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Financial stability and financial system

Speeding up the process of harmonising European insolvency law to strengthen financial integration

For some thirty years, Europeans have been striving to harmonise their national insolvency law regimes. This movement is now gathering momentum, to accompany the construction of the Capital Markets Union. The aim is to reduce costs, better reallocate resources to more efficient or innovative companies, encourage cross-border investment and contribute to financial stability. This recent progress can already be seen in major international rankings (according to the OECD ranking, 16 EU Member States are among the 20 countries with the most advanced insolvency regimes, compared with 11 in 2016). This movement should continue with the new proposal for a directive, which was published by the European Commission in December 2022, and the exploration of new avenues for harmonisation, which is always desirable.

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JEL codes
K15, K33,
K35

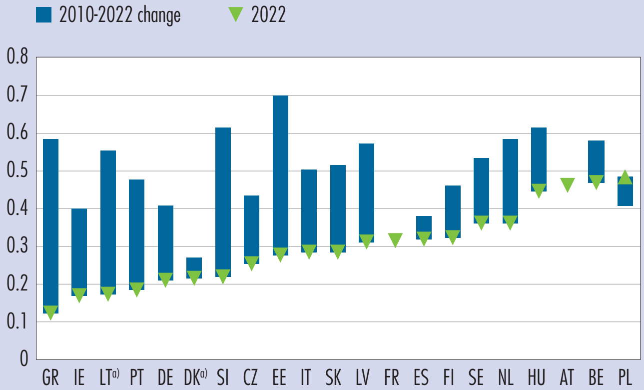
A more favourable insolvency regime:

18 EU countries
improved their insolvency regimes between 2010 and 2022

80%
fall in the OECD insolvency indicator in Greece since 2010

16 EU countries
are now among the 20 countries with the most favourable insolvency regimes (5 more than in 2016)

Improvements in insolvency regimes in EU countries since 2010
(insolvency indicator ranging from 0 to 1, a lower score indicating a more favourable regime)



Source: OECD (André and Demmou, 2022).
a) For Lithuania and Denmark, 2016-2022 change.
ISO country codes: *https://www.iso.org/*

1 The challenge of harmonising insolvency regimes

Developing an insolvency law that is in line with the best international standards has become a major issue for economic attractiveness. In particular, the aim is to prevent resources from being tied up in low-productivity activities, when they could be used more efficiently by innovative or better-managed companies (OECD, 2019). This can be achieved by shortening timeframes, minimising costs and maximising the value of companies in difficulty (from a turnaround perspective). The creation of common standards is also essential to lower the barriers to cross-border investment and thus contribute to a better allocation of capital. This has always been a major concern in the European Union (EU), given member countries' integration into a common internal market. The desire to harmonise European insolvency law is a long-standing one in the EU:[1] for a long time, this idea seemed so far-fetched that it might have aroused scepticism.

However, the convergence of national laws, which began with the signing of the Brussels Convention of 23 November 1995, is well underway and has even gained momentum in recent years, in the context of the Capital Markets Union and the Banking Union. This is reflected in the adoption in 2019 of the Restructuring and Insolvency Directive,[2] which was supplemented, on 7 December 2022, by the publication of a new proposal for a directive aimed at harmonising and improving certain aspects of insolvency law (timeframes, amounts recovered, fairness and predictability of procedures).

Initially dictated solely by concerns about aligning national civil laws – which were seen as the fundamental corollary to the establishment of a single market based on the free movement of goods, people, capital and services – the convergence process now also aims at achieving the common good of macroeconomic and financial stability.

2 Harmonisation fostered by the gradual removal of traditional conceptual barriers

For a long time, harmonisation was considered impossible to achieve in the EU because of the major differences between national legislations. The obstacle was of a conceptual nature, due to the coexistence in Europe of two law systems, which, historically, have assigned divergent purposes to collective proceedings. On the one hand, continental law, which is relatively fragmented, has historically focused more on punishing debtors (criminal sanctions, prohibition from practising following bankruptcy, etc.) and clearing liabilities, through a procedure that is highly judicialised. On the other hand, Anglo-Saxon law (or common law) favours the idea of a fresh start and a recovery largely left to the creditors. This opposition does not exclude a certain heterogeneity within each system.

These differences in purpose, beyond the technical considerations, were not neutral when it came to choosing the **direction of a harmonised European law**, in particular because Anglo-Saxon law, albeit a minority in the Union, was sometimes still perceived as superior. For example, the concept of "trust" has long seemed difficult to extend to the other systems (European Parliament, 2010). However, this tropism is tending to disappear.

On the one hand, the superiority of common law is now being called into question, and quantitative indicators of business regulation no longer make it possible to differentiate between the economic impact of one or the other legal tradition (Canivet, 2018). The indicators developed by the Organisation for Economic Co-operation and Development (OECD)[3] on insolvency confirm that there is no clear superiority of one legal system over the other (see Chart 1 below), contrary to what the World Bank's Doing Business indicator[4] might have suggested until now.

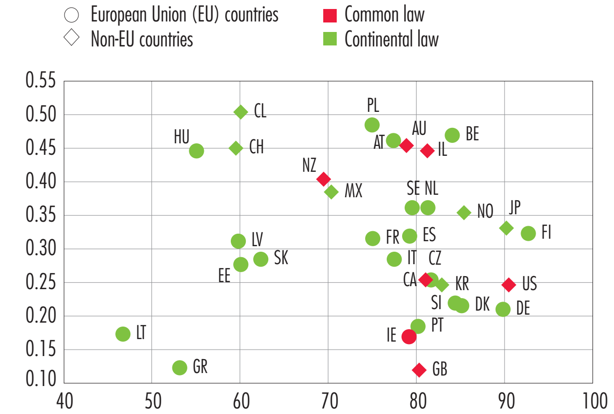
1 As early as 1960, a group of experts was tasked with examining the outlines of European harmonisation in this area (see, for example, the European Commission's opinion of 10 December 1981 on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings).

2 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.

3 Specifically, the OECD (2019) structures the indicator as follows: (i) treatment of failed entrepreneurs (discharge period, exemptions); (ii) prevention and simplification (early warning mechanisms, pre-insolvency regimes, special insolvency procedures for SMEs); (iii) restructuring tools (creditors can engage in restructuring, possibility of suspending proceedings against assets and duration of suspension, possibility of new financing and priority given to this financing, possibility of forced application of restructuring plan to creditors opposed to this plan, treatment reserved for managers during restructuring); (iv) other factors (degree of intervention by the courts, distinction between honest and fraudulent bankruptcies, employees' rights).

4 The Doing Business composite indicator on insolvency resolution measured the time, cost, outcome of insolvency proceedings, recovery rates and strength of legislation (World Bank, 2014).

C1 Efficiency indicators for insolvency regimes
(x-axis, Doing Business indicator in 2020;
y-axis, OECD indicator in 2022)



Sources: World Bank (Doing Business), OECD.
Notes: On the x-axis, the resolving insolvency score is taken from the Doing Business indicators (a higher value indicates a more efficient legal system).
On the y-axis, the OECD indicator summarises 13 indicators relating to insolvency (a lower value indicates a more efficient legal system).
For ISO country codes, see *https://www.iso.org/*

The OECD indicator is only weakly correlated with the World Bank indicator, the publication of which was interrupted due to data irregularities (Machen et al., 2021). In addition, Dia and Melitz (2021) highlight the additional costs associated with common law, as measured by the ratio of associated legal expenses (costs of proceedings, legal advice, etc.).

On the other hand, the **American "rescue culture" has gradually been imported** across continental Europe. This consists in attempting to save a company's existence rather than immediately contemplating its liquidation (see in particular Chapter 11)[5]. In short, the national laws that used to come under the heading of "continental law" have gradually converged, with the emergence of a common main objective, that of restructuring debt in agreement with the principal creditors. Obstacles to harmonisation have gradually been removed, so to speak, without any direct intervention by the European public authorities. This change has also resulted in a notable semantic evolution: bankruptcy (which reflects a "sanction") gradually giving way to the law on companies in difficulty or "collective proceedings" (which emphasizes the idea of a "rescue"). The three-stage development of French law illustrates this movement.[6] Prompted by international comparisons, this movement has spread to most European countries. In so doing, it has prepared the ground for the implementation of a more traditional harmonisation process, largely driven by the financial integration and stability issues that emerged in the context of the major financial crisis of 2007-2008.

3 Harmonisation made necessary by financial integration and stability considerations

Following the major financial crisis of 2007-2008, **the harmonisation of insolvency law was increasingly seen as a central element of financial integration and stability, and a necessary condition for the full implementation of the Capital Markets Union and the Banking Union**.

Firstly, as regards the Capital Markets Union, it has been shown that the predictability of the rules governing a company's insolvency is one of the determining factors in cross-border investment decisions (Valiante, 2016). Unlike banks, financial market investors do not have direct, in-depth knowledge of a debtor's solvency.[7] The fundamental differences in national legislation may therefore act as a brake on cross-border flows, but not as a driving force. In addition, the heterogeneity of insolvency rules across the EU is likely to encourage regulatory arbitrage. This is why harmonisation can contribute to the emergence of a genuine pan-European market in financial securities, including for collateral purposes. Harmonisation would also make it possible to better allocate European and foreign savings, reduce transaction costs within and towards the single market, and lower the cost of risk.

5 Chapter 11 is a major component of US federal bankruptcy law, which enables companies in difficulty to file for bankruptcy protection, leading to a freezing of their liabilities and debts. These measures give companies time to restructure while preserving their existence and maximising their chances of recovery.

6 Firstly, the decriminalisation of bankruptcy law in 1967, then the introduction in 1985 of a preventive and amicable conciliation procedure, open at the request of the debtor, and finally the introduction in 2005 of a judicial safeguard procedure, open at the request of the debtor before any cessation of payments.

7 Where appropriate, they may use substitutes, first and foremost credit rating agencies, which incorporate the locally applicable insolvency law into their analyses, but do not cover all issuers.

BOX

Harmonising national insolvency rules to support the Banking Union

Following the major financial crisis of 2007-2008, in addition to the reform of the prudential framework, the Banking Union was put in place, based on three pillars: the Single Supervisory Mechanism, the Single Resolution Mechanism and the Single Resolution Fund. The framework for managing banking crises consists in providing a range of preventive and curative instruments, including bail-in, which allows losses to be allocated to certain creditors as a priority.

The Bank Recovery and Resolution Directive (BRRD),[1] which aims to protect depositors, especially those expressly covered by a deposit guarantee scheme (EUR 100,000), has not, however, gone so far as to fully harmonise the hierarchy of creditors (only the case of non-covered preferred deposits has been specifically considered).[2] Thus, in most Member States (notably France, Germany and Spain), deposits for which the Directive does not provide priority ranking have the same ranking as ordinary unsecured claims, while in a minority of Member States (e.g. Italy), they rank higher than ordinary unsecured claims.

However, these differences are not neutral, in particular because of the safeguards of creditors' rights, which oblige the resolution authorities to refer in their decisions to the provisions of national insolvency law,[3] while ensuring that the distribution of losses between shareholders and creditors in the context of a resolution procedure is no more unfavourable than in the context of insolvency proceedings (the "no creditor worse off" principle).[4]

European harmonisation of the hierarchy of creditors would therefore contribute to safeguarding the rights of shareholders and creditors in the context of a resolution procedure, while facilitating the latter in the case of groups with cross-border activities, by guaranteeing similar protection for all depositors, which is an objective (Article 31) and general principle (Article 34) of the banking crisis management framework.

1 See Article 44(2) of Directive 2014/59/EU.
2 See Article 108.1(a) of Directive 2014/59/EU, which identifies two hypotheses: "(i) that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU (ii) deposits that would be eligible deposits from natural persons, micro, small and medium–sized enterprises were they not made through branches located outside the Union of institutions established within the Union".
3 See Article 34 of Directive 2014/59/EU: "creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings". See also: European Commission (2023), "Impact assessment report accompanying the proposal for a reform of the banking crisis management framework", SWD (2023) 225 final, 18 April, especially p. 27 et seq.
4 See Article 75 of Directive 2014/59/EU.

4 Harmonisation of substantive rules under way

Although the process of harmonisation began years ago, with preparatory technical work starting in 1960 and culminating in a proposal for a convention in 1982, it has long remained a dead letter. The Brussels Convention of 23 November 1995, which never came into force because it was not ratified in time by all the signatory countries, was another missed opportunity.

A first important step was taken with the adoption of the Regulation of 29 May 2000, revised in 2015, even though the main aim of the regulation was to ensure proper coordination of national laws and provide a framework for mutual recognition of decisions in cross-border proceedings (Fabriès-Lecea, 2012).

After a long pause, a new decisive step towards the harmonisation of substantive rules[8] was taken with the

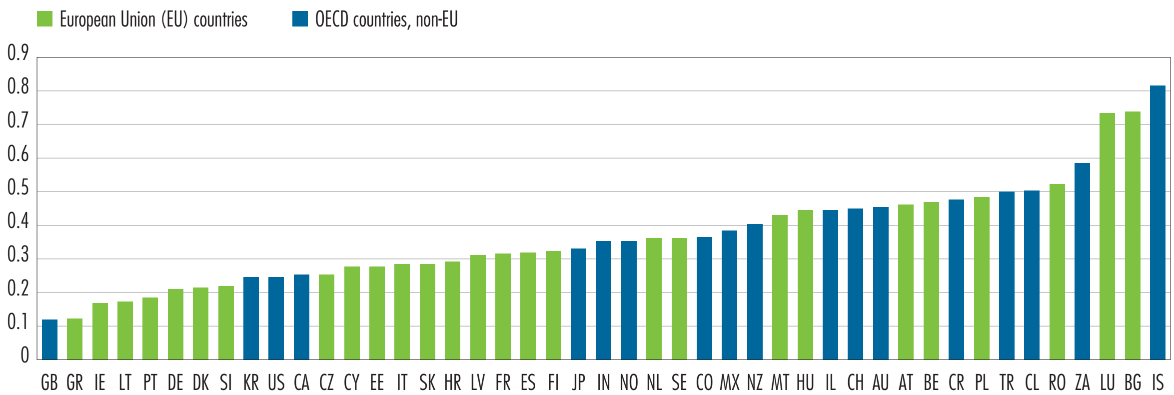
8 As opposed to procedural rules, which govern the arrangements for judicial remedy, substantive rules here refer to the provisions organising insolvency management.

adoption of the Directive of 20 June 2019 on restructuring and insolvency, in the framework of the first Capital Markets Union action plan – published in 2015 –, as part of measures likely to help remove national obstacles to cross-border investment.

Focusing on early restructuring mechanisms and out-of-court procedures – and drawing on a recommendation dated 12 March 2014[9] laying down the objectives of a European insolvency law – this directive first sets out to establish common principles for prevention,[10] so as to minimise the likelihood of liquidation at a given horizon of several years. It also emphasises the idea of a second chance, notably by providing for the introduction of procedures that allow debtors to have their debts written off in full within a maximum period of three years. The directive focuses above all on the restructuring mechanisms themselves, specifying the place and role of creditors in the process of negotiating and adopting a restructuring plan. In particular, the directive advocates the introduction of classes of affected parties,[11] which in principle only concerns procedures affecting large companies. This contribution of the directive is considered by some specialists to be the main novelty of the transposition of the directive in France: it put an end to the ranking of creditors, unrelated to the ranking of claims, which resulted from the former "creditor's committee" (for example, all bond creditors, whether secured or unsecured, were grouped together). Under this Directive, this system was replaced by a ranking of creditors, along the lines of American and German law, on the basis of an economic criterion (i.e. the quality of the claim), allowing greater flexibility in the constitution and number of classes. Moreover, with the cross-class cram-down, the Directive enhances the position of creditors: it provides that the plan may be adopted, despite the negative vote of one or more classes, if the majority of the classes vote in favour of its adoption, provided that at least one of them is a class of secured creditors.

Harmonisation involves more or less profound changes depending on the country. In France, the modernised safeguard procedure is the main channel for implementing restructuring. Other countries, on the other hand, have had to set up preventive procedures from scratch. For example, German law has a preventive procedure modelled on the French conciliation procedure (Sanierungsmoderation). Similarly, an autonomous restructuring procedure has been created under German law, similar to the French safeguard procedure. In addition, the Netherlands (amicable preventive procedure, or Wet homologatie onderhands akkoord) and Italy now have a preventive procedure that was previously absent from their body of law.

C2 Insolvency indicator, in 2022



Source: OECD (André and Demmou, 2022).
Notes: The indicator ranges from 0 to 1; a lower score reflects a more favourable insolvency regime.
For ISO country codes, see *https://www.iso.org/*

9 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.

10 As French law is fairly well-ordered in this area, transposition only consisted in marginally strengthening the effectiveness of existing warning mechanisms.

11 Within the meaning of Article L. 626-30 of the French Commercial Code: "The following are affected parties: 1° Creditors whose rights are directly affected by the draft plan; 2° Members of the extraordinary general meeting or shareholders' meeting, the special meetings referred to in Articles L. 225-99 and L. 228-35-6 and the general meetings of the masses referred to in Article L. 228-103, if their stake in the debtor's capital, the articles of association or their rights are modified by the draft plan. For the purposes of this book, they are referred to as 'holders of capital'. Only the parties affected shall vote on the draft plan."

However strong this movement may be, it should be noted that the resulting harmonisation is not total, due to the interplay of options that remain and allow certain national particularities to be maintained, a fortiori when the solutions adopted are more ambitious than the directive's minimum foundation. However, the positive effects of this harmonisation are reflected in international rankings, where European countries now appear to have the highest rankings (see Chart 2 above).

5 Is harmonisation gathering pace?

The process of harmonising insolvency law, which is already well under way, reached a new stage with the publication on 7 December 2022 of a new proposal for a directive, which is likely to evolve in the course of discussions. Announced on 15 September 2020 as part of the second Capital Markets Union action plan, this new initiative, while not decisive, focuses on a "targeted" harmonisation of certain aspects of substantive law (Lemercier, 2023).

The proposal concerns in particular the introduction of a common regime for revocation proceedings during the suspect period (preferences granted, acts concluded without consideration, acts causing intentional prejudice), for which minimum timeframes for initiating the action would be established, as well as common solutions for determining the starting point of the limitation period for the said action. The aim is to protect creditors from insolvency through common mechanisms designed to prevent the consolidation of acts that would be detrimental to them. In this respect, it should also be noted that the proposal organises and generalises the setting up of creditors' committees within the EU.

The proposal for a directive also requires companies to request the opening of a preventive procedure before their value diminishes ("likelihood of insolvency"). It also introduces a procedure for the negotiated sale of a company in the context of liquidation (the so-called pre-pack proceedings, long known in the United States and already in place in some European countries, which provide a useful new restructuring tool), in which the sale of the company is organised prior to the commencement of the procedure.

Lastly, the proposal introduces a simplified regime for very small enterprises (VSEs), along the lines of the simplified winding-up proceedings and professional recovery schemes already present in French law.

Finally, on 18 April 2023, the European Commission published several proposals on the framework for managing banking crises. Among the many measures announced, the Commission intends to further harmonise the hierarchy of claims by extending the scope of the privilege introduced by the BRRD to all deposits without distinction.

These advances are welcome in that they reflect both a deepening and a speeding-up of the harmonisation of insolvency law within the EU. It should be noted that, at this stage, the European co-legislators are still failing to address certain thorny but cardinal issues, such as agreeing on a common definition of the conditions characterising the insolvency of a company, or those used to standardise the hierarchy of creditors.

6 A few avenues for achieving greater harmonisation

It would appear difficult to subject all European companies to identical solutions in the short term, particularly given the strong interaction of insolvency law with other areas of national civil and commercial law (property law, securities law, contract law, company law, procedural law and labour law in particular). However, there is still room for furthering the harmonisation process.

The contribution could initially be indirect and stem from the synergies resulting from the harmonisation of other branches of law (securities law, company law, labour law, tax law, etc.). This, for example, is the ambition of the promoters of a European Business Code, which aims to "consolidate Economic and Monetary Union by underpinning it with a unified European business law".[12] The movement could also benefit from ongoing efforts to strengthen the Capital Markets Union and the Banking Union in the post-Brexit context.

12 Projet de Code européen des affaires (Draft European Business Code) by the Fondation pour le droit continental and the Association Henri Capitant.

In the shorter term, harmonisation could be achieved directly, by relying on the driving role of a few Member States. This is the thrust of the work carried out by the Association Henri Capitant, based on French and German law.[13]

The sectoral approach would be another direct way forward. It would make it possible to return to the well-known technique of "small steps", starting with the insolvency of banking companies and building on existing harmonisation work (for example through projects creating "synergies with the resolution tools, like treatment of depositors/creditors hierarchy").[14] Prospective work is already being carried out at the global level under the aegis of Unidroit (2021). The objective, according to the timetable adopted at this stage, would be to publish a soft law instrument by 2024, which would be drawn up by a working group supported by the Bank for International Settlements (BIS) and in conjunction with a large number of international institutions (International Monetary Fund, World Bank, etc.).

Another approach (which could, if necessary, be combined with the first) could be to proceed by thresholds, first harmonising the rules applicable to large companies (and possibly intermediate-sized companies) and eventually extending them to all economic players (if necessary with adjustments in accordance with the principles of proportionality and subsidiarity).

Finally, **a fourth approach would be to create a 28th regime (Valiante, 2016)**, through the mechanism of enhanced cooperation, with flexible rules covering only those aspects whose harmonisation is needed for the development of the Banking Union and the Capital Markets Union. Priority would thus be given to establishing a common hierarchy of creditors, along the lines of what has been done for bank resolution.[15] Initially, this could be limited to pan-European financing instruments or certain securitisation transactions, as the harmonisation of insolvency law (like that of securities law) has long been presented as the necessary precondition for achieving a critical size comparable to that observed in the United States.[16]

All in all, although these few avenues cannot claim to be exhaustive[17] or to be mutually exclusive, it must be said that the harmonisation of insolvency law within the European Union is well and truly underway and has even accelerated considerably, taking its rightful place in the face of the challenges of financing digital and environmental transitions, integration and financial stability.

13 A draft legislative proposal is already available: Association Henri Capitant (2021), "Projet de Code européen des affaires – Avant projet relatif au droit de l'insolvabilité / Regelungsentwurf zum insolvenrecht".
14 F. Villeroy de Galhau (2021), "The Banking Union: Time to move forward again", speech at the Eurofi Financial Forum, 10 September.
15 See Directive (EU) 2017/2399 amending Directive 2014/59/EU (BRRD) as regards the ranking of unsecured debt instruments in insolvency hierarchy.
16 K. A. Janse and R. Strauch (2021), "Reviving securitisation in Europe for CMU", European Stability Mechanism.
17 For a broader perspective, see for example Plantin et al. (2013).

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