitalised international financial institution. The ESM primarily engages with sovereigns on the lending side and invests its EUR 82 billion paid-in capital in highly rated instruments issued by supranational entities and sovereigns, excluding corporates.

However, an effective corporate insolvency regime and the streamlining of insolvency rules hold significance for the ESM for several reasons. It aligns with broader objectives such as:

(i) fostering the Banking Union;
(ii) promoting the Capital Markets Union; and
(iii) ensuring overall financial stability.

Unlike for corporates, there exists no generally agreed insolvency regime for sovereigns. Sovereign debt restructuring and corporate insolvency procedures are two distinct processes, each with unique characteristics and implications. While clearly distinct (different entities, legal framework, creditor hierarchies, enforcement mechanisms, etc.), there are notable parallels between the two (debt overhang and distress, negotiation dynamics, creditor- and investor impacts, etc.). The lack of legal certainty and standardised procedures for the sovereign context can lead to prolonged negotiations, creditor disputes and market volatility, thus undermining financial stability. Conversely, well-defined corporate insolvency frameworks provide a more predictable and orderly resolution process, mitigating systemic risks and preserving investor confidence, hence boosting financial stability.

Since its inception in 2012, the ESM has spearheaded advancements in debt management standards for the euro area countries. For instance, euro area member states committed to incorporating uniform Collective Action Clauses (CACs) in their future bonds. These clauses establish common language agreed upon by euro area member states, forming an integral part of bond terms. CACs dictate how a member state can amend the terms of its sovereign bonds, including restructuring its debt. Standardising CACs across the euro area was swiftly and efficiently achieved through their inclusion in the ESM's founding treaty as the relevant legal instrument.[5]

The discussion surrounding CACs for the euro area often recalls the retrofitting[6] of these clauses in Greek government bonds during the landmark 2012 Greek debt restructuring operation, known as the Greek private sector involvement operation.[7] Despite being subject to legal disputes, including rulings by the CJEU and ECHR,[8] this mechanism was essential to prevent further financial woes for Greece at that time. Coupled with fresh financial support from the ESM, it played a crucial role in ensuring financial stability for the euro area.

Capital Markets Union, Banking Union and financial stability

The stability of corporate entities directly impacts the overall economic health of the euro area. Instances of corporate insolvency can trigger chain reactions, affecting creditors, investors and the broader financial system. Secondly, the efficiency and effectiveness of insolvency regimes influence investor confidence and cross-border investment flows. Inconsistencies or inefficiencies in these regimes can deter investment and exacerbate financial instability. The interconnectedness between corporate insolvency regimes in the euro area and financial stability underscores the need for coordinated efforts to mitigate systemic risks.

A robust and resilient Capital Markets Union (CMU) is essential for a thriving European economy. The CMU aims to create a single market for capital, ensuring that funds flow efficiently across the EU. A harmonised insolvency regime is a crucial pillar in achieving this goal. It would foster investor confidence, facilitate cross-border investment, and bolster the European Economy as a whole.

In parallel with harmonisation, the EU has been working on strengthening its Banking Union, which includes initiatives to reduce Non-Performing Loans (NPLs). In addition, the ESM is tasked to act as the common backstop to the Single Resolution Board, the centralised bank resolution authority in the EU. These initiatives will help create a healthier banking system, free-up more bank lending to the corporate sector and provide a more secure environment for businesses and individuals seeking credit.

All these efforts taken together will fortify the European financial landscape, fostering trust and reducing systemic risks.

Conclusion

The harmonisation of cross-border insolvency regimes in the EU is an important step in ensuring the resilience of our financial systems. While sovereign debt restructuring and corporate insolvency procedures are distinct processes, they share commonalities in their underlying dynamics and implications for financial stability. This ties directly with the core mandate of the ESM to safeguard the financial stability of the euro area. In the wake of the unprecedented "*crisis-upon-crisis*" phenomenon highlighted in IMF reports, the need for uniform, efficient, and transparent insolvency frameworks is more pronounced than ever. It is our collective responsibility to work towards this goal, ensuring the stability and resilience of our economies, and ultimately, the well-being of our companies and citizens. We must be prepared to set sail on these uncharted waters, navigate the challenges that lie ahead to weather this perfect storm and reach calmer shores. ■

Footnotes:

1 The views expressed in this article are the author's and not those of the ESM.

2 See the opening panel debate at the INSOL Europe Annual Conference (Amsterdam 2023) on "Making insolvency more efficient: the European Union Insolvency Trilogy". The term refers to the European Insolvency Regulation, EU Directive on Restructuring and Insolvency and the EC proposal harmonising certain aspects of Insolvency Law.

3 See the 2022 Annual Report of the IMF, available at: <imf.org/external/pubs/ft/ar/2022/>.

4 See Kalen Anev Janse, 'Outside of the box: World economy heads for soft landing amid uncertainty International Monetary Fund/World Bank meetings conclude' (*ESM Blog*, 18 October 2023), available at: www.esm.europa.eu/blog/outside-box-world-economy-heads-soft-landing-amid-uncertainty-international-monetary-fundworld.

5 Recital 11 and Article 12(3), ESM Treaty. For more on CACs, see Section 6 in Jasper Aerts and Pedro Bizarro, 'The reform of the European Stability Mechanism' (2020) 15(2) *Capital Markets Law Journal* 159–174.

6 Meaning changing its domestic laws to alter the terms of the relevant sovereign bond contracts retroactively and unilaterally.

7 For the most complete overview, see Jerome Zettelmeyer et al., 'The Greek debt restructuring: an autopsy' (2013) 28(75) *Economic Policy* 513-563. Further Greek restructuring operations followed after the 2012 one, which are described in greater detail in my contribution in Chapter 3, in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP, 2020) (979-1024) and in Jasper Aerts, Gabriela Olariu and Efstathios Sofos, V*oluntary debt restructuring: the 2017 Greek €29.6 billion bond exchange explained* (ESM Discussion Paper No. 15, March 2021).

8 Judgment in Case C-308/17 *Leo Kuhn v Hellenic Republic.*

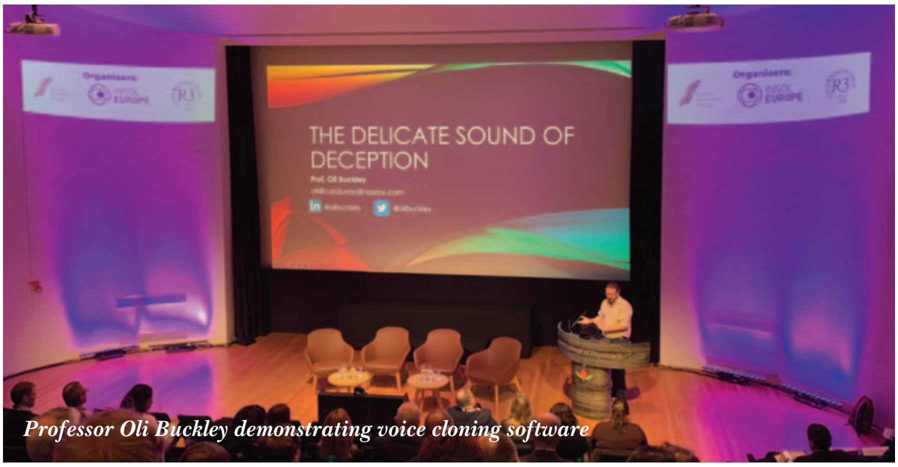
"The harmonisation of cross-border insolvency regimes in the EU is an important step in ensuring the resilience of our financial systems"

We welcome proposals for future articles and relevant news stories at any time. For further details of copy requirements and a production schedule for the forthcoming issues, please contact Paul Newson, Publication Manager: *paulnewson@insol-europe.org*

Seeing is believing… The 4th Joint Fraud Conference triumphs again in London

Report by Carmel King & Bart Heynickx, Co-Chairs of the INSOL Europe Anti-Fraud Forum

The fourth annual Fraud Conference took place on 29 February, welcoming 160 delegates to the Royal College of Physicians in London. A collaboration between INSOL Europe's Anti-Fraud Forum, the Fraud Advisory Panel and R3, this year's theme was "The Future of Fraud: Is Seeing Believing?" with the event bringing together a range of counter-fraud specialists from policy makers to insolvency and asset recovery experts to academics.



Professor Oli Buckley demonstrating voice cloning software

The opening keynote by **Professor Oli Buckley** (UEA) on AI and Deepfakes provided much food for thought, being something of a beginner's guide to creating voice clones. **Arun Chauhan** (Conference Chair) and **Frances Coulson** (INSOL Europe Vice President) were most surprised to find their voices cloned from brief, publicly available samples. The use of AI by both bad actors and as a tool to combat fraud was explored over the course of the day, with a subsequent session exploring the latter.

A breakout panel facilitated by **Bart Heynickx** (INSOL Europe Anti-Fraud Forum Co-Chair) considered international collaboration across a range of jurisdictions including the UK, Belgium, Netherlands and UAE. Participants included INSOL Europe members **Luke Harrison** and **Ferry Ortiz Aldana**. Other panels throughout the morning included a consideration of large collapses, such as FTX and Wirecard; a discussion about luxury goods, counterfeiting and provenance, and the disruption of rogue companies and directors.

During the course of the afternoon, **Frances Coulson** facilitated an in-depth exploration of the failure of public bodies to behave in a fiscally responsible manner, focussing on the Thurrock Council controversy and its consequences. **Penny Dunbabin** (Home Office) provided a brief run-through of the new "failure to prevent" guidance, which provided a jumping-off point for a debate chaired by **Carmel King** (INSOL Europe Anti-Fraud Forum Co-Chair) on whether the Economic Crime and Corporate Transparency Act and similar legislation are likely to prove effective.

The final session of the day was a much-anticipated update on the Post Office scandal. **Kay Linnell**, who had spoken on this topic alongside colleagues at the Fraud Conference 2022, received rousing applause for a compelling account of this ongoing pursuit of justice and restitution.

As ever, the networking lunch and closing reception offered delegates the opportunity to catch up with old friends and to meet some new contacts. A forward-facing conference considering many of the topics most important to the future of our profession left delegates plenty to talk about!

INSOL Europe attend Working Group V in Vienna

Members of the Working Group and observers to the session continued their deliberations on two current projects, namely asset-tracing and recovery in insolvency proceedings and, further, the law applicable in (cross-border) insolvency proceedings. INSOL Europe's representatives engaged actively with both delegates and observers and shared practical experience and lessons learned from cross-border cases. *Past President Frank Tschentscher (Deloitte Legal) and Florian Bruder (Council Member, Germany) report.*

Asset-tracing and recovery (ATR) in insolvency proceedings

The 63rd session picked up from the previous session and commenced with a review of an updated draft of the descriptive, informational and educational draft text on ATR in insolvency proceedings. The objective of the Working Group is to raise the level of awareness of ATR tools that are available in cross-border cases. The current draft, which now reflects the latest submissions by, *inter alia*, the EU, Grip 21, UNIDROIT and other observers as well as delegate input, provides an extensive overview of ATR tools found in the insolvency regimes of certain jurisdictions and in the UNCITRAL insolvency texts helping to achieve said objective. Indeed, policy makers, legislators and judges but also practitioners and researchers will no doubt will find the (further updated) text very helpful when assessing the availability, accessibility, effectiveness and efficiency of their domestic (and cross-border) ATR frameworks.

The Working Group acknowledged that increasing the effectiveness of ATR tools at a global level is essential in a digital age, given the ease of movement of (digital) assets across borders and the instant conclusion of multiple transactions in which parties may not be (immediately) identifiable. That said, it is also acknowledged that technological advances may allow for more flexible, creative and innovative ways to keep up with (traditional) ATR challenges. The toolkit intends to assist with those endeavours and, at the same time, connects the reader to the work of other organisations that are active in this area of policy making (for instance UNIDROIT).

The Working Group – principally – supported both the text of the current draft and the associated appendix. The toolbox approach for ATR in insolvency proceedings as described in Appendix I was widely welcomed, although more debate is required. For anyone interested in the topic of ATR, the draft text already provides an insightful read.

Applicable law in insolvency proceedings

The second part of the session was devoted to the very difficult matter of the law applicable in insolvency proceedings. The project on applicable law in insolvency proceedings has already reached the stage of draft legislative provisions with accompanying commentary.

A lively session highlighted the complexities of cross-border insolvency and workout-situations both for practitioners and law-makers. The Working Group deliberated the scope and content of issues covered by the *lex fori concursus*, although the most difficult discussions evolved around the carve-out provisions in the legislative text and, in particular, the law applicable to avoidance claims, the treatment of secured creditors enjoying *rights in rem* security, the potential impact on payment and settlement systems in the financial sector and the potential impact on pending litigation or arbitration proceedings.

Most prominently, the ability of the *lex fori concursus* of a (main) insolvency process to stay or amend the security interest in collateral situated/located abroad was a topic of intense debate. While some delegations strongly supported the application of the *lex fori concursus*, others disagreed fundamentally.

On all subjects, the Working Group made significant progress but also requested that the Secretariat performed additional research on options that were discussed. For the European lawyer, it will be interesting to hear that the EU delegation appears to have abandoned a position that firmly demanded the adoption of Article 8 EIR, which would prohibit any impairment of security rights in assets located/situated in another Member State. Instead, the EU introduced a compromise text that included the ability to impair such security rights under the insolvency law of the country where the assets are located/situated. It stands to reason that such a compromise could also be the approach for a tentative reform of Article 8 EIR in the near future.

Announcing the Eastern European Countries' Committee (EECC) Conference, *Substance & Form*

13 & 14 June 2024, Krakow, Poland

On behalf of INSOL Europe, we are delighted to invite you to join us in Krakow, Poland, for the Eastern European Countries' Committee (EECC) Conference on "Substance & Form" which will be held on Friday 14 June 2024. The EECC conference will be preceded by an optional networking dinner on Thursday 13 June 2024.

Our INSOL Europe 2024 Krakow EECC Conference "*Substance and Form*" will start with an analysis of the current challenges distressed companies are facing. Indeed, since our last EECC Conference, inflationary pressures, soaring interest rates, geopolitical uncertainties, and an energy crisis put even the more robust sectors to the test. The road testing of EU preventive restructuring frameworks which have been implemented in the recent years will be the opportunity to assess the preventive restructuring stay in different jurisdictions.

Speeding up the process of harmonising European insolvency law, the recent proposal for a directive harmonising certain aspects of insolvency law provides very controversial rules on winding-up of microenterprises questioning *inter alia* the future role and value of insolvency practitioners that will be examined. This proposal will also be the occasion to review the art of pre-packs in Europe. The role of the state in restructuring and insolvency processes as well as the consequences of deadlines and formalities on insolvency proceedings' efficiency will also be explored. Finally, our event will provide an update on the effects of EU sanctions against Russia on insolvency proceedings.

The Technical Programme has been developed by our INSOL Europe 2024 Krakow EECC Conference Technical Committee: **Stela Ivanova** (bnt attorneys in CEE/INSOL Europe EECC Co-Chair & Country Coordinator, Bulgaria), **Georges-Louis Harang** (Addleshaw Goddard (Europe)/INSOL Europe Co-opted Director, EECC Co-Chair & Country Coordinator, France), **Pawel Kuglarz** (Tatara & Partners/INSOL Europe Council member & Country Coordinator, Poland), **Klaudia Frątczak-Kospin** (WKB Wierciński, Kwieciński, Baehr/INSOL Europe YMG Co-Chair, Poland), **Tomáš Richter** (JŠK, advokátní kancelář / Former Chair of the INSOL Europe Academic Forum / INSOL Europe Honorary member, The Czech Republic), **Alina Popa** (CITR, Romania) and **Roman-Knut Seger** (BDO Restructuring, Germany).

This event promises to be a thought-provoking and enlightening experience, bringing together leading experts, industry professionals, to discuss and explore the latest trends, challenges, and opportunities in the field of restructuring and insolvency. You will have the opportunity to engage in meaningful dialogue with your peers, gain valuable insights and expand your professional network.

Don't miss this chance to stay ahead of the curve and deepen your understanding of the most pressing and vital topics of 2024, and enjoy the city of Krakow.

A former royal capital, crammed with history and splendour, Krakow is one of the most beautiful – and interesting – cities in Eastern Europe. Both the medieval old town and Wieliczka salt mines were added to the original UNESCO World Heritage List in 1978. There's a thousand years of living history, much of it in remarkably good shape. In this century, Krakow has continued to develop first-class museums such as Rynek Underground, built beneath the main market square.

Kraków is the second largest and one of the oldest cities in Poland and has traditionally been one of the leading centres of Polish academic, cultural, and artistic life and is one of Poland's most important economic hubs. Today the city has a population of approximately 760,000 and about 8 million people live within a 100 km radius of its famous main Market Square.

It's also a fantastic destination for delicious food, drink, party, and many, many other activities...

We look forward to welcoming you very warmly in this magnificent setting filled with promise!

Register today at: www.insol-europe.org/event/eecc-conference-2024

2025

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Transversal Skills Laboratory

Update by Professor Antonio Leandro, Laboratory Coordinator, Italy

As of 15 April 2024, the University of Bari will host an academic laboratory on the topic of 'Management & Practice of International Contracts in the Foreign Direct Investment Sector'. INSOL Europe, UNIDROIT and the Southern Adriatic Sea Port System Authority are supporting the event. Representatives of the three institutions are included in the teaching staff.

Six modules are scheduled, across which the laboratory will offer attendees a set of transversal, or cross-disciplinary, skills ranging from law to economics in order to master the role of the contract in establishing, implementing and protecting foreign direct investment.

- Module 1 sets the legal background of **international contracts and foreign direct investments**;
- Module 2 deals with the **primary contractual schemes used to enter foreign markets**;
- Module 3 analyses the **effect of insolvency proceedings on pending investment contracts** as well as the main methods to settle investor-State disputes (*including a session led by INSOL Europe President, Giorgio Corno*);
- Module 4 dwells on the **foreign direct investment screening mechanisms** under the exclusive competence of the EU in the sector;
- Module 5 touches upon the **main methods to attract and protect foreign direct investment** with particular focus on tax incentives; and
- Module 6 elaborates on the **impact of the sustainable development principle on investment governance** with a specific focus on ESG clauses.

A theoretical and practical approach will be used in lectures and discussions to adequately explain the challenges that entrepreneurs encounter when trying to enter foreign markets. Lessons will be given in Italian except for the first module. Attendees may also join through MS Teams.

For further information, please contact the laboratory coordinator, Professor Antonio Leandro by email at: *antonio.leandro@uniba.it*.

INSOL EUROPE

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www.oeccbb.be/reseau-cap

https://stecajniupravitelji.hr

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Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili

https://commercialisti.it

www.are.fr

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UNPIR CLUJ BRANCH

https://unpircluj.ro/

https://www.nivd.de/

https://rfe.hu/

Paweł Kuglarz wins award in Warsaw

Report by Mateusz Kaliński, Tatara, Poland

On Friday 8 December 2023, the 15th INSO Congress was held in Warsaw, Poland. The main theme of this year's edition was "enterprise in restructuring" with the Congress being divided into three sessions – practical, legislative and judge-oriented perspectives.

Over 250 participants discussed the most important issues regarding Polish insolvency and restructuring law from various perspectives. Participants also celebrated the 20th anniversary of the Polish Insolvency Law, which was adopted and entered into force exactly 20 years ago.

During the Congress, the annual INSO Section of the Allerhand Institute Award for combining law & economics was granted to Paweł Kuglarz (*pictured second from left*). Last year, this award was conferred on Professor Heinz Vallender with other award winners including, *inter alia*, Judge Stanisław Gurgul and Judge Janusz Płoch.

The next edition of the event has been programmed for 22 November 2024.

A closer look at...
Quarterly statistics on bankruptcy declarations at the European Union level

Emmanuelle Inacio reports on the latest Eurostat figures from the EU[1]

EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

Eurostat[2] is the statistical office of the European Union and monitors *inter alia* declarations of bankruptcies on a quarterly basis[3] in the European Union and euro area as it is useful to provide more up-to-date and frequent information on the economic environment for businesses than the traditional annual business demography statistics.

Quarterly data was very helpful to track better the effects of the COVID-19 pandemic in 2020 and 2021, and the impact of Russia's invasion of Ukraine on European businesses. This has been particularly important for policy makers when policy responses are needed due to business cycle developments in the current context.

Since the first quarter of 2021, the data on the absolute numbers of bankruptcy declarations have been provided by the national statistical institutes of the EU Member States, on a mandatory basis in accordance with the provisions of Regulation (EU) No 2019/2152 on European business statistics. Bankruptcies are defined as the number of legal units that have started the procedure of being declared bankrupt, by issuing a court declaration, at any time during the considered quarter. The bankruptcy declaration is often provisional and does not always mean cessation of an activity.

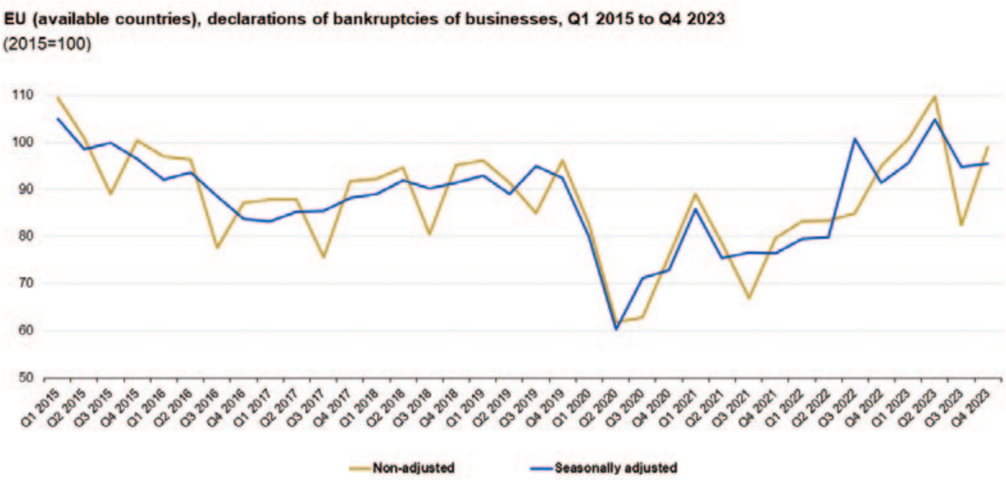
Quarterly comparison in the EU/euro area

Regarding the number of declarations of bankruptcies (*see Chart 1 below*), there has been a downward trend between the first quarter of 2015 and the first quarter of 2017, then turning mainly upwards until the third quarter of 2019. There were considerable decreases in the first and second quarters of 2020. The decrease in bankruptcies, observed in many Member States in the first two quarters of 2020, can be explained by the government measures supporting businesses during the beginning of the COVID-19 crisis which allowed the businesses to avoid declaring bankruptcy.

After that, the number of bankruptcy declarations increased for three consecutive quarters, from the third quarter of 2020 until the first quarter of 2021, while still remaining below the pre-pandemic levels (i.e. between Q1 2018 and Q4 2019). Then the bankruptcy declarations reached a peak in the third quarter of 2022, which was the highest level recorded since the second quarter of 2015. In the second quarter of 2023, the number of bankruptcy declarations rose even higher than the previous peak (from the third quarter of 2022) and at levels just slightly below the highest level observed in the first quarter of 2015. Then the bankruptcy declarations decreased in the third quarter of 2023, which was followed by a slight increase in the fourth quarter of 2023, while still being above the pre-pandemic levels (between Q1 2016 and Q4 2019).

In the fourth quarter of 2023, the seasonally adjusted number of declarations of bankruptcies increased by 0.6% in the EU and by 2.7% in the euro area, compared with the third quarter of 2023. In the third quarter of 2023, declarations of bankruptcies decreased by 9.4%

Chart 1



in the EU and by 10.9% in the euro area, when compared with the second quarter of 2023 (*see Chart 2 right*).

Quarterly comparison by Member State

Comparing the fourth quarter of 2023 with the third quarter of 2023, among Member States for which data are available, the highest increases in bankruptcy declarations were observed in Croatia (+18.5%), Slovakia (+16.8%) and Luxembourg (+15.7%). The largest decreases in the number of declarations of bankruptcies were recorded in Latvia (-26.8%), Hungary (-25.6%) and Romania (-23.4%) (*see Chart 3 right*).

Quarterly comparison by activity

For the whole of the economy (industry, construction, market services), the number of declarations of bankruptcies showed mainly a downward trend in 2015 and 2016, and were then mostly on a slight upward trend from the first quarter of 2017 until the third quarter of 2019 (*see Chart 4 right*).

In all sectors of the economy, there was a significant cumulative decrease in bankruptcy declarations in the first two quarters of 2020 (linked to the extraordinary financial support provided by governments in the first months of the pandemic).

Then, during the following three quarters (from the third quarter of 2020 to the first quarter of 2021), the bankruptcy declarations were essentially on an upward trend in all sectors of the economy. In the third quarter of 2023, the number of bankruptcy declarations decreased in most sectors, with the notable exception of the information and communication sector, and also industry, and construction which recorded increases. Then, in the fourth quarter of 2023, the number of bankruptcies declarations rose in four sectors and decreases in another four sectors. The more articulated changes, compared with the previous period, were the decrease of bankruptcies in information and communication, and on the other hand the increase of bankruptcies in transport.

Chart 2

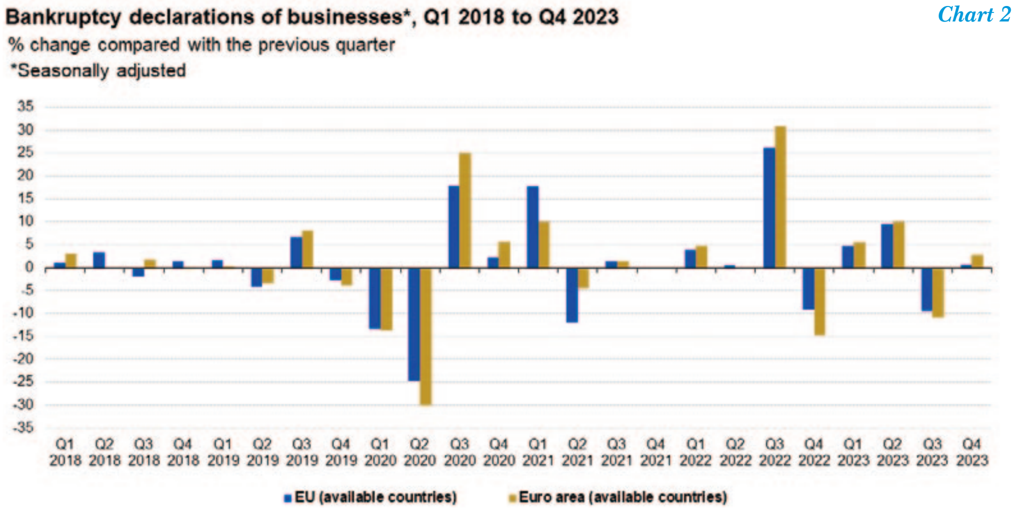


Chart 3

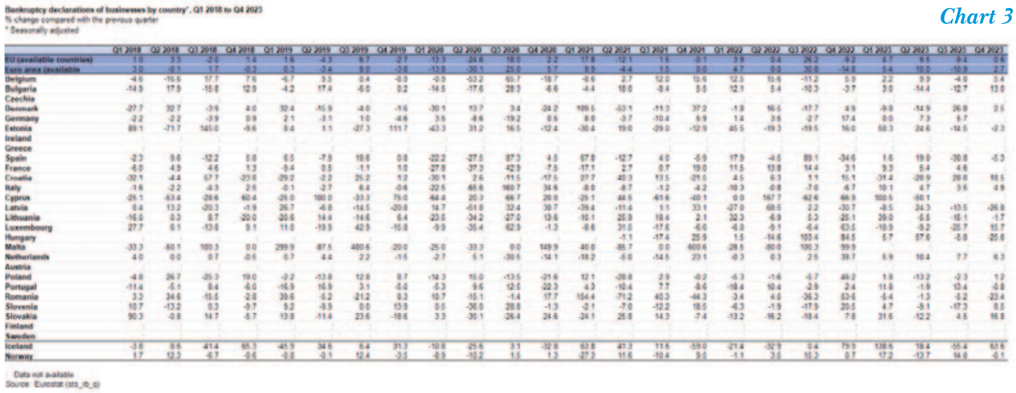
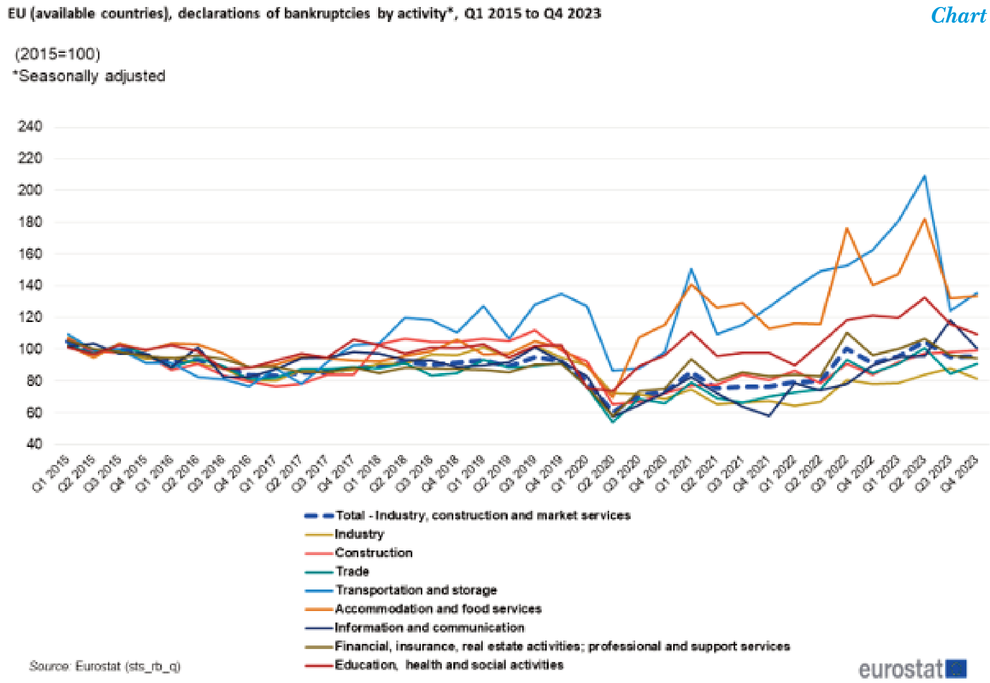


Chart 4



Footnotes:

1 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_registrations_of_new_businesses_and_declarations_of_bankruptcies_-_statistics&oldid=504228 and https://www.insol-europe.org/technical-content/national-insolvency-statistics

2 https://ec.europa.eu/eurostat/web/main/home

3 https://ec.europa.eu/eurostat/web/business-demography/publications

Source: Eurostat

A second chance.... for the Second Chance Directive in Poland

Paweł Kuglarz and Mateusz Kaliński write on the areas needed to be covered in the new bill to ensure compliance with EU law requirements

PAWEŁ KUGLARZ
of Counsel, Tatara and Partners, Poland

MATEUSZ KALIŃSKI
Tatara and Partners, Poland

Almost all of the European Union Member States have already implemented the Restructuring Directive, also referred to as the Second Chance Directive. Unfortunately, at time of writing, Poland is the only country which has failed to do so, although several drafts have so far been discussed.

Proposals of the Implementing Bill

In Poland, a team of experts within the Ministry of Justice prepared the first bill which was subject to public consultations a long while ago. A lot of business organizations (also including the National Chamber of Insolvency Practitioners and the INSO Section of the Allerhand Institute), public entities as well as the courts submitted their positions on the draft. Later on, yet another draft was published, slightly changing its subject matter, by expanding the scope of the regulation, and thus requiring another round of consultations.

Over the period of parliamentary elections in Poland in October 2023, Mateusz Morawiecki's government sent this draft to the Parliament for consideration. However, the newly elected government of Donald Tusk decided in January 2024 to withdraw the draft bill and present it for further amendments. In summary, a lot of work has already been done, including the drafting of a very detailed report on the areas needed to be covered to ensure compliance with EU law requirements.

> *The governmental document envisages some really interesting restructuring tools in line with the Restructuring Directive*

Which areas should be covered

The governmental document envisages some really interesting restructuring tools in line with the Restructuring Directive, like the possibility to access more easily cross-class cram-downs, amendments to liquidation arrangement proceedings and the possibility for the court to change (up to some extent) the arrangement made – and under certain conditions.

Liquidation arrangements and curing defects

Liquidation arrangement is a method of restructuring which uses the sale of an enterprise as an arrangement proposals. So far, using this instrument is not connected with the effect of execution sales, as it provides for no liability towards old debts. The proposed bill changes the situation for the better and stipulates the execution sale effect also for liquidation arrangement. Also, if some minor mistakes are made within the arrangement proceedings, the court will now have the opportunity to change it at its own discretion. Under the initial proposal, it was only able to refuse approval of an arrangement that failed to meet its expectations.

Appointment of Trustees and Court Supervisors

Unfortunately, the currently publicly available bill implementing the Directive proposes far reaching changes to the appointment of the trustees as well as court supervisors. A trustee is appointed under the bankruptcy regime with the appointment being made by the court, whereas a court supervisor is appointed under the restructuring regime and may either be appointed by the debtor or proposed for appointment by the creditor (or creditors). The Directive sets out no strict requirements with respect to this issue, thus in our opinion it is not necessary to implement any changes thereto.

However, the Polish draft envisages that the appointment of the trustee would be made out of a list of insolvency practitioners, with any insolvency practitioner being able to choose three courts by which they can be appointed. This system is somehow close to selection by the drawing of lots, because a trustee never knows what bankruptcy proceedings they will get. Although there are some exceptions envisaged, the general idea provides for automatic choice of a trustee, according to the number assigned to them from the list, even if a qualified insolvency practitioner title will be required for the biggest and most important proceedings.

Moreover, the Polish bill challenges the freedom of establishment of insolvency practitioners, who are entrepreneurs, imposing an obligation on them to choose specific courts. The first draft provided for application of these new rules even in arrangement approval proceedings, where the legal basis for supervision over proceedings is the agreement between the debtor and insolvency practitioner. Thankfully, after hefty criticism, the former government resigned from this particular idea.

Nevertheless, we are still

forced to continue to criticise the latest currently discussed version of the bill, because of its interference in the freedom of conducting business activity by insolvency practitioners and failure to address the obviously problematic issue.

The proposed regulation does not put the right stress on the competences of the trustee. We also believe it pushes transparency to the limits at too high a level it seems, threatening the professionalism of trustees and their proper experience in handling cases.

These plans raised a lot of discussion in Poland, and in our view, the proposed changes should be criticised. As at time of writing, the bill has been withdrawn from the Parliament for further work by the government.

Seizing the opportunity: What could be changed?

We believe that there will be space for further improvements – touching also the appointment of trustees and court lists of insolvency practitioners who can serve as arrangement supervisors within restructuring proceedings. Happily, currently most of ideas covered by the Second Chance Directive are already within the Polish legal framework, thus the lawmakers can focus merely on additional changes that may be introduced.

Firstly, there comes the issue of an appropriate organizational structure for the insolvency-related judicial system, which is nowadays inefficient, despite the idea of reform having been discussed for at least 20 years so far. Secondly, important changes may be introduced to insolvency practitioners formal self-government structures, endowing them with the possibility to enforce disciplinary responsibility.

With regard to the organization of the judiciary system, nowadays, first instance bankruptcy and restructuring cases are processed in district courts (*sądy rejonowe*), which are the lowest level of Polish courts, irrespective of the value of the case and its complexity. Therefore, a first-instance judge has to deal with complex restructuring cases valued at billions of Polish zloty as well as simple consumer bankruptcy cases of relatively small value. The workload is overwhelming. First-instance judges are dealing with approximately 200 consumer bankruptcy cases and ten corporate restructuring cases at the same time – an untenable work load.

A better system would leave consumer bankruptcy cases at the district court level, so that individuals would have easy access to justice, whereas complex restructuring cases could be moved to regional courts. Such a reform has been discussed for over 20 years now, and lately has been emphasized by the INSO Section of the Allerhand Institute.

We believe the regional courts should also become specialised second-instance courts for cases from district courts. Moreover, cases heard in regional courts (*sąd okręgowy*) could be appealed to the appellate courts (*sądy apelacyjne*), which will help to make judgements more uniform in restructuring cases. Currently, Poland struggles with differing judgements in similar cases, which is a pitfall that needs to be addressed.

There is also a need to create a special chamber or unit within the Supreme Court (Sąd Najwyższy), which would be responsible for restructuring and insolvency cases. In our opinion, this reform complies with the requirements set forth in the Restructuring Directive, which places the stress on efficient judicial systems and also the proper training of insolvency practitioners.

Conclusions

To sum up, we would like to point out that the matter of implementation of the Second Chance Directive has become an urgent issue in Poland, as we are currently the only EU Member State with no implementation so far. Unless the Directive is implemented within a very short time, Poland may be subject to financial penalties as the European Commission may take proceedings against Poland before the European Court for failure to implement the Directive.

The current government has an opportunity to implement the new changes in the judicial system and improve other areas that badly need improvement. Therefore, it is hoped that the Polish government can really give a second chance to … the Second Chance Directive, properly and effectively implemented. ■

> *These plans raised a lot of discussion in Poland, and in our view, the proposed changes should be criticised*

Foreign Exchange volatility and the risk to Creditors

Jamie Jemmeson explains the 10-20% devaluation risks involved for creditors ignoring FX volatility

JAMIE JEMMESON
Head of Structured Products, Lumon, UK

During the Liz Truss Premiership, a $5,000,000 insolvency could have been impacted by a devaluation of over £600,000, due to currency market volatility.

The significance of FX (Foreign Exchange) movements amidst an insolvency process is a critical consideration, particularly for estates holding overseas assets or assets denominated in foreign currency. Often, the FX translation risk is underestimated, potentially leading to a reduction in realised asset values and, as a consequence, a reduction in the value of creditor distributions.

Although FX fluctuations may sometimes be advantageous, making decisions driven by emotion without conducting proper due diligence exposes us to unnecessary risks. Emotion should not dictate strategy. Therefore, comprehending and managing FX exposure is paramount in navigating insolvency proceedings effectively and ensuring creditor returns are maximised.

> *The significance of FX (Foreign Exchange) movements amidst an insolvency process is a critical consideration, particularly for estates holding overseas assets or assets denominated in foreign currency*

What does FX market risk look like?

FX market risk emerges because of several factors that are often difficult to control or predict. These factors can include, but are not limited to geopolitical tensions, domestic politics, economic data, central bank policy and sentiment to name but a few.

To put into context how the value of the currency could be impacted, we can review the last 10 years of annual movements on a high and low basis.

- GBP/USD 10-year high to low range = 14.4%;
- GBP/EUR 10-year high to low range = 10.9%.

Highlighting some of the more extreme years:

- EU Referendum 2016 = GBP/USD 24.2% and GBP/EUR 20.16%;
- Trussonomics 2022 = GBP/USD 24.9%.

For illustrative purposes, an insolvency process that takes 12 months, where the equivalent foreign currency exposure has a sterling value of £500,000, the average risk based on the last decade is:

- GBP/USD (14.4%) = Circa £72,000;
- GBP/EUR (10.9%) = Circa £54,500.

Similarly, in extremely volatile years (20%+ for GBP/USD and GBP/EUR), this equates to £100,000+ in risk.

FX consideration factors during the insolvency process

Now that we have highlighted the potential risk that your FX exposure could face, let us look at the FX factors you should you consider during the insolvency process:

- **Market sentiment** – where the market bias is leaning in terms of the direction of the currency pair;
- **Historic and potential volatility** – the range of movement historically over the potential timeframe of the insolvency process, and therefore the potential impact on the insolvency notional;
- **Execution costs and timings** – are you receiving the best price when executing the transaction? If you are receiving a competitive price, is now the best time of day to be transacting?
- **Strategic tools to reduce the risk of FX Volatility** – Have you explored products or strategic partners to reduce your FX volatility?

Some FX strategies to consider

Set and forget (a forward hedge)

"Set and forget," in the context of a forward hedge refers to a hedging strategy, where a company transacts a forward contract to hedge against potential risks, such as currency fluctuations, and then largely leaves the hedge in place without actively managing or adjusting it.

- **Benefits** – the lock in value for IPs of the FX translation when the asset is liquidated. This means that the risk of negative currency movements is removed and certainty provided to creditors;
- **Considerations** – Creditors will not be able to benefit from advantageous moves.

Proportional hedging

Proportional hedging is a risk management strategy used to mitigate the impact of currency fluctuations on international translations. In a proportional hedging approach, the hedging activity is structured to provide a partial hedge against currency risk rather than fully eliminating it.

- **Benefits** – IPs reduce the market volatility of FX

Illustrative example

A UK based company goes into liquidation on 26 September 2022. The company has assets overseas that are denominated in US Dollars. Creditors are based in the UK and want settlement following the insolvency to be in Sterling. The US Dollar exposure is made up of a portfolio of properties based in New York with a value of $5m. The sale of the property portfolio concludes in just over a year and the $5m is translated to Sterling on 24 November 2023. No FX hedge is considered despite the volatile political drop in the UK during the Liz Truss era.

Using mid GBP/USD on a weekly basis, (High + Low)/2, we can calculate the potential impact of not hedging the $5m:

- GBP value of USD week beginning 26 September 2022 = £4,626,202.81;
- GBP value of USD week beginning 24 November 2023 = £3,990,582.23
- GBP depreciation = £635,620.58

Based on this example the Insolvency Estate and therefore the creditors would receive a distribution of circa £600,000 less than that if there were a hedge in place.

> *It is advisable for insolvency practitioners to factor in the FX element and proactively seek information on its potential impact on asset realisation values*

translation when the asset is liquidated;
- **Considerations** – Creditors will not be able to benefit from advantageous moves.

Participating Forward

A participating forward is a conservative hedging instrument that offers complete protection against currency losses without requiring the payment of a premium. More specifically, it allows hedging at a pre-defined rate while, at the same time, you keep the opportunity to benefit partially from a favourable market move on 50% of the notional amount hedged.

- **Benefits** – IPs lock in value of the FX translation when the asset is liquidated whilst having the ability to benefit from advantageous moves on 50% of the notional amount hedged;
- **Considerations** – The hedge rate will always be less favourable than the forward rate.

Do nothing and convert on the day

Leave the position open and transact the currency close to the distribution of funds to the creditors. The creditor will be able to benefit from advantageous moves but will also be susceptible to all devaluation if the currency moves in the wrong direction.

- **Benefits** – Creditors benefit in full from any advantageous moves;
- **Considerations** – Creditors will be taking a haircut on the value of the asset being liquidated if the currency pair moves in the wrong direction.

Conclusion

The FX translation aspect of the insolvency process is often treated as an afterthought, with little consideration for its potential impact on creditors. This oversight is understandable given the myriad of other factors at play during insolvency proceedings.

However, managing FX risk does not have to be daunting; it can be addressed efficiently and effectively. It is advisable for insolvency practitioners to factor in the FX element and proactively seek information on its potential impact on asset realisation values. This informed approach allows for better decision-making, with transparent articulation of choices made in relation to FX translation.

Inaction regarding FX translation risk is unlikely to yield additional benefits for creditors. Conversely, failure to manage FX risk effectively may result in a substantial reduction in distributions available to creditors, creditors raising questions and potentially damaging reputations. Ultimately, the priority must be safeguarding the interests and maximising the return to creditors whenever FX translation risk emerges. ■

Transposition of the Preventive Restructuring Directive into Ukrainian Law

Oleksiy Kononov comments on the alternative bills proposing the adoption of the Directive in Ukraine[1]

OLEKSIY KONONOV
MSCA4Ukraine Post-Doctoral Fellow, Faculty of Law, Economics and Finance (FDEF), University of Luxembourg

The conditions for providing micro-financial assistance for 2023 required Ukraine to implement the Directive by the end of 2023

On 9 November 2023, the Parliamentary Committee for Economic Development recommended the adoption of the Bill implementing the EU Preventive Restructuring Directive 2019/1023 ("Bill #10143")[2] at the first reading. The next day, the Cabinet of Ministers of Ukraine presented its own (alternative) bill on the same subject ("Bill #10228").[3]

The imminent transposition of Directive 2019/1023 ("Directive") into Ukrainian law is driven by several factors:

(1) The attainment of candidate status by Ukraine for EU membership in June 2022 mandates compliance with the Directive as part of the EU *acquis*;[4]

(2) Fulfilling conditions for micro-financial assistance in 2023, crucial during wartime, necessitates legislation aligning with Directive principles to enhance corporate bankruptcy and insolvency regimes, allowing for full debt discharge;[5]

(3) Transposition is integral to the Roadmap for Capacity-Building Activities designed to facilitate the implementation of the Code of Ukraine on Bankruptcy Procedures adopted by the Ministry of Justice in September 2023;[6] and

(4) The European Commission's November 2023 emphasis on the imperative of enhancing Ukraine's bankruptcy legislation further underscores the urgency for the transposition of the Directive.[7]

It is important to keep in mind that the conditions for providing micro-financial assistance for 2023 required Ukraine to implement the Directive by the end of 2023, and it appears that the country failed to meet that deadline. Given the complexity of preventive restructuring and Ukraine's unique situation of having to transpose the Directive during wartime, the failure to meet the deadline is not surprising. What remains clear is that the transposition of the Directive will occur sooner or later, and the bills tabled in Parliament provide a certain idea of how the Ukrainian restructuring procedure may ultimately look.

Existing restructuring framework and problems

Preventive restructuring is not a new concept for Ukraine. Article 5 of the Bankruptcy Code ("BCU")[8] outlines procedures for the so-called "pre-trial rehabilitation". Pre-trial rehabilitation in many respects resembles the English scheme of arrangement,[9] and involves the development of a rehabilitation plan, its prior approval by creditors, and further sanctioning of the plan by the respective commercial court. In essence, the existing procedure is essentially compelling creditors to adhere to a rehabilitation plan developed by the debtor under the strict supervision of the court.

According to the drafters of Bill #10143, the existing regulations do not provide clarity for their practical application, contain numerous contradictions with other provisions of the Code, and lack clear guarantees for debtors and creditors, which could have ensured the debtor's rehabilitation before initiating bankruptcy procedures.[10] Consequently, the existing pre-trial rehabilitation remains unpopular, with only 14 pre-trial rehabilitation plans approved by the courts between 2019 and late 2023.[11]

Different approaches to smaller businesses

Bill #10143 is more radical compared to Bill #10228. It suggests a drastic revision of the BCU by introducing an entirely new section on preventive restructuring, with specific options available for micro and small enterprises, which are the most vulnerable to insolvency. Bill #10228 essentially transposes the minimum requirements of the Directive and offers no special solutions to micro and small enterprises.

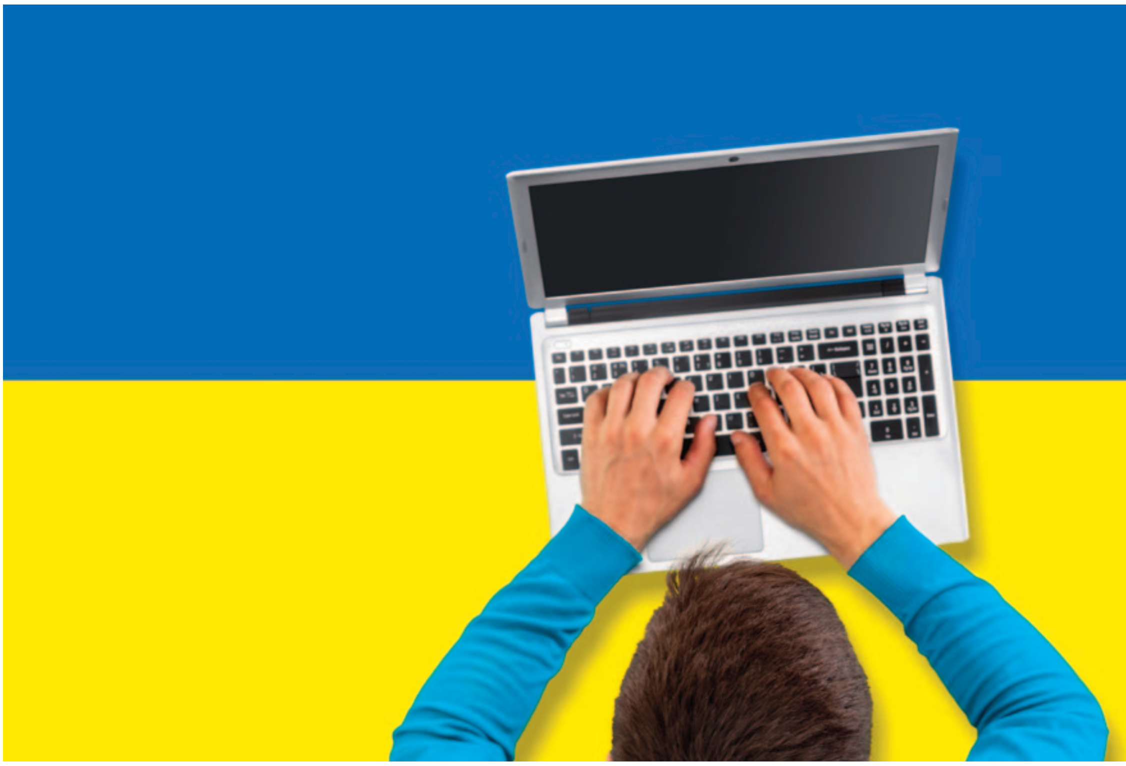
Early warning tools; Internet portal

Both bills propose detailed obligations for company management to inform equity holders about impending bankruptcy risks, with preventive restructuring as a recommended measure. Bill #10143 requires auditors, accountants, and lawyers to alert debtor management of insolvency indicators. However, neither bill specifies consequences for failing to notify equity holders or the debtor. It is unclear if executive agencies and municipal authorities will solely monitor state and municipal enterprises or have broader notification powers.

Without clarity, these rules may remain moot in practice.

Another important and undoubtedly very useful novelty suggested by both bills is the extended authority of the Ministry of Justice on matters related to preventive restructuring. In particular, the ministry will be responsible for the development and maintenance of a dedicated web portal focused on preventing insolvency. This portal will offer information on early warning tools provided by public authorities, details about preventive restructuring measures and procedures, and comprehensive guidance.

The introduction of the web portal is promising: it will provide much-needed assistance to debtors with limited resources and may become a new milestone for Ukrainian authorities in developing new digital tools for those in financial distress. However, the launch of such a portal entails expenditure[12] that is hard to come by, given the state budget has been heavily exhausted by the ongoing war. This problem may not only delay the launch of the portal but also the adoption of either of the two bills into law.



Restructuring plans

Both bills retain the option to employ procedures resembling the existing pre-trial rehabilitation in cases where the debtor already possesses a restructuring plan approved by creditors before applying to court. However, instead of mandating the submission of a plan pre-approved by creditors to the commercial court to initiate pre-trial rehabilitation, both bills propose that debtors can present a draft restructuring plan which can be meticulously negotiated with creditors and amended after the initiation of preventive restructuring. Both bills provide detailed requirements for creditors' voting on the proposed plan and debtor's reporting obligations, which would certainly eliminate problems of the lack of transparency inherent in the existing pre-trial rehabilitation.

Unlike existing pre-trial rehabilitation procedures, debtors will be able to initiate preventive restructuring without presenting a plan to the court. Instead, a preventive restructuring trustee, chosen from arbitration managers, will be mandatory to assist in plan development. Bill #10143 allows micro and small enterprises to submit a concise 'concept of preventive restructuring' as an option. These changes offer advantages by granting debtors with limited resources more flexibility but also increase costs due to mandatory trustee involvement, posing potential financial challenges for micro and small businesses.

Stay and protective measures

Prohibiting affected creditors from initiating insolvency procedures against the debtor is perhaps the most important novelty proposed by both bills in accordance with the Directive. The existing pre-trial rehabilitation chronically suffers from compelling debtors to hide their plans until the final stages to prevent creditors from instigating bankruptcy proceedings, thereby undermining preventive measures against insolvency.[13] The stay will also entail the suspension of financial sanctions against the debtor, suspension of the statute of limitations for affected creditors' claims, and restrictions on foreclosure on the debtor's assets.

In addition to that, both bills provide for the possibility for a court to apply protective measures, such as prohibiting enforced collection from the debtor based on enforcement documents, except during the stage of distributing proceeds, introduction of a moratorium on satisfying creditors' claims, and restrictions on certain transactions by the debtor. It is worth noting that, according to Bill #10143, protective measures can be requested only by the debtor, while under Bill #10228, both the debtor and creditors can petition the court to apply such measures. Under both bills, the application of protective measures cannot exceed the period of six months.

Bill #10143 includes safeguards against potential abuses by debtors seeking to

> *The introduction of the web portal is promising: it will provide much-needed assistance to debtors with limited resources and may become a new milestone for Ukrainian authorities in developing new digital tools*

> *It is uncertain which of the two bills will prevail, with a possibility of legislators combining strengths from both for a more comprehensive approach to transposition*

prolong insolvency. Protective measures are only instituted, if the debtor provides a substantiated plan for preventive restructuring, presents comprehensive financial information, and non-implementation of protective measures would hinder restructuring or lead to insolvency.

Classes of affected creditors

Currently, under the BCU, categorizing creditors into classes for pre-trial rehabilitation plans is optional. Both bills seek to make this mandatory in line with the Directive, with Bill #10143 being more detailed. It requires division into secured creditors, unsecured creditors, unsecured creditors interested in the debtor (such as a parent company, affiliated companies, debtor's managers and executive officers, relatives etc.), and equity holders. Additional classes may be created based on factors like obligation deadlines, claim amounts, and creditor types, with criteria outlined in the preventive restructuring plan.

A class of employees must be established, if the proposed restructuring involves employee claims. The preventive restructuring plan cannot allocate different proportions for satisfying claims within a single class. Any creditors within that class facing a worsened position must unanimously consent in writing to the change. Under both bills, affected creditors may contest the formation of classes in court.

Unfortunately, neither of the two bills incorporates an opt-out provision available in the Directive, which would allow debtors representing micro and small businesses to forego dividing creditors into classes.

Plan approval; cross-class cram down

Both bills stipulate that a proposed restructuring plan is deemed approved by the secured creditors' class if it garners support from creditors entitled to vote, possessing at least two-thirds of the votes from the total secured claims included in the plan within this class. For unsecured creditors, the plan requires more than 50% of the votes from the total unsecured claims included in each class for approval.

Alongside the stay provision, cross-class cramdown will undoubtedly be a significant addition to Ukrainian insolvency law. Both bills adopt Directive provisions, which mandate the respective court to cram down the plan on dissenting creditors if:

(a) no grounds exist for rejecting it;
(b) the plan is approved by a majority of affected parties'; voting classes, with at least one being secured creditors or senior to ordinary unsecured creditors, or by a class other than equity-holders;
(c) dissenting creditor classes are treated equally or better than similar ranks, and more favourably than junior classes; and
(d) no class receives or retains more than their full claims or interests under the plan.

Monitoring and conclusion of the procedure

Under both bills, either the debtor or the appointed preventive restructuring trustee must submit implementation reports to the court. Bill #10143 limits the preventive restructuring plan's implementation to a maximum of four years, whereas Bill #10228 does not impose such a restriction.

The restructuring procedure concludes upon the submission of a report detailing the fulfilment of the preventive restructuring plan to the court. Bill #10228 offers more avenues for affected parties to contest the conclusion and extend the procedure, while Bill #10143 emphasizes "successful" completion but lacks explicit provisions for objections by affected parties.

Summary

At present, it is uncertain which of the two bills introduced in Parliament will prevail, with a possibility of legislators combining strengths from both for a more comprehensive approach to transposition. The efficiency of this process in Ukraine's unique circumstances remains uncertain. Challenges are acknowledged, and stakeholders anticipate the new preventive restructuring mechanism will not be fully operational immediately upon enactment. Nonetheless, both bills offer a solid foundation to address deficiencies in the existing pre-trial rehabilitation system, especially if focusing on aiding micro- and small enterprises. ■

Footnotes:

1 This project has received funding through the MSCA4Ukraine project, which is funded by the European Union. Views and opinions expressed are however those of the author only and do not necessarily reflect those of the European Union. Neither the European Union nor the MSCA4Ukraine Consortium as a whole nor any individual member institutions of the MSCA4Ukraine Consortium can be held responsible for them.

2 Bill #10143 of 12 October 2023 on amending of the Code of Ukraine on bankruptcy procedures and other legislative acts of Ukraine regarding the implementation of Directive 2019/1023 of the European Parliament and the Council of the European Union and the introduction of preventive restructuring procedures, available in Ukrainian at: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2025002.

3 Bill #10228 of 8 November 2023 on amending some legislative acts of Ukraine regarding the improvement of preventive procedures and prevention of bankruptcy (text presented on 10 November 2023), available in Ukrainian at: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2064509.

4 European Council, 'Meeting (23 and 24 June 2022) – Conclusions'; EUCO 24/22, para. 11; Commission, ';Staff working document Ukraine 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy'; SWD/2023/699 final, 28.

5 Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower of 16 January 2023 – Instrument for providing support to Ukraine for 2023 (micro-financial assistance+) of up to EUR 18 billion.

6 See: https://minjust.gov.ua/news/ministry/minyust-zatverdiv-dorojnyu-kartu-u-sferi-bankrutstva.

7 SWD/2023/699 final, 28.

8 Code of Ukraine on Bankruptcy Procedures of 18 October 2018 (in force since 21 October 2019).

9 Olha Stakheyeva-Bogovyk, *New Bankruptcy Code of Ukraine: What to Expect* (2019) 76 *Eurofenix* 26, available at: https://www.insol-europe.org/download/documents/1585.

10 Explanatory note to Bill #10143, available in Ukrainian at: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2025003.

11 The number can be inaccurate and in fact lower due to the absence of data officially published by the Department of Bankruptcy, Ministry of Justice of Ukraine. Besides, it is not uncommon for the Supreme Court to quash decisions of trial courts approving pre-trial rehabilitation plans many months after the approvals by the trial court.

12 The budget problem was emphasized by the respective parliamentary committee, for which see: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2128344; https://itd.rada.gov.ua/billInfo/Bills/pubFile/2120630.

13 Round table 'Preventive Restructuring according to Bill #10143'; (Kyiv, Ukraine, 8 December 2023) (in Ukrainian), available at: https://www.facebook.com/Pravojusticeukraine/videos/262958836778151.

A positive step in the UK's fight against fraud

Tom Russell looks at the 2023 Economic Crime and Corporate Transparency Act (ECCT Act) and the potential missed opportunities around the legislation

TOM RUSSELL
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Over the last four years, a series of national, international, and geopolitical issues has created a need for further legislation to combat the fight against fraud in the UK.

The potential misuse of Government support funds during the pandemic, the war in Ukraine, and a need to strengthen the UK's economy to combat national and international crime has seen the Government pass two specific pieces of legislation to strengthen the UK's anti-fraud efforts and help the work of those who support them.

The first of these pieces of legislation was the Economic Crime (Transparency and Enforcement) Act (ECTE Act) 2022, which focused mainly on strengthening the UK's sanctions regime, creating a register of overseas entities to target foreign criminals using UK property to launder money and making the UK's unexplained wealth regime more effective.

The second, the Economic Crime and Corporate Transparency Act (ECCT Act) 2023, was a follow-up to this, and was introduced to give the Government greater tools to tackle economic crime and improve transparency over corporate entities in the UK itself.

Its wide range of reforms covered limited partnerships, crypto-assets, information sharing and created a new 'failure to prevent fraud' offence. To the insolvency profession, the most interesting of these are the reforms it proposes to Companies House and the opportunities these provide to those investigating fraud and the abuse of the limited company regime.

These reforms improve the transparency of UK companies, making the companies register more reliable and introducing new powers for Companies House to enhance its role in combatting illicit wealth. Companies House has confirmed that provisions which will come into force in March 2024 include information sharing powers to for the proactive sharing of data with law enforcement, regulators and other public authorities.

Further provisions will see increased obligations to verify the identities of people with significant control (PSCs) and other individuals or entities filing on behalf a company on the register, and strengthening the existing offence under s112 Companies Act 2006 for companies that deliver false or misleading statements, with secondary legislation being necessary in order to come into force.

While all these provisions are welcome, and will strengthen Companies House from an operational and reputational perspective, one key element of the legislation which would have benefitted the profession appears to have been missed from the Act itself.

In the White Paper on the then Economic Crime and Corporate Transparency Bill, insolvency practitioners were named among the group of people with whom Companies House could share data with about companies on the Register, but this does not appear to have been included in the legislation.

Given the key role members of the profession play in investigating activities, which are potentially fraudulent and submitting reports into the conduct of company directors, and the fact there will be times when an insolvency practitioner will need access to information about companies over which they have not been appointed, we believe this information sharing process needs to be established as soon as possible.

Doing so would be a crucial step towards improving the efficiency of, and trust in, the UK's company register – as well as the insolvency and restructuring profession's own anti-fraud work, and could result in more effective investigations, more fraud being disrupted and prevented, and more money returned to creditors and into the economy.

Given the Government has already taken a hugely positive step towards helping the profession further support the UK's fight against fraud with these reforms to Companies House, ensuring this additional information Companies House collects is shared with insolvency practitioners and putting a process in place for this information sharing to happen should not be too much of a further step.

The profession and the UK's anti-fraud efforts will be in a better – stronger – place if it is taken – and, with the clock counting down towards a General Election, it would seem critical for the Government to resolve this before purdah starts, and progress on this, and other initiatives, is paused. ■

> *These reforms improve the transparency of UK companies, making the companies register more reliable and introducing new powers for Companies House*

The influence of the Preventive Restructuring Directive in Portugal

Catarina Serra writes on the Discharge of Debts in the Portuguese Insolvency Act 20 years on

CATARINA SERRA
Justice of the Portuguese Supreme Court

> *The main advantage is clearly for the debtor: The discharge allows him to reset his liabilities to zero and make a fresh start*

The Portuguese Insolvency Act

20 years after the enactment of the Portuguese Insolvency Act, it is interesting to take a look at the one of the greatest novelties that was introduced back then: the discharge of debts.

In the design of the Portuguese law, the discharge, applicable to all natural persons, implies the allocation of the insolvent's disposal income, during a certain period ("assignment period", which lasts, in principle, three years), to the payment of the outstanding debts (i.e., debts left unpaid throughout the insolvency proceedings), leading to their cancellation.

The main advantage is clearly for the debtor: the discharge allows him to reset his liabilities to zero and make a fresh start. The truth is that the discharge cannot be taken for granted; it must be earned (it is a privilege reserved for "honest and unfortunate debtors") and it must be conquered (only debtors who fulfil certain obligations during the assignment period are able to get it), which is why it is more correct to speak of an earned (fresh) start.

The Preventive Restructuring Directive

The regime was recently amended by Law No. 9/2022, of 11 January, aimed at transposing the Preventive Restructuring Directive (**PRD**). The two most significant changes concern the discharge period, or rather the assignment period (reduced from five to three years), and the possibility of extending this period (up to a maximum of three years). It is worth noting that, in the case of an extension, the assignment period amounts to six years, which paradoxically means an increase of the previous deadline.

At this point, however, rather than looking back or criticising the recent amendments, it might be appropriate to look ahead to the next 20 years and ask two or three questions.

1. Why not a discharge without asset liquidation?

According to the PRD, a discharge of debt should be available in proceedings that include a repayment plan, a realisation of assets, or a combination of both.[1]

The Portuguese Insolvency

Act provides a repayment plan. The instrument avoids the typical course of insolvency proceedings, that is, asset liquidation, and is accessible to natural persons who are not entrepreneurs or who are small entrepreneurs and, while the discharge is an *additional* measure to liquidation – as a rule, it presupposes liquidation - the payment plan is an *alternative* measure to liquidation – it avoids liquidation. In the end, however, the debtor is only released from his debts whose payment is made or whose discharge is specifically included in the payment plan.

If the payment plan could ensure a discharge of debts, it would have an additional appeal for the debtor. And if the discharge could be obtained without asset liquidation, the debtor would be able to keep his assets, which are usually necessary for him to carry out his activity. This possibility would therefore be useful not only for the debtor but also for creditors and the public interest.

2. Why not differentiate between entrepreneurs and non-entrepreneurs?

The PRD lays down rules on procedures leading to a discharge of debt incurred by insolvent entrepreneurs,[2] but does not prevent, in other words allows, Member States to extend the application of these procedures to insolvent natural persons who are not entrepreneurs.[3]

The discharge of the debt incurred by entrepreneurs is, in principle, more necessary (entrepreneurial activity is a risky activity) and more justified (entrepreneurial activity aims to create value), but it must be more demanding (entrepreneurs are professionals and supposed to be better prepared).

On the other hand, the discharge of debt incurred by non-entrepreneurs/consumers must take into account that they are strangers to the professional credit market and are very sensitive to the solicitations to take credit. The regime should thus include specific measures, such as an assessment of the credit grantor's behaviour.

The need for this assessment is, not only justified by the risk of an incomplete or incorrect assessment of the debtor's behaviour for the purpose of obtaining discharge, but, in most cases, corresponds to the monitoring of creditors' compliance with legal duties (creditors have the obligation to assess the debtor's credit-worthiness before providing a credit). The problem is that non-compliance is not sanctioned or, at least, is not sanctioned in a dissuasive manner. If it was, lending would be more responsible and the problem of over-indebtedness would be tackled *ex ante*, what would, presumably, be more effective.

3. Why are tax and social security debts not dischargeable?

The PRD list six categories of debts that Member States can exclude from discharge.[4] Those categories are: secured debts; debts arising from or in connection with criminal penalties; debts arising from tortious liability; maintenance debts; debts incurred after the application for or opening of the procedure leading to a discharge of debt; and debts relating to the cost of that procedure.

Although it could be argued that the list is non-exhaustive and may be supplemented by Member States,[5] the fact is that it is quite extensive, suggesting, at the very least, that the exclusion of tax and social security debts is not, in the European Union's legislator's view, the most obvious or justified.

Currently, despite widespread criticism, under the Portuguese law tax and social security debts are (still) excluded from discharge. The proviso considerably reduces the scope of discharge as an instrument for the cancellation of the debtor's liabilities. It also puts Portuguese entrepreneurs at a disadvantage compared to their competitors in other member states, since most foreign laws do not include such a proviso.

Most of all, in light of all the interests at stake in discharge, it is difficult to understand what justifies such a privilege to public creditors. It may be argued that it is convenient to ensure the general sustainability of the tax system but this cannot be achieved at all costs and, most of all, does not override all other interests in specific contexts such as this.

Strangely, it is in the chapter dedicated to discharge that we may find one of the two norms in all the Insolvency Act that enshrine the *pari passu principle*. As it is widely known, according to this principle, no discrimination without objective reasons may take place. Is the exclusion of tax and social security debts indeed justified?

This and the preceding are a few of the doubts to which the Portuguese discharge gives rise considering the PRD and are sufficient to show that the regime is not perfect.

Summary

It is difficult to achieve the right balance between all the conflicting interests. But it is indisputable that, at present, beyond the familiar liquidation and rescue/restructuring functions, insolvency law fulfils a discharge function, from which it will no longer be able to resile. Every endeavour to make the regime better will be worthwhile. ■

Footnotes:

1 Article 21(1)(a) and (b) and Recital 75, PRD.
2 Ibid., Article 1(1)(b).
3 Ibid., Article 1(4).
4 Ibid., Article 23(4).
5 See ECJ Cases C-687/22 – Opinion of Advocate General Richard de la Tour, delivered on 14 December 2023, and C-20/23 – Opinion of Advocate General Richard de la Tour, delivered on 11 January 2024).

> *Despite widespread criticism, under the Portuguese law tax and social security debts are (still) excluded from discharge*

Preventing insolvency through transparency and innovation

Nelson Soares Moreira examines the shift in emphasis from competition to mutual support in Portugal

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In Portugal's business environment, characterized by a preponderance of micro- and small-enterprises, the shift from a competitive culture to one of complementarity has been identified as a fundamental strategy to forestall financial crises, especially insolvency.

This transformation, rooted in transparency, innovation, and creativity, signifies the dawn of a new era in corporate governance founded on veracity, in stark contrast to obsolete practices of aggressive advertising, deceptive marketing, unsustainable consumption patterns or insular information systems.

A notable cultural and habitual pattern guiding organizational management has been observed. Many of Portugal's micro- and small-businesses are underpinned by familial ties, perpetuating certain behavioural norms over the years, as well as displaying a certain resistance to the adoption of new habits and organizational methodologies. Therefore, the adoption of a new mindset among Portuguese companies, centred on the transparency of methods and concepts, will cultivate an environment of cooperation and complementarity, in which organizations view each other not as competitors, but as partners in value creation. Indeed, the onset of the global COVID-19 pandemic and subsequent international conflicts have prompted a disruption in the daily lives of individuals and businesses, leading to a new approach to thinking and work methodologies.

> *"The adoption of a new mindset among Portuguese companies, centred on the transparency of methods and concepts, will cultivate an environment of cooperation"*

New models and business approaches

Consequently, new models and approaches to business development, including transparency, are being explored. Corporate transparency, manifested in business procedures and decisions, is not merely a matter of complying with international recommendations, but fundamentally represents a new mode of business operation aiming for a closer relationship with all stakeholders. The adoption of new business operations will foster clearer, more objective, and pragmatic communication, reducing conflicts while promoting the company to levels of true and genuine productivity.

Therefore, implementing transparency policies that materialize into tangible aspects of corporate life, such as entirely open offices and departments, where information and knowledge sharing among staff flows more smoothly and effectively, becomes imperative. Decision-making within companies, as in all aspects of life, can significantly influence any organization's destiny. For this reason, establishing fluid, flexible internal mechanisms, where essential information is processed, so that data reaches decision-making bodies more objectively, is essential. Often, the essence of decision-making lies in timing, necessitating the introduction of internal, pragmatic circuits that enhance the fluidity of information and the speed of decision-making in a fully informed manner.

Innovation and employee involvement

Innovation represents another area of practical interest. Companies must innovate, necessitating a shift in mindset among entrepreneurs. Thus, assigning workers an active role in certain administrative decisions, involving them in the company's dynamics and culture, is crucial. It is often said, "companies are their people", a statement brimming with truth. In this context, workers cannot be seen merely as producers or "labour". As, without workers, companies naturally cease to function, therefore, they should play an increasingly active role in the company's destiny, feeling an integral part of it.

Moreover, it is vital for workers to participate in the company's dividends, in proportions appropriate to their specific situation. Often, pre-insolvency situations commence with disengagement by the workers, i.e., a lack of involvement with the company's culture and dynamic. A worker should not be viewed merely as an employee fulfilling a rigid schedule, but as a partner. In Portugal, "Happiness Departments" have begun to emerge, focusing on employee well-being, implementing various practices and initiatives to enhance work-life quality. For instance, there are companies where top administrators dine with a worker once a week, with discussions about work being prohibited.

Similarly, companies should adopt decision-making mechanisms allowing key stakeholders to be heard, for example, through the establishment of advisory councils within companies. This type of involvement from principal partners in the decision-making core significantly mitigates the risks of insolvency situations. Moreover, commitment among all involved parties is much greater, leading to increased responsibility. A clear example of participatory governance is the Mondragon Cooperative in Spain, promoting a shared commitment to the company's success, thereby minimizing financial and operational risks.

In this vein, the creation of an open innovation culture, where the company collaborates with start-ups, universities and research centres to develop new solutions, is imperative. For instance, Philips is renowned for its commitment to open innovation, collaborating with various external partners through its Philips Innovation Services programme. This strategy has enabled Philips to lead in various technological areas, maintaining financial health.

The role of AI

The pivotal role of artificial intelligence (AI) in the business world cannot be overlooked. In the authors' view, the cultural bases underpinning interpersonal relations have long been exhausted, necessitating the exploration of new forms and models of intelligence. Despite ongoing studies and research, AI could become an excellent complement and ally to natural (human) intelligence, reopening new perspectives and views on relationships and the world. It is increasingly important to understand the role that business organizations play in the life of society, inevitably leading to a remodelling of daily life, reconfiguring what truly constitutes human needs. For instance, AI can play a crucial role in risk analysis situations, such as through predictive analysis platforms, human resource management in identifying and assessing the most suitable candidates, as well as detecting frauds, especially in IT, which can be challenging to detect and may drive an organization to imminent insolvency.

Summary

From our experience in intervening in corporate insolvency processes in Portugal, whether as consultants to Insolvency Administrators or as lawyers for declared insolvent companies, we find that insolvency's main causes are largely due to old business paradigms, namely overly restricted and closed internal circuits to the administration, not involving other stakeholders, coupled with a significant disengagement of workers from the company. In an era where information travels at supersonic speed, companies that do not adjust to these new operational models will undoubtedly enter situations of organizational and productive flow blockages.

In conclusion, it is crucial to reflect on the role that companies will play in people's lives in the medium and long term. A company is an institution, as is a person, a family, a country. Signs of organizational decline are often perceptible well in advance. Timely detection is essential to avoid insolvency and its ensuing consequences. Designing business strategy in terms of business model and market positioning is fundamental. More importantly, however, is the training and education of people, directed towards complementarity and a common well-being based on new intelligence models, not competition, discrimination or old behavioural paradigms. The future is today, not tomorrow. ■

"Artificial Intelligence can play a crucial role in risk analysis situations, such as through predictive analysis platforms"

Taking European insolvency law reform to the next level

Paul Omar traces the development of modern insolvency law developments from the inception from the Brussels Convention 1968 to the modern day

PAUL OMAR
INSOL Europe Technical Research Coordinator

> *The European Community seemed to lose its way with insolvency, activity being suspended for over a decade, while a rival institution pushed for its own version*

At its inception, the place of insolvency in the architecture of the European Community (later Union) was conceived of as being ancillary to the overall purpose of complementing (and completing) the four freedoms.

Judgments resolving commercial and contractual disputes would circulate in the European space and be recognised and enforced wherever debtors could be located. However, the Brussels Convention 1968, emerging out of a working party formed in 1963, excluded in its Article 1(2) the following: "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*". Insolvency had been found to be more complex than at first thought, necessitating the formation of a further working party and some delay in its functioning, which led to a draft only appearing in the early 1970s.

The 1970s text contained jurisdiction and conflict of laws rules alongside a recognition and enforcement framework referring to the Brussels paradigm, as well as, perhaps surprisingly, a very brief Model Law focusing on harmonisation in targeted and discrete areas of family and property law. A later draft, produced in 1979, carried over the jurisdiction, conflict of laws and other procedural rules, but truncated further the scope of the Model Law, reducing its content to a presumption in connection with spousal property, set-off and retention of title. Alongside, but unrelated to all this, there occurred some legislative activity looking at the role of insolvency in connection with TUPE[1] and state guarantee schemes for employee wages.[2] Much of the outline of the framework known today, its definitions and structure, owe their genesis to the preparatory work culminating in the two drafts.

Competition: The race to legislation

At this point in the story, the European Community seemed to lose its way with insolvency, activity being suspended for over a decade, while a rival institution, often mistaken for it in popular minds, the Council of Europe, pushed for its own version that resulted in the Istanbul Convention 1990. Despite its lack of success, as the requisite number of ratifications necessary for it to come into force was never reached, its existence was sufficient to persuade the European Community of the need to continue work, which ultimately bore fruit in the shape of the European Bankruptcy Convention 1995. Alas, this too was doomed to failure, allegedly infected by the political tensions around the BSE[3] crisis that arose at the time.

Against the background of similar work by UNCITRAL building on the same set of definitions, concepts and architectural model, and that resulted in the Model Law on Cross-Border Insolvency 1997,[4] the dust had barely settled before Germany and Finland proposed a resumption of work in 1999. The preparatory work for the 1995 text simply ended up being recycled into the text of a Regulation that saw light in 2000.[5] By then, however, the Model Laws annexed to the first two drafts had fallen by the wayside and only the procedural aspects of insolvency jurisdiction, recognition, enforcement and coordination remained in the various texts that resulted, UNCITRAL's and the European Union's alike.

The proliferation of insolvency texts

Since that time, interestingly, insolvency texts have proliferated. UNCITRAL's work has seen the production of a Legislative Guide 2004, to which parts have been added over the years on enterprise groups, directors' liability in the twilight zone and insolvency for MSEs,[6] two further Model Laws on insolvency-related judgments (2018) and enterprise group insolvency (2019), the whole accompanied by a host of Guides to Enactment and a case-law repository illustrating the use of the 1997 text. Moreover, new projects are on the way in the fields of applicable law and asset-tracing and recovery.[7]

Other international organisations have not shied away from this area either, with the work they have undertaken resulting in the G22 Key Principles and Features of Effective Insolvency Regimes 1998, the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights

Systems 2001 (revised 2015), the EBRD Core Principles for an Insolvency Law Regime 2004 (revised 2020)[8] and the World Bank-IMF Joint Initiative on Creditor Rights and Insolvency Standards 2005.

In the European Union, following on from the Best Project on Restructuring 2003, which examined the case for fresh starts, discharges and the attenuation of the stigma of bankruptcy, and set also against the background of reforms in the member states, the focus moved on quickly to the generation of new measures. These included Directives on the coordination of insolvencies of insurance bodies and credit institutions.[9] Moreover, in the wake of the ample case-law of the European Court of Justice (later CJEU) on the operations of the EIR, the ensuing review of the cross-border framework saw the production of a recast Regulation,[10] which added, *inter alia*, group insolvencies, virtual secondary proceedings and enhanced avenues of cooperation and communication to its diet.

Of note, none of these texts strayed much beyond procedural coordination with a template usually according primacy to the laws of a home state, but with carve-outs preserving competence in the case of key assets and transactions.

It is interesting that, at about the same time, the interest of the Commission narrowed in on the possibility of further harmonisation through its focus on the idea of upstream rescue. Based on a 2014 recommendation, the way was paved for a Directive embodying a preventive restructuring procedure for adoption by Member States.[11] The working group,[12] formed to move the project forward, did so on the basis that member states could "adopt or adapt", leaving the member states to determine how the procedure would sit within their domestic frameworks. Ostensibly a measure to further promote the formation of the Capital Markets Union ("CMU"), the PRD has pushed the envelope of what was seemingly possible further down the road towards harmonisation. No longer would the idea solely be about coordination of diverse procedures, but in fact would aim at the introduction of new ways of doing things.

The renewed quest for harmonisation

In the short period since the PRD was adopted, which has mostly been taken up with its implementation, ideas seem to have moved on considerably. The Insolvency III (or 3.0) Initiative[13] emerged through expansion of the same working group that laboured on the PRD. It operates on the assumption that efficient insolvency laws are one of the key criteria for cross-border investors. As such, discrepancies in national corporate insolvency laws (outside the banking sector) are recognised by many as potential obstacles to a well-functioning CMU. In this process, closer integration of insolvency law is believed ultimately to boost the European Union's capital markets and investor confidence in cross-border financing.

The proposals mentioned a number of areas of interest, including a definition of insolvency and entitlement to file for insolvency; the conditions for determining avoidance actions and the effects of claw-back claims; asset-tracing and recovery frameworks, including in the context of avoidance actions; a focus on directors' duties in the vicinity of insolvency; the position of secured creditors in insolvency and the right balance between secured creditors and the protection of other creditors (e.g. employees, suppliers); as well as the issue of court expertise and the training of judges.

More issues were added during the meetings of the working group, including a focus on pre-packs and special procedures for MSEs. The draft directive that emerged towards the end of 2022 contained a selection of these issues, but has not to date made sufficient progress such that enactment is guaranteed.

Is there a need?

Going back to the beginning, it was thought then that some harmonisation, but narrowly targeted, was desirable. Today, with the latest initiative, we are in the same position, albeit the list of desirables has increased and the rationale is now the completion, not of the Single Market, but of the CMU.

Whatever the "peg" on which this "coat" is hung, some questions remain:

- How far does/should insolvency take us down the road of European integration?
- What are the parameters (if any) of this process, particularly insofar as the scope and methodology of harmonisation are concerned?
- What are the strategic objectives of the process: modernisation pure and simple; building resilience into the framework to withstand future crises, such as the pandemic that has recently impacted economies globally, etc.?

These are issues that the contemporary literature begins to deal with, but that are not as yet fully answered.[14] That said, some support for the Commission can be gleaned from a survey conducted by CERIL in May 2023,[15] but there is still insufficient overall data on whether the proposals will necessarily lead to the objectives sought. Is it enough to believe, as the Commission clearly does, that the initiative will bear fruit? Only time will tell. ■

"These are issues that the contemporary literature begins to deal with, but that are not as yet fully answered"

Footnotes:

1 Transfer of undertakings and protection of employment.

2 TUPE: Directive 77/187/EEC (now 2001/23/EC); state guarantee schemes: Directive 80/987/EEC (now 2008/94/EC).

3 Bovine spongiform encephalitis, also known as "mad cow" disease.

4 For this and other UNCITRAL texts mentioned here, see: https://uncitral.un.org/en/texts/insolvency.

5 Council Regulation (EC) 1346/2000 of 29 May 2000 ("EIR").

6 Micro- and small-enterprises.

7 See reports and papers from the 59th session onwards of Working Group V on insolvency at: https://uncitral.un.org/en/working_groups/5/insolvency_law. See also P. Omar and J. Gant, 'Observing at UNCITRAL: The Creation and Development of Insolvency Norms' (2023) *Eurofenix* (Autumn) 28.

8 See P. Omar, 'Cooperation with the EBRD: Advancing Insolvency Norms' (2023) *Eurofenix* (Spring) 30.

9 Insurance bodies: Directive 2001/17/EC (recast in Solvency II Directive 2009/138/EC); credit institutions: Directive 2001/24/EC.

10 Regulation (EU) 2015/848 of 20 May 2015 ("Recast EIR").

11 Commission Recommendation of 12 March 2014; Directive (EU) 2019/1023 of 20 June 2019 ("PRD").

12 The present author was a member of this group.

13 See: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en.

14 See E. Ghio, *Redefining Harmonisation: Lessons from European Insolvency Law* (Elgar, 2022).

15 See: https://www.ceril.eu/news/ceril-statement-2023-2-on-the-european-commission-proposal-for-a-directive-harmonising-certain-aspects-of-insolvency-law.

EU insolvency law and third countries: Which way(s) forward?

Luciano Panzani and Robert Van Galen summarise the outlook for groups of companies in light of the new regulations

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This text is an abstract of a more wider study presented by Luciano Panzani and Robert Van Galen at the Conference "EU Insolvency Law and Third Countries: Which Way(s) forward?" held in Kiel, 26 – 28 October 2023.

Main features of the group insolvency treatment in the EIR[1]

The EIR 1346/2000 did not contain any provisions on groups of companies. When the Recast EIR 848/2015 ("Recast EIR") was finally introduced, in Chapter V, the scope for intervening either directly or through the courts in the insolvency proceedings of group companies was limited. Chapter V also introduced the concept of a group coordinator, who could try to coordinate the negotiation of a restructuring plan. However, the group coordinator's powers are very limited. The whole construct seems to rest on the premise that a restructuring plan should be reached by negotiation between the insolvency practitioners appointed in all the insolvency proceedings and possibly the group coordinator and by subsequent adoption in all these proceedings. Around the time of the adoption of the Recast EIR, in 2017, a similar regulation was adopted under German law[2] and incorporated as §§ 269a-i of the German *Insolvenzordnung*. The provisions of this regulation apply to local German groups of companies. Contrary to European law, under §§ 3a-3e of the *Insolvenzordnung*, insolvency proceedings can be opened in a single court with respect to all group companies.[3]

Articles 56-60 Recast EIR[4] concern cooperation and communication. These provisions are the complement to Articles 41-43, which provide for cooperation and coordination between insolvency proceedings with respect to the same debtor (main and secondary proceedings). Article 56 contains an obligation for an insolvency practitioner appointed in proceedings concerning a member of a group to cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group. An insolvency practitioner's obligation to cooperate as provided for in Article 56 is subject to limitations which are more restrictive that those applying under the equivalent Article 41. Under Article 56:

(i) the obligation to cooperate only applies to the extent that the cooperation is appropriate to facilitate the effective administration in the receiving proceedings;
(ii) the cooperation should not be incompatible with rules applicable to the proceedings of that insolvency practitioner; and
(iii) the cooperation should not entail any conflict of interest.

These limitations considerably weaken the obligation to cooperate. In insolvency situations, there are often conflicts of interests between group companies, because they have different sets of creditors.

Section 2 of Chapter V concerns group coordination proceedings. According to Article 61(1), group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. The group coordinator must not be one of the insolvency practitioners appointed in respect of any of the group companies. The group coordination proceedings will thus be opened by the court first seized. A limitation can be created by means of an opt-out, as discussed below. Solvent group companies cannot be included in the group coordination proceedings.

After the request for the opening of the group coordination proceedings has been filed, the court considers various criteria. If the court is satisfied that these criteria are met, it notifies the insolvency practitioners involved and gives them an opportunity to be heard.

Subsequently, there is a waiting period of 30 days, during which insolvency practitioners appointed in respect of group companies may object to the person of the proposed group coordinator. An insolvency practitioner may also opt out of the group coordination proceedings altogether (Articles 64 (1)(a) and 65 (1)), in which case the proceedings in which this insolvency practitioner is involved will not be included in the group coordination proceedings. Nevertheless, it is possible that some kind of informal consultation takes place.

Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group companies agree that the court of another member state having jurisdiction is the most appropriate court, that court will have exclusive jurisdiction over the group coordination proceedings.

The insolvency practitioners appointed in relation to group members and the group coordinator must cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.

The essential tasks of the group coordinator are to make recommendations for the coordinated conduct of the insolvency proceedings and to propose a group coordination plan. A group coordination plan is not a rescue plan in the classic sense of a plan capable of modifying creditors' rights and resolving the insolvency. Instead, it is more about coordinating the proceedings. The insolvency practitioners must consider the recommendations of the group coordinator and the content of the group coordination plan, but are not obliged to follow the recommendations of the plan. However, if the insolvency practitioner does not follow the plan, he must give reasons for this. So, this is actually tantamount to a comply-or-explain rule.

Under Article 72(2), the group coordinator has various important rights, including the following:

(i) the right to be heard and participate in any of the proceedings with respect to group companies included in the plan;
(ii) the right to mediate any dispute arising between insolvency practitioners of group members;
(iii) the right to request information from any insolvency practitioner in respect of any member of the group that is included in the plan; and
(iv) the right to request a stay of proceedings opened in respect of any member of the group that is included in the plan, provided that such a stay is necessary to ensure its proper implementation.

Efficiency of the EIR and of the MLEGI

The Model Law on Enterprise Group Insolvency (MLEGI) was adopted by UNCITRAL in 2019. So far it has not been enacted in any state.[5] Similarly to the Recast EIR, the MLEGI provides for a group proceeding focused on the development of a group insolvency solution for the whole or part of an enterprise group (as explained by recital (c) of its preamble). Additionally, the MLEGI provides for cross-border recognition and implementation of the group insolvency solution in multiple States.

Substantively, to a large extent, the Recast EIR and the MLEGI take the same approach. The planning proceeding is the MLEGI equivalent to the EIR group coordination proceeding and the group representative is the equivalent to the EIR group coordinator.

The Conference on European Restructuring and Insolvency Law ("CERIL") issued a statement and a report on 29 June 2021 (CERIL Statement 2021-2)[6] on EU Group Coordination Proceedings. Statement 2021-2 observes that as matter of fact the coordination proceeding provided by the Recast EIR was never used in any significant case of a cross-border insolvency.

There are two important reasons that explain why insolvency practitioners do not request the opening of coordination proceedings: the costs and the time involved with such proceedings. The stay that the coordinator may ask for according to Article 72 stops for six months any liquidation of assets which is irreconcilable with the coordination project. Costs are also important. Making a preliminary estimate of the costs of the coordination proceeding is difficult. To these costs must be added the indirect costs coming from the delay of the proceeding.

The more serious reason that convinces the insolvency practitioner not to open the coordination proceeding is the lack of power of the coordinator. It has been observed that the group coordination proceeding in the EIR is unlikely to be particularly helpful, as it lacks certainty and predictability.[7] The experience with the secondary proceeding where the EIR provides duties of cooperation between the insolvency practitioner of the main and secondary proceedings, shows that there are bugs and conflicts. The root of these conflicts comes from the creditors' interests that may differ from each other.

Spontaneous coordination between the insolvency practitioners of the group companies is possible, but in the more difficult situations coordination may be desirable, but the coordination proceedings need teeth and claws to be effective.

What has been created was a compromise solution that does not work. There is no interest to ask for the opening of the coordination proceeding. The stakeholders know that it does not provide an efficient solution. ■

> *Spontaneous coordination between the insolvency practitioners of the group companies is possible, but the coordination proceedings need teeth and claws to be effective*

Footnotes:

1 This text is an abstract of a more wider study presented by Luciano Panzani and Robert Van Galen at the Conference "EU Insolvency Law and Third Countries: Which Way(s) forward?" held in Kiel, 26 – 28 October 2023.

2 *Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen.*

3 These provisions pre-date the law of 2017.

4 References below to Articles are to those of the Recast EIR, unless stated otherwise.

5 The table of the status of UNCITRAL texts on the UNCITRAL website does not show the MLEGI.

6 Both the statement and the annexed report can be viewed at: www.ceril.eu/news/ceril-statement-2021-2-on-eu-group-coordination-proceedings

7 A. Cohen, R. Dammann and S. Sax, 'Final text for the Amended EU Regulation of Insolvency proceedings' (2015) IILR 117, 120.

US Court expands creditors' rights to assert claims against insiders

David Conaway writes on a recent ruling involving breaches of fiduciary duties

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On 2 February 2024, in the Chapter 11 case of *Packable Holdings, LLC*, the Bankruptcy Court for the District of Delaware ruled that the US Bankruptcy Code provides creditors (including creditors' committees) federal law-based derivative standing to sue LLC members, managers and officers for breaches of fiduciary duties.

The *Packable Holdings* creditors' committee filed a complaint for breaches of fiduciary duties, equitable subordination of claims, the avoidance and recovery of fraudulent conveyances, and the disallowance of claims. In so ruling, the Bankruptcy Court determined that the Bankruptcy Code-based derivative standing trumped the prohibition in Delaware Limited Liability Company Act (DLLCA) against creditor claims against LLC members and managers. The *Packable Holdings* ruling was also in direct conflict with three prior Delaware Bankruptcy Court rulings in 2018 and 2019, which held the DLLCA indeed prohibited derivative standing for creditors to file claims.

The *Packable Holdings* ruling has significant ramifications for foreign-based company groups and foreign investors. Many foreign investors create US LLCs (often in Delaware) to invest in US operating enterprises, which may be Subchapter C or S corporations, but are often registered as limited liability companies. When US investment entities file Chapter 11, foreign owners, members, managers and officers may have liability to creditors. The creditors' committee complaint in Packable Holdings included, as defendants, individuals, corporations and LLCs that were owners, members, managers or officers of Packable Holdings.

> *The Packable Holdings ruling has significant ramifications for foreign-based company groups and foreign investors*

The background was, according to the court ruling:

> *"The debtors operated an e-commerce business, as third-party sellers of health, beauty, and other consumer products on online marketplaces. They filed for bankruptcy after raising several rounds of debt and equity financing, followed by the collapse of a potential merger with a special purpose acquisition company ("SPAC") under which the debtors would have become a public company that allegedly would have been valued at $1.5 billion. As the first-day declaration describes, after the SPAC merger failed, the debtors shifted their efforts to pursuing a going-concern sale. Those efforts, however, were unsuccessful, leaving the debtors to wind down their affairs through an orderly liquidation in bankruptcy.*
>
> *The Official Committee of Unsecured Creditors appointed in this bankruptcy case alleges that the business failure is not the result of a challenged SPAC market and generally unfavourable business conditions, but instead was caused by mismanagement and self-dealing by the company's insiders. The Committee has filed an adversary proceeding asserting those claims, as well as claims for equitable subordination, the avoidance and recovery of alleged fraudulent conveyances, and the disallowance of claims."*

The defendants have challenged only the creditors' right to assert claims for breaches of fiduciary duties, based upon the prohibition of the DLLCA, and the three prior Delaware Bankruptcy Court opinions that applied the DLLCA prohibition on creditors' derivative standing to deny claims by creditors against LLC members, managers and officers.

It should be noted that Delaware law for corporations (a Subchapter C or S corporation) is different. Under Delaware General Corporate Law, the right to assert a derivative action is limited to shareholders who held shares at the time of the challenged transaction. However, Delaware case law also recognizes that, when a corporation becomes insolvent, creditors replace shareholders as the residual beneficiaries of corporate value. The Delaware Supreme Court has ruled that creditors may assert derivative claims to enforce obligations that an insolvent company's directors owe to the corporation.

The Packable Holdings court noted that:

> *"Delaware law treats limited liability companies as "creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.'" A limited liability company can be managed either by a member (which is the title for an owner of a limited liability company) or by a non-member manager. Members can therefore either serve as*

> *Foreign business enterprises who have US affiliates or investments should take note of the ruling, to avoid potential liability*

managers or can be passive investors. As a general proposition, the manager of a limited liability company (whether or not the manager is a member), much like a corporate officer, owes fiduciary duties to the entity and its members. In addition, it bears note that various of Packable's managers also served as officers of the limited liability company.

The Delaware Limited Liability Company Act, however, allows for the exculpation of these fiduciary duties. The Act permits the company's operating agreement to expand, restrict, or eliminate a manager's fiduciary duties.

The Delaware Limited Liability Company Act also provides that, in a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and at the time of the transaction of which the plaintiff complains."

The Delaware Supreme Court has enforced this limitation, as the DLLCA "means what it says", despite the Delaware Supreme Court's 2007 *Gheewalla* ruling that creditors of an insolvent Corporation have standing to pursue derivative claims against the corporation's officers and directors.

However, in the *Cybergenics Corp*. Chapter 11 case, the US Third Circuit Court of Appeals ruled that the Delaware Bankruptcy Court in *Cybergenics* could exercise its federal law equitable power (under the US Bankruptcy Code) to grant a creditors' committee derivative standing to assert fraudulent conveyance claims. The *Cybergenics* court made clear it did not, and did not need to, rely on any state law, such as the DLLCA, in determining the creditors' committee's derivative standing.

The Delaware Bankruptcy Court in *Packable Holdings* concluded that the *Cybergenics* ruling was controlling authority, and that neither the DLLCA nor the prior Delaware state court rulings prohibited creditors' standings to bring derivative actions for bankruptcy "estate" causes of action against the LLC's members and officers, which are federal law claims. Moreover, the court in *Packable Holdings* ruled that the Bankruptcy Court's federal law power was not limited to fraudulent conveyances; rather, the power to grant creditors' derivative standing to assert claims included claims for breaches of fiduciary duties.

The Delaware Bankruptcy Court in *Packable Holdings* noted that, as LLCs are creatures of contract, the provisions of LLCs' operating agreements would be determinative and enforced, including waivers of liability. In the Packable Holdings LLC operating agreement, managers were exculpated from liabilities. However, LLC officers were not included in the exculpation provision.

While *Packable Holdings* is a dramatic expansion of creditors' rights against insiders as a source of recovery, its impact can be minimized or avoided by a well written LLC operating agreement. Foreign business enterprises who have US affiliates or investments should take note of the ruling, to avoid potential liability arising from the insolvency of its affiliates or US investment entities. ■

Here we bring you short updates from our members including statistics updates and insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: *paulnewson@insol-europe.org*

National Insolvency Statistics Update from Cyprus

ANDRI ANTONIOU
Director, Insolvency Practitioner, CRI Group, Cyprus

> *Compared to compulsory liquidations, the number of voluntary liquidations remain comparatively higher*

Voluntary liquidations

In accordance with the statistics maintained by the Insolvency Service in Cyprus, there were 951 voluntary liquidations during the first six months of 2022, whereas in the second part of the year a further 821 cases were recorded. During the first half of 2023, there were 764 voluntary liquidations. Based on these statistics, the number of voluntary liquidations declined by approximately 20% in the first half of 2023, compared to the same period last year, and by 30%, compared to the same period of 2021. Compared to compulsory liquidations, the number of voluntary liquidations remain comparatively higher as referred to below.

Compulsory liquidations

The number of winding up orders have been declining over the past decade, from a peak of 189 in 2003 to 57 in 2022. It is noteworthy, however, that, in March of 2023 alone, 31 winding up orders were issued, resulting in a 91% increase in compulsory winding up orders for the first half of 2023, compared to the same period of 2022. This raises a question as to whether this is a sign of things to come. Compulsory liquidations tend to be avoided wherever possible as adjudication of cases by the Cyprus courts can take a number of years where petitions are contested.

Examinership

The concept of Examinership was introduced in Cyprus in 2015. However, to date, there have not been any successful Examiner appointments, albeit a handful of interim examiners have been appointed in a few cases.

Bankruptcies

The number of bankruptcy orders has fallen significantly over the past decade from 561 in 2012 to just 43 in 2022, albeit there has been an increase in the number of bankruptcy orders in the first half of 2023, compared to the first half of 2022 of just under 10%.

Insolvency proceedings in general

Overall, the total number of insolvencies have decreased in the first half of 2023 by 12%, compared to the first half of 2022. However, it remains to be seen if factors such as the European Central Bank increasing interest rates and inflation will lead to higher levels of insolvency over the coming years. ■

Increase in debtor in possession proceedings in Austria - still no preventive restructuring proceedings

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Although Austria introduced a new judicial procedure for preventive restructuring in July 2021 by way of implementation of Directive (EU) 2019/1023, there has not been a single such procedure under the new Restructuring Code (*Restrukturierungs-ordnung*) to date.

However, it has recently been noted that the number of restructuring proceedings with self-administration has been on the rise. One reason for the unexpected increase could be that larger companies have considered preventive restructuring proceedings, but ultimately decided against the new procedure, due to the even greater preparatory effort required in comparison to self-administered restructuring proceedings. In addition, the debtor must not yet be insolvent (illiquid) and this requirement is probably the greatest obstacle for preventive restructuring proceedings. Furthermore, in contrast to preventive restructuring proceedings. restructuring proceedings, whether with or without self-administration, offer the possibility of cancelling uneconomic contracts.

Restructuring proceedings with self-administration were introduced in Austria by the major amendment to insolvency law in 2010. The restructuring procedure with self-administration essentially corresponds to the old settlement code (*Ausgleichsordnung*), the biggest difference being the lower minimum quota that must be offered to unsecured insolvency creditors. Since 2010, this quota is 30% within two years, compared to 40% previously.

Just like the proceedings under the previous settlement code, the restructuring procedure with self-administration has been little accepted in practice. Nonetheless, as noted, this has changed in recent months, with the number of restructuring proceedings with self-administration constantly increasing, including the largest proceedings ever opened in Austria in terms of liabilities.

So what are the advantages and disadvantages of debtor in possession proceedings?

In particular, well-known companies prefer self-administration due to the perceived lack of stigma. Self-administration however does not mean that debtors can do whatever they want. During proceedings, they are subject to the supervision of a restructuring administrator who must authorise all legal acts that are not part of normal business operations. The restructuring administrator is also authorised to carry out certain activities such as proving insolvency claims and take action to avoid legal acts.

One of the main advantages is the short duration of the proceedings; restructuring proceedings with self-administration can be concluded and legally binding within four months. However, this is also the main disadvantage of the procedure. Self-administration must be withdrawn, if the restructuring plan is not accepted by the creditors with the required majorities within 90 days of the proceedings being opened. However, the flexibility of the Austrian Insolvency Code allows the proceedings to be continued as restructuring proceedings without self-administration or bankruptcy proceedings after self-administration has been withdrawn.

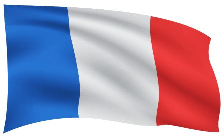
Another advantage of the procedure is the possibility of carrying out rationalisation of the workforce through employee redundancies within the first month of proceedings being opened. However, the restructuring procedure with self-administration is not suitable for a company sale in the form of an asset deal because, in contrast to other insolvency proceedings, the purchaser of the company must adopt existing employment relationships.

To be completed within the stipulated short timeframe, restructuring proceedings with self-administration require extremely thorough and consequently costly preparation. It is also necessary to explain which measures and in what period it will be possible to fulfil the quota offered in the restructuring plan. If this is not possible or if the quota offered does not appear appropriate according to the restructuring administrator's report, the creditors will not agree. The prerequisite for the acceptance of the restructuring plan is the approval of half of the creditors present and half of the claims represented by these creditors.

It remains to be seen whether the trend towards an increase in self-administered restructuring procedures will continue or whether the preventive restructuring proceeding created in 2021 will be accepted in practice after all. ■

> *Well-known companies prefer self-administration due to the perceived lack of stigma*

Facing new challenges in the French office market: Statistics and analysis



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> To attract new tenants, office building owners often have no other choice but to offer various (and significant) commercial incentives

In 2023, the office market in France has remained highly fragmented, particularly in the Greater Paris Region, in line with the trend observed since the Covid-19 pandemic and the rise of remote working. French brokers report an average vacancy rate of 8.5% for the Greater Paris Region, reaching 4,759,000 sq. m. by the end of 2023.

Vacancy rates and rental levels vary significantly across the Greater Paris Region. The Central Business District of Paris as well as other Paris downtown districts are performing quite well. With vacancies remaining low in the Central Business District of Paris (2.7%), prime rents have reached an average amount up to €960 sq.m./year (excluding taxes and charges) with top values in excess of €1,000. If rental levels remain high in Paris, it is a different story for the suburbs, which are experiencing high vacancy rates and therefore falling rental values.

The office market in the suburbs has had difficulties absorbing the available vacant space, which continues to increase. Indeed, the oversupply of office space will take time to absorb. In addition to this immediate supply, there are new buildings currently under construction, as investors have chosen to defer project completion.

Market impacts

The market has been significantly affected by a reduction in investments. In the Greater Paris Region, 2023 ended with total investments amounting to €6.8 billion, representing a substantial -56% year-over-year drop and a -64% decrease from the 10-year average! This investment contraction can be explained by rising construction costs, ESG constraints, ongoing inflation and increase in interest rates as well as the fears of oversupply of offices.

To attract new tenants, office building owners often have no other choice but to offer various (and significant) commercial incentives (lower rents, longer rent-free periods, no pass on of taxes and charges, etc.). According to brokers, the commercial incentives in the Greater Paris Region have risen to 26% of headline rent with the figures reaching 35% in La Défense.

As a result, office market financing is currently being threatened, leading office owners and their sponsors to renegotiate terms with their banks and request loan extensions. In some offices, the vacancy rate can be as high as 80%, making any sale in a stagnant market unreasonable, as this would result in a fire sale and the immediate booking of a significant loss. In practice, banks prefer supporting the borrower in refinancing the deal under current terms and conditions. In this context, the banks need to be sure that they will not be in the same situation in a few years' time.

Available legal tools and remedies

In addition to autonomous guarantees granted by the borrower's sponsors, banks increasingly use the '*fiducie*' instrument (French trust) to get control over SPVs without taking ownership of the underlying asset. Thanks to *fiducie* instruments, banks can organize an orderly sale of the property at the right moment. Nevertheless, the costs of a *fiducie*, usually borne by the borrower, are generally higher than the use of traditional guarantees.

Conclusion

It is interesting to note that around 1.1 million sq. m. of office space in the Greater Paris Region have been vacant for more than 4 years, representing almost 24% of the immediate supply. Changes to use, including transformation of office space into accommodation/housing, could be considered for these distressed properties. ■

The expected positive impact of (future) pre-packs on Portuguese companies

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With the Proposal for a Directive (Com (2022) 702 final) dated 7 December 2022, the European Commission has presented yet another exercise in harmonising insolvency legislation. The European legislator intends to increase the efficiency of liquidation proceedings by maximising the recovery of claims in a fairer and more predictable manner, notably through pre-pack sales.

In the legal framework established by the Proposal for a Directive, pre-pack procedures are seen as a (more advantageous) alternative to insolvency procedures and, possibly, to pre-insolvency procedures. In a situation of current insolvency or probable insolvency, pre-pack procedures allow the debtor company to be sold, in whole or in part, as a going concern to the best bidder, with a view to better satisfying the interests of creditors. Pre-pack sales have become increasingly important in restructuring and insolvency proceedings in various jurisdictions.

Pre-packs are an agile and strategic alternative for companies facing financial difficulties, particularly Portuguese companies, especially in the current economic context (inflation crisis). If the company is insolvent, pre-packs are more advantageous than traditional insolvency proceedings, which usually end in a piecemeal liquidation of the company's assets, with low recovery rates. If the company is likely to be insolvent, pre-insolvency instruments tend to be more advantageous for creditors, compared to what they would receive if the company's assets were liquidated piecemeal.

However, if the sale of the active company is the most advantageous situation, the pre-pack seems to offer greater advantages compared to pre-insolvency proceedings.

In Portugal, the business fabric does include big companies, but is mostly made up of micro-, small- and medium-sized companies. Therefore, the pre-pack regime should not only be thought of with reference to large commercial transactions, but should be adapted to the economic circumstances of all companies. Pre-pack sales could be very positive in terms of the following issues:

Preserving operational viability

When a company faces financial difficulties, the interruption of its operations could have significant consequences. The quick and efficient sale of the company's assets and business allows it to continue operating under new management. This is crucial for the continuation of services provided to customers and for maintaining the trust of suppliers.

Valuation of assets

Interested buyers would be able to establish the value of the company and its assets before the sale. This would allow the assets to be valued fairly and competitively. Many companies have specialised assets, such as patented technology, trademarks, or loyal customer bases. Pre-pack sales allow the value created by the company to be preserved and reinvested in future endeavours.

Agility and efficiency

Pre-pack sales could be faster than traditional insolvency proceedings. The sale is completed quickly, minimising uncertainty, and allowing the company to continue operating without major interruptions. With pre-packs, companies could sell their assets quickly, so they could restructure and fulfil customer orders without delays.

Reduced impact on creditors and employees

In pre-pack sales, the sale is pre-agreed between the company and the buyer, so it involves less intervention from creditors and stakeholders. This reduces the impact on creditors, who often face delays and uncertainty in protracted insolvency proceedings. In addition, maintaining jobs is crucial for social and economic stability. Employees can continue to work for the company under new management, avoiding mass redundancies. This is especially important in sectors where employee expertise is key (such as technology companies or specialised consultancies).

Flexibility in restructuring

During the pre-pack procedure, companies could evaluate their business strategy and make necessary adjustments: redefining objectives, identifying new markets and eliminating unprofitable areas.

If these or similar requirements are maintained in the future Directive, a significant reform/revision of Portuguese insolvency law is expected. ■

> “Pre-packs are an agile and strategic alternative for companies facing financial difficulties, particularly Portuguese companies”

'Big Year For Insolvency' in 2024

Myriam Mailly writes about the latest information made available to the INSOL Europe members on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Technical Officer

State of play on the implementation of the EU Directive on Restructuring and Insolvency (2019/1023) in all EU member states

I am pleased to let you know that the report for **Bulgaria** is now available! I am grateful to **Angel Ganev**, **Simeon Simeonov** and **Irina Mihaylova** from Djingov, Gouginski, Kyutchukov & Velichkov (Sofia, Bulgaria) for their kind cooperation.

The latest article to be published will focus on legislative amendments introduced in **Poland**, which is the latest country to consider implementing the EU Directive on Restructuring and Insolvency on whose progress information is still available thanks to our dedicated tracker at: *www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency*

At the time of writing, 27 reports (26 EU Member States + the UK) are available: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic (updated), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands (updated), Portugal, Romania, Slovakia, Slovenia (updated), Spain, Sweden and the UK.

Individual articles as well as the consolidated table are available at: *www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023*

Please note that the results of this research are only available to members of INSOL Europe (you must log in to access the individual articles as well as the consolidated table).

> *The latest article to be published will focus on legislative amendments introduced in Poland*

Updated insolvency laws

Following the implementation of the European Directive on Restructuring and Insolvency in **EU Member States**, updates are still in progress on the 'Updated Insolvency Law' technical section of our website, but I am pleased to let you know that updated legislation (2023) is now available for: Austria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Malta, Netherlands, Norway, Portugal, Romania, Slovakia, Spain and Sweden.

The latest updates have come from **Czech Republic**, **Germany**, **Lithuania** and **Norway** and I am grateful to **Dr Ernst Giese** of Giese & Partner, INSOL Europe Country co-ordinator & **Ond ej Rathouský** of Giese & Partner (Czech Republic), **Incoronata Cruciano** from Schiebe Und Collegen & INSOL Europe Country Coordinator (Germany), **Frank Heemann** of bnt attorneys in CEE and INSOL Europe Country Coordinator (Lithuania) and **Ingrid E. S. Tronshaug** from Wiersholm and INSOL Europe member (Norway) for kindly sharing this information.

More updates will follow soon for **Belgium**, **Bulgaria**, **Ireland**, **Italy**, **Luxembourg** and **Slovenia**.

Updates for **non-EU Member States** (Switzerland, Turkey and the UK) are also available at: *www.insol-europe.org/technical-content/updated-insolvency-laws*

New data available on national insolvency statistics

The latest insolvency statistics for **France** (Year 2023), **England & Wales** (Year 2023), **Northern Ireland and Scotland** (Year 2023), **Belgium** (Year 2023), **Spain** (Q2-Q4 2023), **Italy** (Q2 2023), **Portugal** (Year 2023) and **Croatia** (2007-2022) as well as the latest **Eurostat** quarterly statistics on declarations of bankruptcies (released on 15 February 2023) are now available.

Please note that short commentaries published in 2023/2024 in the INSOL Europe E-newsletters or Eurofenix are also available for **Slovakia**, **Spain**, **Cyprus**, **Croatia**, **Portugal** and **Turkey**.

Further updates from **Ireland**, **France**, **Belgium**, **Sweden**, **Denmark**, **Malta** and **Switzerland** will be published soon. So please do not hesitate to have a regular look at our dedicated technical section of our website at: *www.insol-europe.org/technical-content/national-insolvency-statistics*. ■

For updates on new technical content recently published on the INSOL Europe website, visit: **www.insol-europe.org/technical-content/introduction** or contact Myriam Mailly by email: **technical@insol-europe.org**

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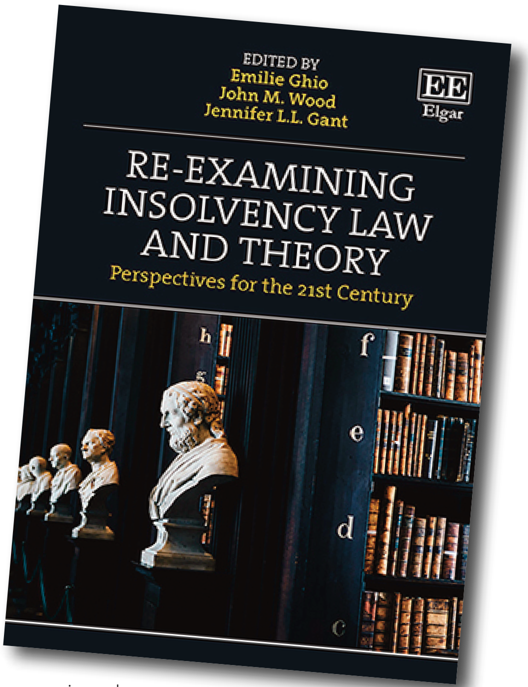
If you would like to suggest a book for a future edition, please contact our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

Re-Examining Insolvency Law and Theory: Perspectives for the 21st Century

Emilie Ghio, John Wood and Jennifer Gant (eds) (1st edition) (2023, Elgar, Cheltenham), 312pp, £115, ISBN 9781803928753.



Four decades ago, looking at insolvency acts in many countries, its core was related to formal (procedural) proceedings, focussing on assets and on liquidation, managed by 'liquidators' (IPs) all full-blown controlled by courts. Especially during the last two decades, however, the paradigm has shifted: less formal (quasi-contractual) procedures, focussing on debts and their restructuring, managed by the debtor itself, sometimes guided by IPs and a short confirmation phase for the courts. Basic assumptions underlying bankruptcy acts, working well for liquidation, are being rethought and criticized. New practical questions are being discussed. Many aspects of restructuring cannot meaningfully solved by applying a rather ancient act. The book announced here stresses the important role that legal theory can play in the development or the renewal of insolvency and restructuring laws.

The book presents three kinds of themes, covered in seventeen chapters. The first part deals with philosophical considerations and their influence on insolvency laws. Next to thinkers as Dworkin, Nietzche and Rawls, morality, liberalisation (e.g. of criminal elements), and feminism are explored. The second theme presents four chapters, touching upon decision theory, competing goals between insolvency law and theory, successor liability and vulnerability and insolvency law. It is clear that both chapters open their doors for philosophical considerations and theoretical perspectives, with attention for the internal mechanisms of insolvency law. The third theme (with five chapters) evaluates how external theoretical paradigms could be used to shift perspectives on insolvency frameworks. Other legal areas raise their lenses on insolvency law from different angles: human rights, company law, contract theory, property law and psychology theories. Indeed, as the editors conclude, certainly new ways to theorise about insolvency and rescue.

This publication will certainly be welcomed by academics and students interested in insolvency and rescue law. In scope it is wide enough to think that it will be of interest for readers around the globe. Legal professionals and practitioners specialising in insolvency law will be enticed in as far as a rather uncommon way of thinking about day-to-day practical problems could broaden their perspectives. It may also be a welcome book for staff of national or European legislators. Theoretical concepts, philosophical considerations and unexpected perspectives from other fields may inspire them to develop fresh insights.

In all a welcome contribution to scholarship in relation to the law of corporate insolvency and rescue. With many aspects to discuss the traditional assumptions as the foundations of many insolvency acts, and food to further develop thinking about this necessary shift in paradigm.

Professor Emeritus Bob Wessels, University of Leiden

Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings

Stuart Isaacs KC, Tom Smith KC and Christoph Paulus (eds) (4th edition) (2023, OUP, Oxford), xlviii + 665pp, £250, ISBN 9780192855237.

The European Union is one of the largest global markets in the world. Almost all of the European member states (with the significant exception of Denmark) agreed to harmonise the laws relating to the opening, recognition and enforcement of insolvency procedures across the block.

This extended commentary, edited and authored by some of the most influential practitioners and academics in the field, provides an article-by-article analysis of the European Regulation on Insolvency Proceedings (recast) (EIR-R) and its predecessor in law.

This treatise provides a comprehensive and up-to-date legal analysis of the EIR-R, with some forward-looking comments on the future evolution of the law in the area. Chapters 1 to 7 give thematic consideration to specific topics. Chapter 1 provides a historical overview of the EU laws in the area. Chapter 2 provides some guidance on the importance and interpretation of the EIR-R as a European legal instrument. The treatise then covers key topics, such as the scope and jurisdiction of the EIR-R (Chapter 3), the choice-of-law rules (Chapter 4) and the procedures for the recognition and enforcement of insolvency judgments across the European Union (Chapter 5).

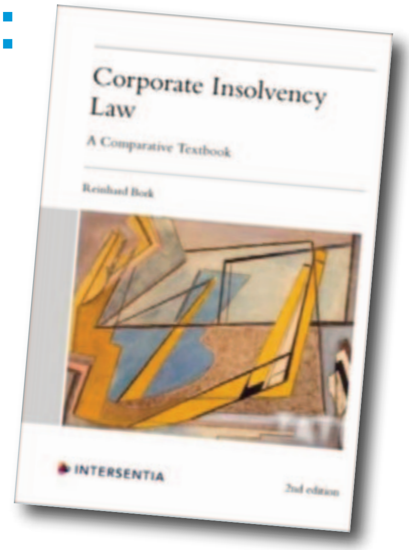
Where Chapter 6 deals with the effect of the EIR-R on cross-border security and quasi-security, the following chapter is dedicated to the regulation of financial institutions, services and markets. The treatise used to conclude with a chapter dedicated to a detailed, case-by-case analysis of the original insolvency regulation and the EIR-R, which has been updated to take account of developments since the last edition was published. One of the most notable additions is the inclusion of a new Chapter (Chapter 9) dealing with the impact of the UK's departure from the EU on insolvency proceedings in the UK.

This treatise comes as highly recommended for anyone with academic and professional interest on the European rules on the opening, recognition and enforcement of insolvency proceedings across the block.

Eugenio Vaccari, Senior Lecturer in Law, Royal Holloway, University of London

Corporate Insolvency Law: A Comparative Textbook

Reinhard Bork (2nd edition) (2023, Intersentia, Cambridge), xxx + 248pp, €95, ISBN 9781839704024.



This textbook, now in its second edition, provides a comparative overview of the literature on insolvency and restructuring laws of four leading jurisdictions in the area: USA, England and Wales, France and Germany.

The first edition of this book was published in 2020. The COVID-19 pandemic, the UK's withdrawal from the EU and the emergence of new restructuring hubs are among the most significant factors that have contributed to significantly change the regulatory frameworks of the countries considered in this textbook (as well as many other jurisdictions). It was, therefore, appropriate to update this publication in light of the significant changes occurring at domestic, but also cross-border, levels. In particular, the book constantly refers to the evolution of European law in the area, as a comparator for the national laws considered in it.

The book analyses from a comparative perspective the fundamental issues covered in any modern insolvency and restructuring framework. These include, but are not limited to: (i) the meaning of insolvency; (ii) the opening of insolvency proceedings and the effect of such event on interested stakeholders; (iii) the discipline of transaction avoidance rules; (iv) mechanisms to promote the rescue of distressed businesses; (v) consumer insolvencies; and (vi) approaches to cross-border insolvency disputes.

The book is targeted at students as well as at researchers and practitioners who approach the topics covered in it for the first time. It provides a succinct but accurate overview of the key topics in insolvency and restructuring laws and an overview of the principal mechanisms to deal with cross-border insolvency disputes. The textbook includes plenty of references to established cases and authoritative sources to allow readers to expand their knowledge on any given topic. It comes as highly recommended.

Eugenio Vaccari, Senior Lecturer in Law, Royal Holloway, University of London

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3-6 October	INSOL Europe Annual Congress – *Sorrento, Italy*

2025

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