

The EU Preventive Restructuring Framework: a hole in one?

Celebrating the 10 year anniversary of YANIL

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Introduction

In 2009, Prof. Em. Bob Wessels and Dr. Myriam Mailly took the initiative to establish the Younger Academics Network of Insolvency Law (YANIL). It is a branch of the INSOL Europe Academic Forum (IEAF) and brings together postgraduate and PhD students along with early career academics. The founders righteously observed the need to bring together younger academics to connect with their peers and overcome the limited opportunities to engage in the insolvency academy as sometimes experienced by those still early in their careers.

This year, YANIL celebrates its ten year anniversary. Since its founding, YANIL has grown steadily and comprises currently over 70 members from more than 20 jurisdictions. It aims to foster the exchange of information, specific sources, teaching and research opportunities, and information on research funding and support. It strives to meet in conjunction to the INSOL Europe annual conference and other insolvency related conferences. Over 30 younger academics have been invited over the last ten years to present and discuss their research at the annual YANIL panel of the IEAF.

To mark this anniversary, five members of the board of YANIL conducted a comparative study on preventive restructuring in Europe and the impact of the Preventive Restructuring Directive. The study includes country reports for Denmark, Germany, France, the Netherlands and the UK. Here we will highlight the main findings.

Restructuring in Europe

The perception of insolvency and restructuring law in Europe has been subject to significant changes in recent years. Following a fresh breeze coming from national reforms, topped by more radical and substantive reform envisaged in the proposed EU directive for a preventive restructuring framework ("Proposal").¹

For decades, the (continental) European understanding of insolvency was merciless. The troubled debtor's directors were threatened with strict liability and, in some jurisdictions, even criminal punishment for a failure to file for an insolvency procedure. The stigma of insolvency was firmly attached to the insolvent debtor and often was one of the reasons for a debtor's late filing for commencement of insolvency proceedings. This would almost always lead to the dissolution of the debtor and the (piece-meal) liquidation of its assets.

Legal reforms in many of the European Member States' insolvency law prove, however, that insolvency and restructuring procedures are now considered not only a tool for dissolutions of non-viable businesses, but also a tool to facilitate a going-concern rehabilitation of the business and a way to grant the debtor a second chance for the benefit of value-maximization.² However not all Member States have focused on this shift from dissolution to rehabilitation. With the implementation of the EU Proposal, a first (baby) step is taken toward a minimum harmonised restructuring framework based on the underlying proposition that a timely and cooperative restructuring, incentivized by carrots

¹ European Parliament legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)) TA/2019/0321.

² David Christopher Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Lankjaer & Emilie Ghio, 'The EU Preventive Restructuring Framework: a hole in one?' (2019) 28(2) *International Insolvency Review*, forthcoming.

rather than sticks, should create a surplus in contrast to a delayed in-court insolvency procedure; a surplus that could be shared amongst the debtor and its creditors.

Once adopted and implemented, the Proposal will have an impact on substantive insolvency laws. In order to establish to what extent it will impact legislation in Member States, country reports were prepared on the “state of the art” of restructuring law and practice in Denmark, France, Germany, the Netherlands, and the United Kingdom. The country reports elaborate for each jurisdiction(s) on (1) the development of the restructuring culture, (2) the available legal tools to support the restructuring of insolvent companies, and (3) venues for improvement of restructuring laws.

The Country Reports show that there is a great diversity of approaches in force among national legislators and in the different EU jurisdictions. Even though restructuring has become more prominent in most jurisdictions, the divergences remain significant.

The Added-Value of the Preventive Restructuring Directive

The Proposal leaves much scope for Member States, which makes it hard to foresee what the effects of the implementation will be. Minimum harmonisation requirements may not lead to the convergence envisaged by the 2014 Commission Recommendation³ or the early discussions on the purpose of the Proposal and its eventual form as a Preventive Restructuring Directive. The wording in the Proposal tends to take an almost optional approach, using the word “may” instead of something more prescriptive that would present a more obligatory implementation parameter. The impression left by the wording in the Articles is vague and even voluntary. These watered-down provisions can be traced to the hesitancy of Member States to take on obligatory changes from the EU given the legal culture laden aspects of the approach to insolvency and preventive restructuring generally.

The Proposal tends to codify what has been considered best practices across the Member States. While this does not change much in relation to pre-existing preventive restructuring frameworks in a number of EU countries, it does set a baseline for those jurisdictions that do not yet have such effective regimes, to improve their approach.

For example, in Denmark, Germany and the Netherlands, it will prompt legislative reform. In Denmark, a restructuring framework that provides tools for a debtor prior to his insolvency is a major change, in particular, with respect to restructuring secured credit. For Germany, it will promote a more restructuring-friendly approach. It may remove obstacles for an out-of-court restructuring option, enabling that in a pre-insolvency phase contractual arrangements are restructured. For the Netherlands, the Proposal will support the current legislative reform introducing a debtor in possession proceeding. For countries like France and the UK, which already have an extensive framework on preventive restructuring, not much change is expected. However, the Proposal introduces procedures that may also have the effect of lessening the degree of forum shopping as the competition for effective preventive restructuring procedures will also be lessened should Member States engage in a thorough implementation process in line with the Proposal.

The question remains, however, as to whether the Proposal has introduced provisions of an obligatory enough nature to go beyond what was set out in the original Commission Recommendation. If the Commission Recommendation failed to encourage reform, will a watered-down Preventive Restructuring Directive allowing massive margins of appreciation be more successful? Or will Member States whose regimes are already quite different from the Proposal seek to maintain their status quo as far as possible, implementing the provisions in the least disruptive manner possible? Given the current text is merely a confirmed compromise with a view to agreement, it is yet to be seen how its

³ European Commission’s Recommendation of 12.3.2014 on a new approach to business failure and insolvency.

implementation in the Member States will affect preventive restructuring frameworks in Europe, and the EU's goal to harmonise in this area as far as possible.

Celebrating ten years YANIL

The full comparative study, including the five country reports, will be published in International Insolvency Review in the Spring of 2019. In addition, the ten-year anniversary of YANIL will be celebrated with a conference for younger academics. This will take place on Tuesday 24 September 2019 in Copenhagen, at the offices of DLA Piper. It will provide younger academics with ample room to present and discuss research with peers and experienced academics and a great occasion to kick-off the next ten years.⁴

⁴ For more information about the YANIL conference, visit: <https://www.insol-europe.org/yanil-mission-statement>.