# 10 Years of YANIL:

# Restructuring across Europe and the EU Directive on Restructuring and Insolvency

Gert-Jan Boon, Line Langkjaer, David Christoph Ehmke, Jennifer L. L. Gant & Emilie Ghio present a 10 year anniversary celebration of YANIL collaboration

**SINCE ITS FOUNDING, YANIL HAS GROWN STEADILY AND CURRENTLY COMPRISES OVER 70 MEMBERS FROM MORE THAN 20 JURISDICTIONS**

**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) which brings together postgraduate and PhD students along with early career academics.**

The founders rightly observed the need to have the younger academics 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 currently comprises over 70 members from more than 20 jurisdictions. It aims to foster the exchange of information on specific sources, teaching and research opportunities, research funding and support. YANIL group members meet annually at the IEAF, being present on a dedicated YANIL panel during the conference, and also connect at other insolvency-related events throughout Europe and beyond. 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 across Europe and the impact of the EU Directive on Restructuring and Insolvency (**Directive**)[1]. The study includes country reports from Denmark, Germany, France, the Netherlands and United Kingdom. Here we will briefly discuss this study.

## Promoting restructuring in Europe

The perception of insolvency and restructuring laws 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 reforms envisaged in the proposed Directive.[1]

For decades, the (continental) European application of the insolvency law was merciless. The troubled debtor company's directors were subject to 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 company and often was one of the reasons for a debtor's late filing for the commencement of insolvency proceedings. This almost always led to the dissolution of the debtor company and the piece-meal liquidation of its assets.

Legal reforms in many of the EU Member States' insolvency laws prove, however, that insolvency and restructuring proceedings are now considered not only a tool for dissolutions of non-viable businesses, but also a tool to facilitate a going-concern's rehabilitation and a way to grant the debtor a second chance for the benefit of value-maximisation.[2] However, not all Member States have focused on this shift from dissolution to rehabilitation. With the implementation of the Directive, a first baby step is taken toward a minimum harmonised restructuring framework based on the underlying proposition that a timely and cooperative restructuring, incentivised by carrots rather than being beaten by sticks, should create a surplus, in contrast to a delayed in-court insolvency procedure: a surplus that could be shared among the creditors.

Once adopted and implemented, the Directive will have an impact on substantive insolvency laws. In order to establish to what extent it will impact legislation in the 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. For each jurisdiction, the country reports elaborate upon:

(1) the development of the restructuring culture;
(2) the available legal tools to support the restructuring of insolvent companies; and
(3) the avenues for improvement of the 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 Directive

The Directive leaves much liberty to the 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 Recommendation[3] or the Directive. The wording in the Directive tends to take an almost optional approach, using the verb "may" instead of a more prescriptive word that would present a more obligatory implementation parameter. The impression left by the wording in the Directive's Articles is voluntarily vague. These watered provisions can be due to the hesitancy of the Member States to accept obligatory changes prescribed by the EU, given the legal culture-laden aspects of the approach to insolvency and preventive restructuring in general.

However, if fully implemented, the Directive will significantly impact restructuring in Europe with its debtor- and restructuring-friendly approach. The combination of a debtor-in-possession pre-insolvency regime, a stay and a cross-class cram-down goes beyond what is the current restructuring practice in the UK, with its scheme of arrangement, and is more like an EU version of the US Chapter 11 Bankruptcy Code. As this may be a step too far for some, it could motivate some Member States to take a cautious approach when implementing the Directive.

The Directive 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 a legislative reform. In Denmark, a restructuring framework that provides tools for a debtor, prior to insolvency, is a major change, in particular with respect to restructuring secured credit. In Germany, it will promote a more restructuring-friendly approach. It may remove obstacles for an out-of-court restructuring option, enabling, in a pre-insolvency phase, that contractual arrangements are restructured. In the Netherlands, the Directive will support the current legislative reform introducing debtor-in- possession proceedings. In countries such as France and the UK, which already have an extensive framework of preventive restructuring, not much change is expected. However, the Directive 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 minimised, should the Member States engage in a thorough implementation process in line with the Directive.

The question remains, however, if the Directive 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 Directive, allowing for significant margins of appreciation, be more successful? Or will the Member States, whose regimes are already quite different from the Directive, seek to maintain their status quo as long as possible, implementing the provisions in the least disruptive manner possible? Given that the current text is merely a confirmed compromise with a view to agreement, it is yet to be seen how its implementation in the Member States will affect preventive restructuring frameworks in Europe, and the EU's goal to harmonise them as far as possible.

## Celebrating ten years of YANIL

The full comparative study, including the five country reports, is published in the International Insolvency Review in 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] ■

**Footnotes:**

1 Directive of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt,and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).
2 David Christopher Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer & Emilie Ghio, 'The EU Preventive Restructuring Framework: a hole in one?', (2019) 28(2) *International Insolvency Review*, forthcoming.
3 European Commission's Recommendation of 12.3.2014 on a new approach to business failure and insolvency.
4 For more information and participation in the YANIL conference, visit: www.insol-europe.org/yanil-mission-statement.

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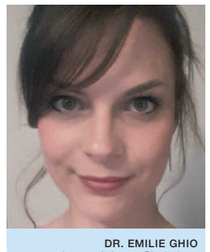

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