Brussels, 09th December 2020

# EACB comments on the European Commission's Inception Impact Assessment on Enhancing the convergence of insolvency laws

(Ref. Ares(2020)6591479 - 11/11/2020)

## Goal of harmonisation

The focus of harmonisation of insolvency laws should be to contribute to the greater economic process. Important (sub) goals grounded in notions of (distributive) justice held within different member states (rights of workers, the environment etc.) should be also reflected. These sub-goals may vary from MS to MS.

Indeed, we see in insolvency law means to achieve an economic outcome and believe that the main goal of alignment should be to achieve this outcome. Before national features can get further aligned, a careful assessment of the existing frameworks aimed at identification of the most efficient regimes in terms of economic outcomes is needed. Such assessment should consider a close interlinkage of national insolvency with the broader framework of hard and soft law and institutions. This complexity contributes to further divergences and different outcomes of insolvency in the EU.

Also, the EBA in its report on the benchmarking of national enforcement frameworks[1] demonstrates that the potential (economic) impact of changes to insolvency law is extensive, nevertheless changes in insolvency law should be done only after careful contemplation given important variations between the MSs concerning recovery rate of debt, time to recovery of debt and judicial costs of recovery.

## Benchmark

The benchmark for harmonisation should be those EU jurisdictions which have a better recovery rate, shorter time to recovery of the debt and lower judicial costs of recovery and other economic parameters, such as the degree insolvency law prevents parties from going bankrupt in the first place. In addition, any harmonisation should still allow MSs to adopt a solution that fits within their broader framework. Moreover, MSs should also have the option

[1] EBA/Rep/2020/29


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to adopt (non-economic) (sub)goals of insolvency law. The insolvency law of MSs should be predictable so that the different implications can be more easily foreseen ex ante.

**Suitable subjects**

Given the differences in the legal system over the EU, we suggest a focused approach. A further research is required most importantly with respect to:

- conditions for determining avoidance actions and effects of claw-back rights;

- directors' duties related to handling imminent/actual insolvency proceedings;

- court capacity when it comes to expertise and necessary training of judges; and

- asset tracing which would be relevant, in particular in the context of avoidance actions.

As an additional and related topic we list the following topics:

- the prerequisites for when insolvency proceedings should be commenced.

- the incentives insolvency law provides to the Insolvency Practitioner, i.e. the person central to most insolvencies.

These topics are all relevant as they affect the behaviour of parties in the period shortly before any insolvency proceedings will be opened and of course the behaviour of parties during the insolvency.

Distributive justice goals should not be harmonised.

With regard to the EC's considerations on the position of secured creditors in insolvency, taking into account specific needs for the protection of other creditors (e.g. employees, suppliers), we think it will be difficult to align those positions given the differences between the national laws on security interests and the preferential rights enjoyed by some creditors. Moreover, these rules affect the behaviour of parties long before insolvency law comes into play.

**Conclusion**

In the light of above, we believe that any attempt to align should be done for the moment by promoting principles and best practices at the EU level. Given the complexity of the EU national regimes (broader context), soft law measures, e.g. EC recommendations should be considered in the first place as the EU harmonization uniquely of the insolvency laws might not bring a desired effect.


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