EU Proposals for Harmonisation of Insolvency Practitioners and Judges

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Much has already been written about the proposal for the “Second Chance” directive (“Proposal”) published in November 2016 which is still being debated by the EU bodies - and rightly so. Harmonisation of insolvency law across the EU is needed as one in four insolvency proceedings is a cross-border insolvency and creditors need to know what to expect in other EU countries and that the courts and practitioners cooperate in an efficient way.

But clear and harmonised rules for insolvency procedures are not enough for a successful, rapid and cost-effective restructuring of a company, if an incompetent or unprofessional trustee is handling the procedure and the courts take their time to act. Therefore, the Proposal also focuses on the qualification and training of insolvency professionals and the support for restructuring measures through the courts. This should result in procedures of better quality, more effective supervision, improvement of the residual value for creditors and, importantly, a reduction in the legal uncertainty creditors face, which is said to lead to low recovery rates at present.

The Proposal devotes four draft articles to this topic but addresses it in quite an ambiguous way, which does not seem to change much. The Proposal only states that judicial and administrative authorities should receive training to a level appropriate to their responsibilities, and that the focus of the training should be, for the courts at least, to ensure that the appropriate expertise and specialisation is available in order to allow for efficient and expeditious treatment of cases.

Today, most of the countries do not have specialised courts and the cases are heard by the judges with extensive experience in insolvency matters. This is also the case of Slovakia and the Proposal does not require the Member States to ensure that judges have an exclusive competency in restructuring and insolvency matters, or that the Member States create specialised courts. Therefore, focus should be on the qualification of judges and effective and efficient communication. Principles of such communication between the courts of the Member States are already laid down in the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Communication Guidelines so the judges just need to adhere to them. In Slovakia particularly, a lot needs to be improved in this respect but that is a topic for a separate blog.

When it comes to insolvency practitioners, the Proposal requires the same “initial and further” training requirements. This may be difficult to achieve in countries where education of insolvency practitioners is vested in several private companies, having only a general curriculum for initial training, not to mention further education, and thus differing substantially in the quality of education. A successful practitioner should not only know the law by heart, but should be able to deal with complex cases involving several stakeholders and cross-border creditors and be familiar with various principles for insolvency practitioners prepared e.g. by Insol Europe or by the European Bank for Reconstruction and Development (“EBRD”) or the UNCITRAL Practice Guide. Cross-border cooperation between trustees should also be part of the curriculum but that is not always the case, at least in Slovakia.

The Proposal also suggests that Member States should encourage the development of voluntary codes of conduct for practice as well as effective oversight mechanisms, which, with appropriate regulatory structures
including a sanctions element, should lead to effective supervision of the practitioner. However, in countries such as Slovakia where insolvency practitioners are not organised in one professional organisation, this may be difficult to achieve. Even if some professional organisation would create such a code of conduct, if such an organisation is not also a supervising authority, adherence to the rules will remain strictly voluntary and thus effectively unenforceable.

Given the ambiguous and voluntary nature of most of the proposals, one can expect that the directive will not really lead to a harmonisation of the quality of the insolvency practitioners and judges across the EU.

The Proposal gives a bit more detail on appointment and remuneration of insolvency practitioners. The Proposal requires that practitioners are appointed or removed under rules that are “clear, predictable and fair”. This applies also to appointments by the courts, although the selection may be influenced by the experience or expertise of the practitioner under consideration and room may be given for appropriate consultation with the debtor and/or creditors in the selection of the practitioner. For cross-border cases, other criteria for selection could include the human and administrative resources available to the practitioner and, perhaps more importantly, their ability to communicate and cooperate with foreign practitioners and courts.

This will require changes in the Slovak insolvency law as the practitioners are currently chosen randomly which does not allow any consideration of their resources, capabilities or experience. It might be useful to create separate lists of practitioners for cross-border cases as well as for cases of companies with substantial assets and complex business.

Overall, the impression given by the Proposals is that the EU’s intention is not to overregulate insolvency practitioners but to create at least basic “qualification” presumptions for successful preventive restructuring measures, which is the reason why the directive is to be adopted.

This approach of the EU is fully in line with the findings of the EBRD from 2014 when surveying the insolvency office-holder regulations in 27 countries, some of them being also members of the EU (e.g. Slovakia, Poland and Hungary). the EBRD concluded that in countries such as Estonia and Romania where insolvency-office holders are self-regulated by their own professional organisations, insolvency procedures are more successful in many aspects. Therefore, less regulation by the EU might actually lead to more educated and efficient insolvency practitioners and judges.

We agree, but we should also make sure that both insolvency practitioners and judges are aware of various international principles of cooperation and education and adhere to these principles.

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