Corporate Restructuring and Insolvency Law at issue - A comparative perspective of four EU countries

1. Introduction

The worldwide economic crisis urged some reforms of the insolvency systems, particularly in several EU member states, in order to tackle the negative effects of the economic downturn on both enterprises and households.
This was further fostered by the renewed interest of European institutions towards insolvency law that led them to engage in a set of legal and political reforms aiming to promote coherence among domestic laws and to facilitate cross-border cooperation between courts [see European Commission Recommendation 2014/135/EU of 12 March 2014, on business failure and insolvency, and the Regulation (EU) 2015/848 of 20 May 2015, on cross-border insolvencies].
The reach and success of the reforms are ultimately connected to courts' performance, which can be enhanced by addressing existing obstacles and promoting best practices.

2. Project ACURIA

The research project ACURIA - Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement – funded by the DG Justice and Consumers of the European Commission (JUST/2015/ACTION GRANTS) aims to contribute to the improvement of courts' responses regarding the general goals of corporate insolvency and restructuring law: protect creditors' rights and give a second chance to viable enterprises.
Project ACURIA relies on an in-depth analysis of the insolvency law and policy of EU and four distinct EU countries – Italy, Netherlands, Poland and Portugal – combined with an empirically-based approach to judicial enforcement of the law.
This report is the first outcome of the project. It brings a comparison between the insolvency legal systems of Italy, Netherlands, Poland and Portugal, in order to identify common problems and best practices, as well as the results of existing reforms in the matter. Besides its theoretical value, the information gathered is also fundamental to prepare the fieldwork, particularly the analysis of court cases, the interviews to judicial actors and the focus groups with stakeholders that follows.

3. Methodology

We carried out a critical analysis of national and EU documents, studies and legislation on corporate insolvency and restructuring. Further, we designed an analytical grid to support the comparative analysis on the legal regimes and national court arrangements. The grid was fulfilled by each partner, accordingly.
Available statistical data, mostly on socio-economic conditions, were included whenever deemed relevant.

4. Key findings

• The recent developments concerning insolvency and restructuring law, both on EU and national dimensions, tend to favor rescue-solutions over liquidation outcomes.
• Concerning jurisdiction matters, the absence of specialized courts to trial insolvency and restructuring cases is a common feature among all the participant countries in the

project.
• In all four participant countries it is possible to appeal to higher courts from insolvency related decisions.
• Insolvency practitioners play a relevant role in all legal frameworks under analysis, both in insolvency and restructuring proceedings, particularly on what concerns the management of the insolvent's estate and the satisfaction of creditors' claims.
• It is possible to find different judicial and non-judicial operators within each country: insolvency representative, liquidator and expert, in Italy; trustee, in the Netherlands; trustee, arrangement supervisor, court supervisor and receiver, in Poland; insolvency practitioner, temporary insolvency practitioner and the Institute aimed at Supporting Small and Medium-Sized Companies and Innovation (IAPMEI), in Portugal;
• While in Italy and in the Netherlands, insolvency practitioners are solely appointed by the judge, in Poland and in Portugal they can, under certain conditions, be chosen by creditors.
• Only in Portugal insolvency and restructuring proceedings benefit from priority before other judicial cases.
• In Italy, Poland and Portugal there is an obligation on the debtor company to file for its insolvency, but not in the Netherlands.
• While in Italy, Poland and Portugal courts can establish precautionary measures in order to prevent further damages to the insolvent's estate, in the Netherlands no precautionary measures are available but there is a removal of the debtor's powers over his/her assets.
• Every domestic insolvency laws under analysis allow the establishment of creditor's committees within insolvency proceedings. In Poland, such committee can even be established during restructuring proceedings.
• In all four legal systems is possible to find specific rules intended for the protection of employees' claims towards the insolvent employer.
• Concerning winding-up solutions, only in Portugal and Poland is possible to find specific deadlines that ought to be observed in liquidation scenarios.
• In the Netherlands there is no specific time limit within which debtor and creditors must reach a restructuring agreement.
• While the lack of debtor's assets may lead to an early termination of insolvency proceedings, in Poland such insufficiency may, even, preclude the possibility of filing for insolvency.
• Even though it is not mandatory to notify all creditors when filing for restructuring, in Portugal the debtor may be held responsible if he fails to inform his creditors that such proceedings are taking place.
• In Poland and in the Netherlands it is not, currently, possible to file for insolvency or restructuring through the use of electronic means.
• Only in Portugal is the debtor allowed, under certain conditions, to remain in control of the insolvent's estate.
• In Italy and Portugal, only debtors facing economic difficulties or impending insolvency are allowed to resort to out-of-court restructuring mechanisms. In Poland, such proceedings are also available for insolvent debtors. Dutch law does not provide for any specific statutory out-of-court restructuring proceedings.
• The filing of unsuccessful out-of-court restructuring proceedings does not preclude the possibility of resorting to other insolvency and pre-insolvency mechanisms.

For more information concerning this research project, please contact us.