Lucky No. 28? The EU's Proposals for an Insolvency Regime

Paul Omar writes on the story of European insolvency law so far and what might happen next

In May 2025, the European Union (EU) announced an EU "Start-up and Scale-up Strategy",[1] whose key priorities are to promote technology-driven start-ups and associated research and innovation strategies. This is justified by reference to the key importance of start-ups and scale-ups to driving innovation and creating new markets.

The subtext to this is to close the innovation divide between the EU and its global competitors and avoid entrepreneurs relocating to outside the EU to perceived "friendlier" jurisdictions. Other stated drivers include building in further progress within the Single Market and enhancing overall competitiveness. As part of this strategy, key actions envisaged will include a focus on innovation-friendly regulation, improving access to finance,[2] accelerating market uptake and expansion of business, the attraction and retention of talent and, overall, the facilitating of access to infrastructure, networks and services.[3]

A key outcome of the strategy will be a so-called "European Innovation Act",[4] which will operate across all sectors of the economy, serve to exploit the commercial potential of research, strengthen collaborations between industry and academia and improving access to markets, finance, talent as well as infrastructure, all this to be achieved through promoting an innovation-friendly regulatory, policy and investment environment.

As such, the proposal for the Act creating a "28th regime"[5] envisages: "…a single, harmonised set of EU-wide rules, including any relevant aspects of corporate law, insolvency, labour and tax law."[6] This will be achieved through addressing (via a modular and progressive approach) issues such as the current fragmentation of legal rules in respect of the formation, structure and operations of business entities, the need for digitalisation of compliance and reporting burdens as well as the reduction or removal of impediments to scale-ups and investment.[7]

"European" Insolvency Law: The story so far

A perfunctory stock-take reveals that the field of European insolvency law is already populated by a considerable number of texts. Chief among these are, of course, the European Insolvency Regulation 2000 (EIR) and its successor of 2015 (EIR Recast), which enable the cross-border coordination of instances (through jurisdiction, recognition and enforcement rules) as well as setting standards for cooperation and communication in such cases. The Preventive Restructuring Directive 2019 (PRD) addresses the tool-kit of insolvency processes through focusing on preventive restructuring, while the Directive Harmonising certain Aspects of Insolvency Law (Insolvency Harmonisation Directive) seeks to introduce harmonised rules in certain procedural and substantive areas of insolvency, such as avoidance actions, asset-tracing, directors' duties, creditors' committees and a unique version of prepacks.[8]

The question then becomes how the proposed 28th regime will take the development of this increasingly important area of interest any further. In fact, while the mention in the Call for Evidence is for a "single, harmonised set of EU-wide rules", the field of application is not restricted to solely insolvency, but covers corporate, labour and tax laws. The reading, if any is to be gained by the order of appearance of the topics mentioned, seems to suggest that the promotion via the strategy of start-ups and scale-ups seeks primarily to focus on corporate rules and access to the market and financing for these entities. As such, the other areas of interest appear to be ancillary to the main theme, given the inclusion of words such as "any relevant aspects", i.e., only as much as necessary to achieve the main objective. If this is not so, the question then becomes whether substantive development of insolvency is the preferred outcome, either through enabling rules that either address the specific needs, specifically of start-ups or scale-ups, or offering all business entities an alternative to domestic rules. The possibility of the latter approach has excited some commentary, incidentally revealing many of the key issues that will require resolving.[9]

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Key issues

The first and perhaps most important issue is, arguably, **autonomy** and whether the 28th regime will sit outside or alongside domestic frameworks. This presupposes the enactment of a regulation, rather than a directive, simply to avoid the possibility of proposals being watered down or (too much) variability introduced (as was the case with the PRD) through the process of transposition. Key to accessing any autonomous procedure is, to which Garcimartín and Paulus make reference,[10] a decision on how and whether the current Centre of Main Interests (COMI) concept will apply to provide **jurisdiction**.

Given the pushback by Member States in respect of the proposal in the Insolvency Harmonisation Directive that sought to introduce a common approach to liquidation proceedings for MSMEs, there may well be more resistance to a process intended to sit outside domestic law. This may be more true if the 28th regime is seen as causing competition with domestic procedures, although even the PRD with its variability has facilitated a certain amount of **competition**, in which entities able to forum shop are also able to cherry-pick the preventive restructuring variant that most appeals and enables any particular outcomes sought.[11] A sector-specific approach could well alleviate this, but would require identification of those able to opt-in to the European process and whether opt-outs will are be available. Furthermore, will access to new procedures be enabled for **debtors-in-possession** in a holistic way, unlike the half-hearted structural approach in the EIR Recast? This will be a key issue for further development of upstream processes (such as preventive restructuring etc.).

Nonetheless, the fact of competition does not resolve the question of what happens in the case of **cross-border** cases and concurrency of jurisdiction (were COMI still the preferred test for jurisdiction). In other words, what if there is more than one procedure, especially if stakeholders have very divergent positions? How will any conflict be resolved, by which court(s), and in whose favour? In this light, it should be noted that the coordination framework in the EIR Recast took many years to evolve through practice and did not wholly avoid recourse to contentious litigation. As such, the potential for jurisdictional competition cannot be wholly ruled out, at least in the early phases of the use of a 28th regime text.

Autonomy also suggests needing to talk about **content**. How much of substantive and/or procedural insolvency law will feature in the development of an autonomous regime is a critical issue. The need to refer to domestic law and lack of harmonisation of key definitions in the PRD can be seen as a weakness that would undermine the coherence of an autonomous procedure. If the intention is to promote autonomy, as far as possible logically, then the relationship of insolvency and restructuring laws to underlying concepts of **contract and property**, which are by no means harmonised,[12] will need to be addressed. It is very likely here that there will be push-back on a text with potential to impact on deeply-held domestic rules.

Related to the issue of content would be **capacity** building, by which is meant the creation and sustenance of a structure that would implement the 28th regime and oversee its use. Are there to be new courts? Where will they sit in the existing EU hierarchy? Will they be staffed with insolvency-competent judges? Will a new cadre of insolvency office-holders (IOHs) need to be created or can existing IOHs be grandfathered into any new profession? How will professional oversight be ensured and policed? Will there need to be new registers (for case-management and access to information) or can the proposal ride on existing developments under the EIR Recast? Here too, **costs** will also be a consideration as to who supports the framework necessary for the success of a 28th regime and who will be able to access these procedures, especially, if the new rules are seen as (more) attractive to those able to take advantage.

Lastly, though unlikely to be finally, there are issues in relation to **competence** and whether the change in use of different legal bases means anything for the proposals, a peculiar feature of European Union law, which has always needed a "peg" on which to hang texts and initiatives, given the expanding (but still limited) competence of the supranational entity. A shift in "pegs" has occurred from the company law harmonisation programme to civil justice cooperation, later the Capital Markets Union and now, possibly, back to its origins.[13] This underlines the absence of a coherent insolvency-focused competence that, possibly also, results in some tailoring of relevant proposals to the needs to stay within the parameters set by the choice of "pegs".

What else?

While further elucidation on the above and the many other issues that exist will only come with the production of the expected text in 2026 (albeit also likely to prompt the raising of further questions), there remain issues with respect to some outstanding proposals and other initiatives that will have an impact in the restructuring and insolvency fields. The content of the Insolvency Harmonisation Directive excluded after the "trilogues" in 2025 remains of interest,[14] though it may be superseded by the outcome of the latest proposals. There are other possible harmonisation suggestions (e.g., on ranking, key definitions and the function of IOHs), emanating from the work of think-tanks active in the area (e.g., CERIL).[15] UNCITRAL's work, most recently on asset-tracing and recovery, in part prompted by the EU, has also led to outcomes that would be worthwhile integrating in any insolvency-focused strategy. All of these would be worth considering in order to come up-to-date with developments in the field.

Also coming up soon, in 2027, is the review of the EIR Recast, mandated by Article 90 of its text.[16] This is likely to be an elaborate and intensive process, especially given, *inter alia*, the changes in practice since 2015, concern about the utility of the group coordination procedure as well as recent re-consideration of the effectiveness of the COMI rule.

Whether the EU has the capacity to properly consider the deployment of a 28th regime alongside this remains to be seen, never mind the capacity of Member States and stakeholders to engage with what is likely to be a complex process. The result might be to see the type of "insolvency fatigue" that was seen after the introduction of the PRD, when Member States felt the need to avail of the option in its Article 34(2) to delay implementation, especially as work on the Insolvency Harmonisation Directive overlapped with the end of this phase. With the new proposals and everything else potentially coming on-stream, will it be a case of "too much, too soon"?

Summary

While the Start-up and Scale-up Strategy and the reasons to intervene in related areas of the legal framework can seemingly be justified, could the same be said of the focus of proposals on a possible 28th regime, if indeed the approach is to go beyond the merely ancillary meeting of strategic objectives towards a larger and more comprehensive reshaping of restructuring and insolvency law? In this regard, the last word may be given to Emilie Ghio's observations as to whether harmonisation is desirable and what objectives it should serve.[17] In doing so, perhaps as the Serenity Prayer has it, we should give thought to what change should happen and what should not, with the wisdom to be able to discern the difference. ■

Footnotes:

1 See outline of Strategy, available at: https://research-and-innovation.ec.europa.eu/strategy/strategy-research-and-innovation/jobs-and-economy/eu-startup-and-scaleup-strategy_en

2 See Press Release (28 October 2025) on proposals for a Scaleup Europe Fund, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2529

3 See Staff Working Document COM(2025) 270 final (28 May 2025), available at: https://research-and-innovation.ec.europa.eu/document/download/8f899486-6e4e-48df-8633-9582375f41eb_en?filename=ec_rtd_eu-startup-scaleup-strategy-swd.pdf

4 See Commission Communication SWD(2025) 138 final (28 May 2025), 5, available at: https://research-and-innovation.ec.europa.eu/document/download/2f76a0df-b09b-47c2-949c-800c30e4c530_en?filename=ec_rtd_eu-startup-scaleup-strategy-communication.pdf

5 The initiative has since been retitled "EU Inc.", for which see: <https://commission.europa.eu/news-and-media/news/eu-inc-making-business-easier-european-union-2026-03-18_en>.

6 Author's emphasis. See Call for Evidence for an Impact Assessment Ares(2025)5502931 (8 July 2025), available at: https://polit-x.de/en/documents/21504828/

7 Idem.

8 For a history of these and other European initiatives, see, by this author, 'European Insolvency Law Reform: Taking it to the Next Level?' (2024) *Eurofenix (Spring)* 32. See also Directive (EU) 2026/799 of 30 March 2026.

9 See Francisco Garcimartín and Christoph Paulus, 'The 28th insolvency law: Reflections on a lex concursus europaea' (2025) 34(2) *International Insolvency Review* 428; Bob Wessels, 'EU's working agenda for restructuring and insolvency revealed' (*Bob Wessels Blog*, 6 June 2025), available at: https://bobwessels.nl/blog/2025-06-doc1-eus-working-agenda-for-restructuring-and-insolvency-revealed/
More detail has now been provided in a series of texts, including a Communication and Proposal, available via a web page (above note 5).

10 Garcimartín and Paulus (above note 9), section 4.2.

11 The author is indebted to Dr. Gert-Jan Boon for this observation.

12 Although see information on the (probably defunct) European Contract Law initiative (2001), available at: https://eur-lex.europa.eu/EN/legal-content/summary/european-contract-law.html

13 The Call for Evidence suggests using Articles 50 (company law harmonisation programme) or 352 (EU corporate forms),

14 See Wessels (above note 9).

15 See Annexe to CERIL Statement 2023-2, sections 3.6.-3.7., available at: www.ceril.eu/news/ceril-statement-2023-2-on-the-european-commission-proposal-for-a-directive-harmonising-certain-aspects-of-insolvency-law

16 See, by this author, 'The European Insolvency Regulation: Milestones and Celebrations' (2024) *Eurofenix (Autumn)* 22.

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

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