**Environmental Claims: a Missing Piece in the Insolvency Harmonization Puzzle**

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In its introductory ‘context’, the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law claims to be *‘coherent with the Directive 2004/35/EC …, which aims to limit the accumulation of environmental liabilities and to ensure compliance with the ‘polluter pays’ principle.’* It also asserts that *‘a more efficient insolvency framework would support a speedier and more effective recovery of asset value overall and hence would facilitate the compensation for environmental claims against an insolvent company even without having recourse to financial security instruments, in full consistence with the aims of Directive 2004/35/EC.’*

Our analysis focuses on the unliquidated environmental claims that are not covered by any potential securities (such as the financial securities provided according to Directive 2004/35/EC, Article 14, par. 1). They seem to be the most difficult to recover, as they are *facere* obligations, they require the debtor’s positive intervention and they cannot undergo a ‘haircut’.

We have found the debtor’s ability to perform such obligations is dependent on the debtor’s business being carried on, either by the debtor itself (in the reorganization proceedings) or by the purchaser of the debtor’s business (in the pre-pack proceedings). Should the debtor be the subject of liquidation proceedings, there is a high (if not 100%) chance that such environmental unliquidated claims remain uncovered.

We propose three remedies:

1. claim-related (by way of analogy with the recovery of the state aid):

i) the national environment protection agency should have the obligation to liquidate the claim and lodge it / update it during the insolvency proceedings, and

ii) the environmental claim should be ranked higher than the claims of ordinary unsecured creditors;

2. liability-related:

During the restructuring / pre-pack / reorganization proceedings: whoever manages the debtor’s business is also responsible for the debtor’s compliance with its environmental obligations. Also, should an asset encumbered by such obligations (usually *propter rem*) be transferred to a third party, the transferee’s liability in this respect is triggered.

Yet, the creditors and the insolvency practitioner have a strong say in the debtor’s out-of-ordinary business decisions. Thus, according to the ‘polluter pays’ principle, should the creditors’ vote / the IP’s decision enhance the debtor’s environmental liability, they / the IP should share it with the debtor’s management.

Moreover, the creditors and the potential lenders of fresh money should develop strict corporate social responsibility rules so as not to cast votes / lend fresh money that would support business decisions detrimental to the environment.

3. priority-related:

Changing the perspective, should the insolvent debtor be granted a specific-purpose loan to fulfil its environmental obligations, the proposed directive could grant the provider of such a loan priority at least over the claims of ordinary unsecured creditors.

Concluding, the quoted recital in the proposed directive is, at best, an overstatement, while the proposed directive misses the opportunity to harmonize, even at a minimal level, the legal treatment of the environmental claims in cross-border insolvency proceedings.