

A Lex Concursum Europaea as Insolvency Law No. 28?

Francisco Garcimartín and Christoph G. Paulus present a preview of their article to be published later this year in the *International Insolvency Review*



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If the inauguration of the new President of the USA has made one thing clear, then it is the dawning of an era of competition across the entire globe. Unheard amounts will be pumped into several economic sectors to guarantee the lead position. Directed primarily towards China, it leaves the EU far behind.

This is not because the EU was lacking the appropriate brain power but (among few more things) sufficient investment – it is money that is lacking. Here, again, one of the reasons for such hesitation is that the differences in the member states’ insolvency laws are making investment costly and therefore unattractive. Understandably, what reasonable investor would throw money into a region in which it is hardly possible to foresee the insolvency risks?

It is no wonder, thus, that the capital markets have been pushing for harmonisation of these laws for around 15 years. It is indicative of the specific European mode of reaction, however, that the measures taken so far leave the goal still a distance away. The present authors submit a proposal how the process of harmonisation could be sped up drastically. The Commission would just have to enact a regulation which allows companies to opt in to a separate insolvency law, which we will call the *lex concursus europaea* and which would constitute the 28th set of insolvency laws.

Advantages and disadvantages

The most apparent benefit is the provision of a uniform insolvency

law framework for foreign investors operating in the EU market. This will result in a reduction of transaction costs. Because of this uniformity, there is no cause for concern regarding the determination of the debtor’s COMI, nor unilateral modifications to insolvency rules through its strategic relocation (forum shopping). After all, the COMI is a mobile connecting factor, particularly when determined in the context of group formations. The 28th regime eliminates the inherent risks of the term’s vagueness by ensuring that the commitment to it is *ex ante*, publicly disclosed, and unaffected by COMI-shifts.

Secondly, from an optimal policy perspective, this approach enables the EU legislator to concentrate on the intrinsic merits of the rules, rather than seeking political compromises. Any process of harmonization is inherently disruptive from a perspective of national law. Consequently, Member States tend to endeavour to align the EU-harmonised rules with their national legislation. This ultimately determines the outcome of many EU harmonization processes. Subsequently, during the implementation phase by each Member State, divergences emerge even further.

The 28th regime does not eliminate this problem entirely. Some pressure by Member States to promote their national policy is likely to arise (e.g. ranking of claims). However, this pressure will be reduced, since they will not be obliged to change their internal laws. This approach thus facilitates the pursuit of a

uniform, *sound and efficient* insolvency regime, as opposed to attempting to reach political consensus or identify a common denominator among the disparate insolvency rules of Member States.

Thirdly, this approach respects legal diversity and thus aligns more closely with the subsidiarity and proportionality principles of EU law. Should market participants opt for the 28th regime, Member States might be encouraged to replicate it in their domestic legislation. In addition, as the application of the 28th regime is optional, the market can select whether the “Commitment Rule” or the “COMI Rule” is preferable.

On the other hand, given the substantial direct costs associated with any harmonisation process, a challenge is the potential for unsuccessful outcomes: What happens if market participants do not select the 28th regime? Is it worth the splurge? After all, experience indicates that even if an optimal regime is successfully implemented, market participants may be reluctant to select it. Legal practise is “path-dependent” and thus reluctant to embrace changes.

In principle, it seems reasonable to posit that, given the 28th regime offers an insolvency framework that is both sound and efficient, and that will be interpreted and applied uniformly across the entire EU market – a uniformity that is guaranteed by the CJEU – participants will be willing to choose it. Theoretically, it can be postulated that foreign investors will be more compliant with this novel regime and will encourage debtors to select it.

And, by the same token, debtors will be more motivated to do so, as this will result in a reduction of their financing costs. Debtors who commit to the 28th regime are likely to only have to pay a reduced interest premium. And the EU herself could provide additional “carrots” to make it more attractive for companies to opt into the new system.

Competence

To ensure a truly comprehensive and uniform framework, the 28th regime must take the form of a Regulation (Article 288, TFEU). The instrument will be directly applicable and will thus form part of the substantive law of each Member State. Regarding its legal basis, different provisions can be considered, in particular Articles 114 or 352. Article 114 allows for the adoption of measures for the approximation of national provisions having as their object the establishment and functioning of the internal market. The term “approximation” should not exclude the adoption of optional instrument which, after all, provides common rules to market participants but respect national law and therefore is more consistent with the principles of proportionality and subsidiarity. If this argument were not acceptable, Article 352 could also be considered. This is a “catch-all” article that provides the legal basis for EU actions aiming to attain one of the EU objectives. Article 352 (ex-Article 358, TEC) is the legal basis of the existing European company forms such as the European Company.

Contents

We are not offering a fully-fledged statute. Instead, we confine ourselves to briefly mentioning some of the main contents which we think to be indispensable. Fortunately, there is no need to reinvent the wheel, since the UNCITRAL Legislative Guide seems to us to be not only a good starting point, but also a reliable indicator of relevance. Moreover, it also indicates where interfaces with respective

domestic law (such as property law, labour law etc) should be considered.

For the sake of the law’s intended uniformity, the aim of the European legislative endeavours should be to elaborate a statute as comprehensive and exhaustive as possible. Accordingly, not only liquidation and restructuring proceedings should be regulated but also – following the pan-European trend including the Directive (EU) 2019/1023 – preventive proceedings. Because of its economic importance and its factual omnipresence, rules on the insolvency of groups of companies (or parts of it) are to be included as well as questions of jurisdiction. Above all, drafters of the law should strive for clarity regarding the purpose of the 28th insolvency law. The often-cited difference of purposes between the French and the German law reminds us that even within a coherent group of states like the European Union there are considerable differences in insolvency law’s purpose. Whereas the French prioritise the rescue of firms and working places, the Germans strive for the maximisation of the creditors’ return. Such differences might even lead to antagonistic results.

Despite this, every single topic is worthwhile and extensive discussions may even be needed. Restrictions of space, however, allow us only to mention those issues which we discuss in a bit more detail in an article to be published later this year. We begin with structural deliberations, followed by addressing the observations to be made by determining who qualifies as debtor, creditors rights and organisation, the right to file, avoidance actions, plan proceeding, preventive proceeding insolvency of groups, which court would be the “insolvency court”, what qualifications are necessary for the insolvency practitioner, what are the opening reasons, how should the plan proceeding and the preventive proceeding look like, etc.



Final observations

The purpose of the preceding deliberations is to show that the concept of a 28th insolvency law, a *lex concursus europaea*, is more than just an *idée fixe*. It is feasible. As a regulation, the choice should be offered to companies above a certain size and with their registered seat in one of the Member States. It should and need not be a copy of any one of the existing 27 insolvency laws, and it should not be a mere amalgam of all of them. The huge advantage of such a *lex concursus europaea* is that it can be drafted without any consideration of the need for political compromises; it can strive for the best solution. It should cover all three types of proceedings which are seen nowadays as standard for European insolvency legislation. Furthermore, it should determine the opting-in mechanism, in particular, its publicity and the compliance with the commitment, as well as the competent insolvency court(s) and other office-holders, such as IPs. ■



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