



The Insolvency Law of Central and Eastern Europe

Twelve Country Screenings of the New Member and Candidate
Countries of the European Union and Russia: A Comparative Analysis

Jens Lowitzsch (Ed.)

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A Comparative Analysis

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- Insolvency Practice
- Reform Objectives

2. Commencement of Insolvency Proceedings

- Principles of Procedure and Legal Protection
- Scope and Applicability
- Special Regulations
- Grounds for Opening Insolvency Proceedings
- Persons Entitled and Persons Obligated to File the Petition

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Preface

A modern bankruptcy law is key to efficient market economies. In 2001, in order to share good practice in the area of business failure and to initiate a dialogue among experts and policy makers, the European Commission, together with the Dutch Ministry of Economic Affairs, organised a seminar on business failure in Noordwijk, the Netherlands. The good practice cases identified were then made public in the European Commission booklet "Helping businesses overcome financial difficulties".

In 2002, the European Commission published "Bankruptcy and a Fresh Start", a collection of data on the legal and social consequences of business failure. In the context of the Best Procedure project on "Restructuring, Bankruptcy and a Fresh Start", the European Commission analysed this study together with experts from the EU 15, Norway and some candidate countries, with a view to agreeing on a set of indicators and benchmarks on four topics: early warning systems for preventing bankruptcy; improving insolvency procedures and promoting restructuring; facilitating a fresh start after bankruptcy; and tackling the negative perception of bankruptcy among public opinion. The final report of the expert group, released in 2003, formulates policy guidelines which include, for example, incentives for early reaction to financial difficulties, easy access to reorganisation, and speedy and efficient liquidation proceedings.

Following these initiatives at EU level, many EU countries - although to varying degrees - have recently made policy commitments to address the issue of business failure. In the context of the renewed Lisbon Strategy for Growth and Jobs, around one third of the 27 Member States have put forward plans to reform their national insolvency legislation. As a result, half of the Member States have recently taken measures to reduce discharge periods, abolish restrictions on bankrupts or to streamline bankruptcy proceedings. Further, an increasing number of legal systems now opt for restructuring and business continuity rather than for liquidation. To speed up the pace of reforms, the European Commission is now publishing a Communication that presents policy recommendations with a focus on a fresh start after bankruptcy.

Preface

Many Eastern European countries have drawn inspiration from the latest developments in insolvency law in the EU-15. It is hoped that the country-specific analysis and systematic approach of this book will help impart fresh impetus to reforms and deepen the understanding of insolvency law in the new Members of the EU, Croatia and other countries in Central and Eastern Europe. This volume could serve as a catalyst for further research and trigger changes that contribute to the success of the EU Strategy for Growth and Jobs.

Sonia Herrero Rada
European Commission
Directorate-General for Enterprise and Industry

This preface represents the views of its author on the subject and not the official position of the European Commission.

Foreword

Insolvency law is positioned at the interface of economics and law; moreover, modern insolvency law with its reorganisation option calls for entrepreneurialship of the procedural stakeholder where the time-honoured liquidation procedure settles with the mere talent of a good sales-person; and finally, insolvency law is not just a confined body of law – by touching virtually the complete field of commercial, tax, labour, environmental law (to name but a few) it is a kind of meta layer encompassing all of them which makes its understanding and even more so its application highly complicated. This is true for economies which have uninterruptedly developed an understanding for these interrelations and intricacies for a period of (sometimes much) more than a century; and it must be all the more true for economies that, more or less abruptly, have been pushed not even twenty years ago into market economy after several decades of planned economy. This turnaround is difficult enough and it did not become necessarily much easier through the manifold help that had been offered in the early years of that transition period. Even the guide books by the International Monetary Fund, the World Bank, and UNCITRAL – as good as each one of them might be – are not free from contradictions and frictions when seen together.

Thus, the challenge to draft an insolvency law that fits the special needs of each particular transition jurisdiction is enormous. It is telling in this context that it took the Chinese officials twelve years to come up with a final draft of a new insolvency law; about ten out of these twelve years the main stumbling block on the way to finalizing the project has been the endeavours to cope with the particular problem of the state-owned enterprises (SOEs) and the ranking of labour claims vis-à-vis secured creditors. A challenge of a different dimension but, nevertheless, of utmost importance when seen from a rule of law-perspective is the possibility of abuse. Insolvency proceedings can be (and sometimes are indeed) instrumentalized to kick out disturbing competitors from the market; more often than not such a strategy is combined with using the proceeding to absorb this very competitor in the course of the liquidation at a (sometimes ridi-culously) cheap prize. In such a case, it is fair

to state that the insolvency proceeding was abused as a kind of expropriation mechanism.

These few examples suffice to demonstrate that the path towards a modern and efficient insolvency regime is paved with pitfalls and perils. It is this insight which reveals and explains the particular value of this book. It provides a competent overview about where the respective jurisdictions are on the said path and what their peculiarities are; and it offers well balanced guidance when it comes to the resolution of certain core problems. Moreover, since legal development is practically never based on inventing something completely new but rather on taking over pre-existing models and adapting them then to one's own needs, this book constitutes a kind of treasure chest for everyone who is in search of inspiration. The book is, thus, an invaluable help for anyone who walks on that path. It deserves to be stressed at this expositioned place of the book that the goal of efficiency – seen from an macro-economic perspective – should be understood as a proceeding which returns goods, assets, and labour which, in the course of business, have become less productive than possible as quickly as possible back to full productivity. To be sure, this is a goal not only for the transition economies but an ongoing task for every economy in this world.

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