JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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Annex III: Chapter 6 - Additional Guidelines

As indicated in the course of Chapter 6, there are additional guidelines and projects, which were not discussed as part of that Chapter, that have addressed some areas or aspects relevant to cooperation. First, as the JCOERE project focuses on cooperation within the EU, it was felt that the Asian Development Bank Good Practice Standards for Insolvency Law ("ADB Standards") may not be as relevant as the European and International guidelines contained in the Chapter. As a result, the analysis of this standard under the two relevant headings – the sharing or obtaining of information and disclosure requirements and asset co-ordination – will be conducted in the coming paragraphs. As also indicated, while both the ACURIA (Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement) [1] and CODIRE (Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings)[2] projects refer to issues such as information disclosure, the main focus of the projects was not as directly relevant to court-to-court and practitioner.

The ADB Standards: The sharing of information about the debtor

The Asian Development Bank, in its Good Practice Standards for Insolvency Law of 2000, takes into consideration the sharing of information. Good Practice Standards 8.1 and 8.2 provide that "the law should prescribe, as fully as possible, for the provision of relevant information concerning the debtor" and that, in addition, also an independent comment and analysis on such information should be provided.

This provision is particularly relevant if we consider the principal aims of the Good Practice Standards elaborated by the Asian Development Bank, which include the creation of a common basis for the insolvency laws of the Asian countries and the enhancement of a dialogue between their courts and representatives.

The availability of proper information and the consequent transparency that derives from it is understood by the Asian Development Bank studies as a fundamental element of an

[1] Catarina Frade, et al, 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: Best Practices, Blockages, and Ways of Improvement' (European Commission 2019) (hereinafter referred to as 'ACURIA').
[2] Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus, and Ignacio Tirado, *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) (hereinafter referred to as 'CODIRE').

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effective co-operation and, more in general, of shared insolvency law standards. This point is particularly highlighted with regard to the rescue process of a business.

***In summary**:*

- All relevant information about the debtors must be provided, along with an analysis of such data.

The ADB Standards: Stay in the context of a reorganisation

The Asian Development Bank deals with the present issue with its Good Practice Standards n. 5.4 and 5.5.

Good Practice Standard 5.4 provides that, in the context of a reorganisation, "the automatic stay or suspension of actions should be as wide and all-embracing as possible" and that it should apply to all creditors and persons bearing an interest in the property of the debtor. Instead, Good Practice 5.5. provides that the stay should be of "limited specific duration" and that relief from the stay should be granted on the application of affected creditors or other persons.

The above-mentioned provisions of the Asian Development Bank seem to be aligned with the other guidelines and best practices proposed by other international institutions and, also in this case, the value of a reorganisation efforts that preserve the assets and going concern of the debtor seems to be fully recognised.

***In summary**:*

- In a reorganisation scenario, an automatic stay, as wide as possible, is recommended.

- A relief from such stay should be granted on application of the creditors or other actors.

CODIRE: The need for adequate and updated information

CODIRE is a research project carried out by Università degli Studi di Firenze (Project Co-ordinator), Humboldt-Universität zu Berlin, and Universidad Autónoma de Madrid.

Two main objectives drove the project action:

a) the formulation of harmonised guidelines for effective judicial review of and oversight of fair and efficient insolvency and pre-insolvency proceedings;

b) the development of policy recommendations addressed to policymakers at European and national level.

The project also aimed to cast light on other key issues, highlighted both in the Recommendation on a new approach to business failure and insolvency (2014/135/EU)[3] and in the Preventive Restructuring Directive (2019/1023/EU),[4] henceforth PRD.[5]

More specifically, in order to remove or at least reduce obstacles to an effective cooperation between foreign courts, such provisions consider possible incentives for the creation of a common ground in the European insolvency context by providing shared, core principles to the actors involved in the restructuring process.[6]

The CODIRE project, suggests a set of guidelines and policy recommendations that focus on:

a) The importance of identifying (and addressing) the crisis in a timely fashion;

b) The role of fairness during the proceedings, both under a procedural and substantive point of view;

c) The development of a common basis with respect to the content and structure of restructuring plans and the role of the professionals involved;

d) The development of best practices with regard to the confirmation and implementation of restructuring plans.

It is hoped that the adoption and implementation by the various Member States of the best practices outlined in the CODIRE project may, therefore, achieve the goal contained in both the PRD and in the EIR Recast, namely the creation of common basic norms in order to remove obstacles to an effective cooperation between foreign courts.[7]

With specific regard to the sharing of information and disclosure requirements, it is worth noting that Policy Recommendation n. 2.5 of CODIRE requires adequate information to be

[3] European Commission, 'Recommendation of 12 March 2014 on a new approach to business failure and insolvency' [2014] OJ L 74/65, COM (2014) 1500 final.

[4] Council Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 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 the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter Preventive Restructuring Directive or PRD].

[5] Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus and Ignacio Tirado, *Best practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer, 2018), Introduction, p. XVIII. The full report is available at <https://www.codire.eu/publications/>. Many CODIRE guidelines and policy recommendations are relevant in the context of the analysis of substantive and procedural obstacles to judicial cooperation (and coordination) in cross-border insolvency cases. In fact, as already noted in Report 1 of JCOERE Project, the PRD envisages provisions that - both directly and indirectly - impact the framework set by the Regulation 848/2015 See JCOERE Report 1, Identifying substantive rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations, p. 10. The full report is available at < https://www.ucc.ie/en/jcoere/research/report1/

[6] In this regard, it is worth remembering that Recital 12 of the PRD, once explained the scope of Regulation 848/2015 and its limits ('that Regulation does not tackle the disparities between national laws regulating those procedures'), stresses the 'need to go beyond matters of judicial co-operation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs'.
That said, Recital 13 of the PRD is coherent with the premises laid down by Recital 12. Pursuant to it, the PRD 'aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness' see Appendix to the Exposition of the terms of the PRD.

[7] With regard to this specific issue see the Note on 'Harmonisation of Insolvency Law at Eu Level', 2010, requested by the European Parliament's Committee on Legal Affairs and Rolef J de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and *Anticommons*' (2012) 21(2) *International Insolvency Review* 67.

provided to stakeholders. Further recommendations refer to additional information requirements benefitting the actors involved in a restructuring process. Whilst these principles will feed into the quality of restructuring practises in Europe and are reflected in the PRD they only indirectly affect the ability of courts to cooperate as envisaged by the EIR Recast.

***In summary**:*

- Actors involved in a restructuring process should be provided with an adequate and updated set of information.

CODIRE: The role of professionals to maximise the value of the assets

CODIRE's Policy Recommendation 7.2 concerns the sale of debtor's assets and the best practices to maximise their value. In this regard, this Recommendation provides that, if the plan is completely or mainly based on the realisation of the debtor's assets, 'the law should provide for the appointment of a professional entrusted with the task of implementing the plan concerning the sale of the debtor's assets in the best interest of creditors'.

Similarly, regarding restructuring plans, Guideline 7.2 recommends the appointment of a professional to realise assets should the restructuring plan envisage the sale of assets 'having a relevant economic value'. These two provisions, read together, stress the importance of the appointment of a professional that is invested with the necessary power to maximise the value of the debtor's assets in the best interest of all the parties involved. With a view to harmonising the insolvency law of the countries involved in cross-border insolvency proceedings, it might be useful to incorporate, at a domestic level, the best practices mentioned above and, therefore, develop a common ground for the coordination of the actors involved.

***In summary**:*

- The appointment of a professional invested with the necessary power to maximise the value of the debtor's assets is recommended.

ACURIA: Disclosure and transparency

ACURIA is a research project carried out by the Centre for Social Studies of Portugal (Project Co-ordinator), Università degli Studi di Firenze, Uniwersytet Gdanski and Maastricht University. It was aimed at identifying best practices and legal and procedural strategies in the field of business insolvency and restructuring law that are suitable for replication in different jurisdictions. This, in turn, was in order to enable courts to provide a better response in those cases.

In addition, ACURIA planned to:

a) support the development of stronger legislation and policies at domestic and EU levels, with special regard to insolvency and cross-border insolvency; and

b) promote the cooperation between the academic world, practitioners and economic actors.

ACURIA takes into consideration the substantial and procedural rules that become relevant during an insolvency proceeding (intended to also include restructuring proceedings) and conducted a comparative analysis between various European jurisdictions, namely Italy, the Netherlands, Poland and Portugal.

The findings of the research show that these jurisdictions have some common features, for example, their favour for 'rescue-solutions over liquidation outcomes' and 'the absence of specialised courts to trial insolvency and restructuring cases'.[8]

Resonating with our discussion in Chapter 4 of this Report, ACURIA also highlights a deep heterogeneity amongst the relevant jurisdictions, regarding some procedural and substantial aspects of their insolvency laws, such as the existence of precautionary measures in order to prevent further damage to the insolvent's estate and the appointment of the insolvency practitioner.

Furthermore, the project focuses on some possible ways to enhance the response of the courts when facing insolvency cases and, in this regard, it stresses the importance of:

a) timelines of the proceeding, by creating and developing early warning devices;

b) predictability and legal certainty, by providing specialised training to judges and insolvency practitioners in insolvency law, economic sciences, and accounting;[9]

c) haste and efficiency, by means of new information technologies, in order to streamline the communication between the parties involved, including judges and insolvency practitioners;

d) participation by simplifying the interaction of all the relevant parties of the proceeding and by implementing technological devices to allow meetings to be held at a distance;

e) transparency by means of clear communication with the stakeholders and requiring appropriate disclosure.[10]

[8] See ACURIA *Comparative perspective of four EU countries*, p. 1-2, available at https://acuria.eu/index.php?id=16486&id_lingua=2&pag=16491. See also articles in a special edition of the International Insolvency Review on the ACURIA project (2020) 29(3).

[9] This issue is considered in Chapters 4 and 8 of this Report.

[10] ACURIA, *Building trust: enhancing courts' performance in corporate restructuring and insolvency*, p. 16, available at https://acuria.eu/index.php?id=16486&id_lingua=2&pag=16491.

With a particular focus on the sharing of information and disclosure, ACURIA stresses the importance of transparency in the context of corporate restructuring and insolvency procedures and, for this reason, it requires the relevant actors to disclose 'information at the decisive stages of the process, such as the sale of assets, through transparent methods' pursuant to Guideline e) of the 'Ways of improvement'.

Guideline e) accounts for both the 'procedural' and 'substantive' aspects of the disclosure duties in this context, by also suggesting the use of 'publicised virtual auctions' in order to effectively share the relevant information.

***In summary**:*

- The disclosure of all the relevant information and the adoption of transparent methods during the decisive stages of the proceeding are