Harmonization of Substantive Insolvency Law in the EU

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1 Introduction

Insolvency law may be one of the last vestiges of a nationalistic, codified approach to private law on the European continent. Whereas other areas of law – first and foremost in the field of (consumer) contracts – have been the target of (some) harmonization studies and efforts for a number of decades, insolvency law has thus far proven mostly resilient to such attempts. The immediate reason is that bankruptcy entails an enforcement mechanism that depends on local strong arm support which cannot easily be harmonized or internationalized. Public policy is also otherwise heavy where it concerns the liquidation or forced reorganization of whole estates; bankruptcy is hardly private law even if for historical reasons we still largely characterize it as commercial law. A more fundamental reason (implicitly or explicitly) advanced for insolvency law's resilience against harmonization attempts is that insolvency law functions as a coordinating mechanism that is both imperative for, as well as dependent on, other areas of law that are equally difficult to harmonize internationally, *e.g.* the law of secured transactions, labour law, and tax law. Past attempts at a more unified insolvency regime across the European Union (EU) have therefore mostly been concerned with coordinating the recognition and enforcement of domestic insolvency proceedings between Member States.[1]

Nevertheless, in recent years, attempts have been made at streamlining at least proceedings that may be entered into by debtors on the brink of bankruptcy to avoid more formal insolvency proceedings.[2] It must be assumed that claims to EU competency in these matters can be sustained. The European Commission now appears willing to take a further plunge and to draft a Directive that addresses the harmonization of substantive insolvency law head on. First, to test the waters, the Commission has launched an 'Inception Impact Assessment' that seeks to inform various stakeholders about its potential harmonization initiatives and solicits feedback.[3] In this assessment, the Commission recognizes that insolvency law is 'a cross-cutting area of civil law that always has to strike a delicate balance between the legitimate interests of creditors and debtors, as well as between those of different types of creditors' and that therefore a 'holistic approach towards insolvency issues' is to be taken.

Given the impact a harmonization of substantive insolvency law across EU Member States would have for various areas of (national) law, it is important to consider the Commission's plans at an early stage (the indicative planning for legislative action on the topic as mentioned in the assessment is the second quarter of 2022). Undoubtedly, other authors will be inclined to offer detailed assessments of the Commission's initiative at a later stage, especially if and when the plans become more concrete. In this article, I intend to make an analysis in broad strokes before such detailed assessments are submitted. One reason for doing so is that it allows for a more general reflection on the rationale behind the implementation of harmonization legislation, as this rationale informs much of the rest of the process. Another reason is that a preliminary assessment of the main issues – without delving into too much detail – allows for some more general remarks on the nature of harmonization (in general and with regards to insolvency law specifically) to be made at a stage when many of the more 'strategic' choices with regards to harmonization are still on the table. This might be of use in terms of deciding upon the order by – and the process through – which harmonization is attempted. Finally, a more general assessment may serve to identify issues and problem areas that require further thought in order for harmonization to have a chance of success, both formally and substantially. Because of the general nature of this article, which serves more as a starting point for debate, I shall omit most of the references and footnotes that would be expected in a more detailed analysis. Since the debate about harmonization of substantive insolvency law is to be conducted between (representatives and stakeholders from) all Member States, this contribution is written in English.

I shall start with some preliminary observations about past efforts (mainly in the United States) to harmonize commercial law and insolvency law (paragraph 2). Building on these observations, I identify eight policy issues that may need to be addressed and resolved (with a specific focus on the legislative basis that the Commission intends to use in its harmonization attempts) in order for EU efforts at harmonizing substantive insolvency law to be successful (paragraph 3). These may serve as a starting point for discussion at a policy level. A (brief) list of items to be included in any harmonization legislation is

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1. See the European Insolvency Directive 2000/1346, recast in 2015/848.
2. See the European Restructuring Directive 2019/1023.
3. 'Initiative to increase the convergence of substantive corporate (non-bank) insolvency laws', Document Ares(2020)6591479, accessible through https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=PI_COM:Ares(2020)65914791.

presented for further discussion on substantive issues of insolvency law (paragraph 4). My conclusion is that while harmonization of substantive insolvency law may partly take place through EU institutions, the limited scope of any such legislation under present EU competences may call instead for a treaty between participating Member States. In addition, it may be necessary to consider a judicial apparatus fit to task with a wide range of discretion to fill in substantial gaps that would remain. Because of the way in which modern commerce and finance progresses, these gaps are not likely to become smaller and (will continue to) put considerable pressure on a cross-border bankruptcy regime as a rule-based system (paragraph 5). The question then is whether this judicial function should be embedded within the present EU court system or operate in parallel with it.

2 Preliminary observations about prior experiences with harmonization of commercial (insolvency) law, especially in the US

After the early unification of states within the US, the US federal government promptly introduced federal insolvency laws. Although the process was not always smooth – state law had to fill gaps in legislation for long periods of time through equitable receiverships – insolvency itself was from the beginning a federal competency under the Constitution and state law had to be careful not to overstep the mark.[4] The first federal US Bankruptcy Act dates from 1800 and there has been one ever since 1898 with the present Bankruptcy Code dating from 1978. A similar approach was taken in Germany, which introduced its first federal bankruptcy act (*Konkursordnung*) soon after unification in 1879 – superseded in 2001 by the *Insolvenzordunung* – and served as model for the Dutch Bankruptcy Act of 1896 that is still in force.

The significance of these efforts was that they came *before* unification of private law. In Germany, unification of private law followed only in 1900 with the introduction of the German civil code (*Bürgerliches Gesetzbuch*). In the US, private law has remained a state competency and, except for important uniform laws, especially the Uniform Commercial Code (UCC), has not been harmonized.[5] To the extent there is such uniform private law in the US, it remains state law with differences still obtaining between States, who are under no duty to conform, nor are bound to a uniform interpretation even if valued by the courts. In practice, main drivers of convergence (including uniform interpretation) have been the federal Bankruptcy Code and federal (bankruptcy) courts, albeit technically only for the purposes of bankruptcy liquidation or reorganization. It confirms nevertheless that harmonization of private law is no precondition for a harmonized or uniform bankruptcy law and that there is much experience abroad with a dual system that operates with differing legal regimes on a state and federal level. It may be useful to consider how and to what extent these differences are resolved or reconciled (if at all), as this may serve to illustrate a potential way forward for the operation of local EU Member State private law regimes (which are likely to survive longer) under a harmonized EU insolvency law regime. To this end, the manner in which especially (State) proprietary interests are treated under the US Bankruptcy Code is discussed in more detail below.

It is well known, very relevant and should be carefully considered in this connection, that thus far domestic bankruptcy courts are used to a measure of discretion in international cases. In particular, these courts practice a system of adjustments for foreign proprietary interests to make them fit into their bankruptcy systems as a matter of acquired rights, especially in terms of priorities of foreign secured or similar rights in respect of assets moving within the power of the bankruptcy court. These courts then usually look for nearest equivalents in their own laws (assuming these can be found) which thus serve as some model for how foreign proprietary interests are treated. The alternative is the loss of asset backing and priority which – as a general principle – if properly established should be avoided. Clearly, this phenomenon of discretion and adjustment is more acute in countries such as the US, that have different jurisdictions and different attitudes and priority regimes, especially in asset backed financing, but only one bankruptcy law. Such a dual system assumes some model or statutory process for adjusting between the different legal regimes that may be applicable. It would not be different in the EU.

Although the Uniform Commercial Code – especially through its functional approach to securities and security interests under Article 9 – brought unity in the area of contractual security interests in personal property in the US, State law continues to prevail in principle in the area of secured transactions and other asset backed funding operations like conditional or temporary ownership transfers in finance sales, such as finance leases and repos, which have given rise to considerable problems even under Article 9 UCC. Moreover, securities and other proprietary interests or preferences still vary considerably between the different States if arising outside the area of Article 9 UCC. The federal Bankruptcy Code offers some rules of its own for the various securities and other proprietary interests or liens and preferences arising under State law. To this effect, these interests are essentially divided into three types: consensual, judicial, and statutory liens. The latter are often of federal origin (like tax liens), but may also arise under State law (such as liens for employees). In this approach, especially statutory liens may benefit from a high priority under the Bankruptcy Code, may even arise after insolvency, and vest later. The essence is that the Bankruptcy Code accepts the existence of these different security interests but may rearrange or determine their rank in liquidation or reorganization proceedings and make them fit in its bankruptcy order. This is not to say that the current system is all-encompassing; there may still be issues especially with finance sales or similar asset backed funding, in which areas State law

4. See Art. I, Section 8, cl. 4 US Constitution.
5. It should be noted that there is a common history in common law in all the US states except in Louisiana where important common law influences cannot be denied either.

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itself may remain less than clear and even the UCC leaves important issues unresolved. This is reason why indeed federal bankruptcy courts may in practice play an important role in the operation and interpretation of the UCC and provide here a sense of unity which the UCC under its own rules does not require in interpretation.

Other ways in which the Bankruptcy Code unifies the application, especially of property law issues, are through provisions with regards to the eligibility to file claims (any security interests need to support an allowed claim to retain their effect in a federal bankruptcy),[6] the ability of creditors to take recourse (execution may be stayed pending reorganization proceedings),[7] and the possibility to remove excess security to allow the collateral to be used for new financings if not otherwise available during the evaluation period.[8] As elsewhere, in the US, the various (State level) security interests may also be avoided as fraudulent transfers (still expressed in the traditional common law language of hindering, delaying or defrauding common creditors, although the extent of the provisions are wider in practice)[9] or as preferential conveyances[10] under the Bankruptcy Code, which supplements State law in this respect.

It is clear in the US that the federal Bankruptcy Code deals in this manner with key policy issues especially concerning proof and allowance of claims and secured transactions, and their ranking. It was already said that the federal Bankruptcy Code also has its own system of priorities,[11] which for example gives a high rank to administrative expenses.[12] The Bankruptcy Code also deals with the treatment in bankruptcy of newer financial products, such as swaps and repos,[13] in particular in the set-off and netting facilities, which could still be fraught under state law.

6. Section 506(d).
7. Section 362(a)(5). Interest on the underlying loans only continues to accrue to the extent that there is overvalue in the collateral, see section 506(b). The stay may be lifted (section 362(d)) if it can be shown there is no overvalue (or equity) for the debtor in the property and if it is not necessary in an effective reorganization, or otherwise for cause, including the lack of adequate protection (as defined in section 361).
8. There is a need for adequate protection, which may mean the offering of replacement security or even cash (section 364(d)). In reorganizations, security interests may be converted and adjusted as part of the plan, although not taken away without the consent of the secured creditor (sections 1129 and 1325). However, in the so-called 'cram down', a delay in payment may be imposed as long as the present value of these payments is not less than the secured claim.
9. Section 548.
10. Section 547.
11. Section 506.
12. It includes the cost of preserving and managing the estate (under section 503(b)(1)(A)), but the contribution of secured creditors is limited to the cost of the estate in preserving and liquidating their collateral (section 506(c)).
13. Specific amendments were introduced for the latter in 2005, especially to allow netting (sections 556ff; for repo netting see section 561). Rights under conditional sales do not prevent the assets being part of the estate under section 541 (subject to the possibility of their abandonment as burdensome assets under section 554). The stay provisions also apply unless lifted in which case the assets can be repossessed.

Another area in which the Bankruptcy Code offers a competing federal regime to State level legislation is that of exemptions, *i.e.* assets that do not form part of the estate in bankruptcy, such as wages, the homestead, and life insurance benefits.[14] Such exemptions have relevance primarily in personal bankruptcies and are closely connected with the legal discharge which is normal and has been long standing in the US. The debtor is given the option to choose either the exemptions formulated by the state of its domicile or the federal exemptions allowed by the Bankruptcy Code (unless the State in question has opted out of the federal exemptions). It shows a special State or public interest in how smaller debtors are protected, a reason why in the EU their insolvency might better remain Member State competency altogether.

Matters that do not fall squarely under either State law or federal law are generally resolved by the bankruptcy courts. A prime example is the issue of valuation, which has given rise to much debate. In many insolvency scenarios, the selection of proper valuation methods and their precise application is key in determining the positions of the various stakeholders, especially in reorganizations where there are no liquidation proceeds. The Bankruptcy Code is less than specific on this important issue and the bankruptcy courts assume here their traditional role and latitude as courts of equity in this area.[15]

3 Policy issues to be addressed when attempting to harmonize substantive insolvency law across EU Member States

As mentioned above, the experiences in the US (and Germany) serve to show that harmonization of insolvency law does not necessarily presuppose harmonization of private law. In fact, private law harmonization is more likely to follow uniform bankruptcy law rather than to precede or coincide with it. It also means that any private law unification that may be practiced in the application of these insolvency laws is limited in effect to the procedures promoted thereunder and has in principle no meaning outside them. We often still consider bankruptcy an issue of private law, which historically derives

14. Section 522 Bankruptcy Code.
15. In the US, first there is the valuation necessary under Sec. 506(a) to determine any excess non-secured claim or any excess collateral as the case may be, that may have to be released, especially important in the event of floating charges. This valuation takes place in the light of the purpose of the valuation and of the proposed disposition or use of such collateral. This means that a case by case approach is adopted. Under Section 1129(a)(7) the valuation, necessary to determine if within a not unanimously consenting class every creditor obtained property of a value not less than his share in a liquidation, is tied to an imaginary liquidation under the Code. Where the election of Section 1111(b)(2) is made under which secured creditors may opt out of the valuation under Section 506 in a reorganization (and may then not share in the dividend for any shortfall), they must at least receive the value as determined under Section 506. To determine under Section 1129(b)(2)(A) for dissenting secured creditors the present value of deferred cash payments (with or without interest as may be provided by the plan), the normal accounting standards are used with reference to the prevailing interest (discount) rate, whilst for determining the corresponding collateral values the standard of Section 506 may again be proper (the excess value being released).

from its origin in commerce at a time where regulatory and administrative law were not yet developed. It was already said that bankruptcy law is laden with public policy. In a more modern sense and perception, bankruptcy provisions are of a regulatory nature and denote a (often serious) public policy intervention in private relationships of many types. How policy is given substance in this regard, and how it is (practically) handled, may lead to considerable differences between legal systems, even more so in modern reorganization and rehabilitation proceedings. A number of fundamental issues, each implying policy choices, need to be considered before a credible harmonization effort can take place. It may be observed that such a review of policy and methodology has often been missing in the EU in the past; one may think of its now abandoned effort to introduce a common sales law (CESL) and a regulation concerning the proprietary aspects of assignments, now also running into headwinds. Arguably one important reason for this failure was a lack of insight in the policy choices and methodology used.

I will begin my observations on these issues by pointing out, as a first issue, that it may be better to consider insolvency harmonization only for professional debtors like corporates and banks (for which there is already a special regime in the eurozone), much like the French model that still derives from the idea that commercial law including bankruptcy law only applies to merchants. It would confirm that consumer bankruptcies and rehabilitation facilities would remain Member State concerns. The Commission Impact Assessment foresees that any legislative efforts would be applicable to corporate insolvency scenario's, with the exception of banks, and is therefore largely in line with this approach (which still raises important definitional issues). Professional insolvencies are also more likely to have cross-border features and therefore fit better into the Commission's stated legal basis for harmonization, which – in the view of the Commission – is the safeguarding and/or promoting the operation of the internal market (Art. 114 TFEU).

This leads to the second issue, which is the legal basis for any harmonization attempts and the limits imposed by it. Previous attempts at European integration of insolvency matters – notably in the form of the present EU Insolvency Regulation of 2002 (recast in 2015) – were limited to recognition of bankruptcies pronounced in other Member States. The EU competency for implementing measures to increase the level of mutual recognition and enforcement had a strong formal basis, as it relates to matters of private international law.[16] This author's view has always been that if there is substantial cross-border business between EU Member States, the EU Insolvency Regulation and its private international law solutions are insufficient (but this may require empirical validation). Without substantial cross-border business, the EU Insolvency Regulation is largely irrelevant. If there is to be a more fundamental progression towards a harmonized bankruptcy regime, this is *not* a private international law matter and there is therefore no original EU law formation jurisdiction in this area; hence the need for the Commission to base its competency on (only) Article 114 TFEU. Yet it remains to be established that harmonization of insolvency law is a serious internal market need at the moment and whether the issue is sufficiently pressing (the idea that a harmonized insolvency regime would also promote the operation of the capital market in the EU appears fanciful). But even if it were now so established, using Article 114 TFEU as a legal basis would imply (and this is often forgotten) that any legislation based on it would need to be interpreted as a single market prerequisite, thereby restricting the scope, operation and interpretation of any measures accordingly. Article 114 TFEU could hardly cover a full harmonization of private law in this context or even a pick and choose facility. As can be observed in the US, a far-reaching harmonization might not be necessary, but serious questions would remain over whether and to what extent private law issues may incidentally still be so covered or affected by a harmonized insolvency law regime. The EU Commission thinks lightly about the EU's Article 114 competency and may be sustained by the ECJ, but constitutional courts elsewhere may take a different view and consider the intrusions into national laws in this manner increasingly excessive. To be more comprehensive, it was already said that treaty law, as we used to have in the Brussels Convention for the recognition and enforcement of civil and commercial judgments and in the Rome Convention for the applicable law in contractual matters, may be more appropriate.[17] Again, harmonization of private law is no private international law matter and harmonization of regulation even less so.

A third issue, in line with the foregoing and with the promotion of the international financial markets and their operation in the EU more broadly, is in how far bankruptcy judges under a harmonized EU regime can recognize and include in the administration of the estate and its possible liquidation or reorganization matters that potentially go beyond the operation of the EU internal market. It concerns the operation of facilities (products and services) created and operating in the international (*i.e.* not confined to the EU) financial markets. These markets more broadly are promoted by recognizing its products and facilities or services under the rules operating in those markets. That raises the issue of legal transnationalization and the recognition of its legal structures. One may think in particular of credit facilities and their applicable terms in those markets, which is often (and more crucially) an issue of property law: segregation (economic interests or constructive trust structures in asset management, custodial relationships, and collection arrangements), floating charges (in international productions and distribution chains), finance sales (conditional or temporary sales as in reservations title, hire purchases or similar arrangements like financial leases and repos), (the terms for) set-off and netting, as well as the treatment of market-related contracts in insolvency situations as

16. Such matters already fell under the Amsterdam Treaty of 1998 and are now provided for in Art. 81(2)(a) and (c) TFEU.

17. Which have since been replaced by the Brussels I bis Regulation and the Rome I Regulation.

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demonstrated more in particular in the operation of the Eurobond and swap markets, the largest markets in the world. Thus, these practices should not merely be considered contractual (and may then overlap with good faith considerations), but are substantially issues of property law.

This author strongly supports the acceptance of such international market structures unless indeed public policy is acutely offended. The issue is often more one of participation and claiming the benefits of this type of globalization but it suggests and requires also local bankruptcy law accommodation; one cannot have it both ways. They need a place even now in Member State insolvency procedures and (therefore) also in any EU harmonization project unless again public policy of an EU nature (or its financial regulations) or even of Member States in their territories forbid acceptance of specific structures. These international market structures are ever evolving under transnational law, which requires flexibility of the legal regimes accommodating them. It concerns the relevance of international practices or customary law supported by fundamental and general principle these markets concerning; it is the world of the modern *lex mercatoria*, which surpasses the EU. In this regard, domestic notions of equality of creditors are notably rejected as main guiding principle and argument against such an approach: bankruptcy was never about equality but always about ranking. Only the lowest ranking creditors are equal and usually get little. For consumers creditors, this can be balanced, and it could be considered, by giving them a carve out (percentage of the estate). What the value of a given estate is, is difficult to determine and (therefore) problematic especially in reorganizations, but offering low-ranking creditors a part would at least take them out of the reorganization process and the majorities it requires. It would be another aspect of taking private debtors out of a harmonized regime altogether.

Further to the above, a fourth issue is how insolvency matters are to be addressed at the judicial level, both in terms of the required expertise (keeping in mind especially the above transnational or other foreign instruments and their impact on insolvency proceedings) and the uniform application of any implemented measures in a – for now – heavily fragmented insolvency landscape. In the Eurozone (but not for other Member States), we have at least a uniform resolution regime for banks in the Single Resolution Mechanism (SRM), supported for all of the EU by the fundamentals of the Bank Recovery and Resolution Directive (BRRD). It is a resolution facility without precise rules, where much is left to a specialized regulator, the Single Resolution Board (SRB), which has substantial discretion, makes a plan, and advises national resolution authorities, all subject to the final authority of the EU Commission. Such a set-up is bound to create serious problems as there is no clear system of legal protection for private stakeholders, but it makes a contribution in so far that it demonstrates the administrative character of the facility and points into the direction of the need for substantial judicial discretion to make a harmonized approach work and effective. It also concords with the more activist approach that reorganization proceedings may require from the judiciary. In common law countries, this is perhaps intuitively better understood as in those countries the bankruptcy jurisdiction belongs to the courts of equity (cf. also the experience under the US dual system with the bankruptcy courts taking their latitude in matters of valuation). The Lehman cases were the more recent example of a flexibility civil law hardly has.[18] For a harmonized system to work properly in the EU, this may mean a need for a specialized EU court to make sure of sufficient specialized expertise, *especially at the lower level*, and a (reasonably) uniform application. It could be the ECJ or a special chamber, but it needs to be carefully considered that such a court would then have to work within the narrower confines of typical EU law and that may prove to be too restrictive. Under a treaty approach, it might be better to experiment with a separate specialized court.

A fifth basic issue that needs consideration is whether a harmonized insolvency law in the business sphere would be oriented towards liquidation or reorganization. Unlike what many academics seem to think, reorganization is no *panacea* for all problems, especially if a debtor is not economically viable, and the prompt cleaning out of the market place is an important issue for its proper functioning and operation. That is more in particular relevant in the service and startup industries and needs perhaps more careful consideration in a post-industrial environment. Liquidation is not a dirty word; mainly when problems are temporary and can demonstrably be overcome another approach is justified, assuming that a temporary suspension of payments is not sufficient. The issue of viability here is precarious and a key assessment. It is often still considered a judicial issue, but has been abandoned in the US as unworkable. It is still part of the EU Restructuring Directive (Art. 4(3)), which is likely to serve as guidance for a fuller harmonization effort, but may well require considerable reconsideration. Again, policy and method might not have been fully considered and there was little consideration in academic writing. Rather, what is viable in this context should ultimately be left to the judgment of the private actors given the legislation induced concessions, especially in terms of stay and cram down of secured or other asset backed financing. It may on the other hand be useful to identify some provisions of the current EU Insolvency Regulation that could be adopted in potential new legislation. It is possible especially to think about the system of sub-pools of assets in different places to support main insolvency proceedings, an important feature

18. See J.H. Dalhuisen, Dalhuisen on Transnational and Comparative Commercial, Financial and Trade law, Volume 1, 7th ed., Oxford: Hart Publishing 2019, p. 611.

that may remain useful in a harmonized regime.[19] This could still serve as a model for overcoming substantial differences in applicable legal regimes (especially relating to those issues that fall outside the direct scope of insolvency matters and may therefore not be part of a harmonized approach), although it should be realized that such a division in sub-pools tends to be liquidation-oriented and therefore sits uneasily with the reorganization of a business.

A sixth, related, issue is who can ask for reorganization and whether management can do so even before insolvency (however defined) as a matter of its risk management. That is the approach in the US (Chapter 11) and since 2006 also in France under the *procedure de sauvegarde* (further facilitated in 2008). Reorganization proceedings as are currently being implemented under the European Restructuring Directive 2019/1023 also promote it. In all of this, key issues are the early stay of all execution measures, the release of any excess asset backing, and whether management can count on creditors being considered consenters to a reorganization plan (necessary normally to reach the required majorities) if receiving as much replacement value as they would in an immediate liquidation, prompting – again – the question of how the value of a distressed company and its assets are to be determined.

A seventh issue, which could cut deeply into matters of private law and also implies key policy considerations, is whether and to what extent insolvency proceedings extend to directors and managers of a company (in the form of liability or otherwise) and who else may have to contribute (and in what way), especially dominant shareholders c.q. parent companies or even facilitating banks. Many legal systems currently know different kinds of tort or tort-like actions in this connection that may either be part of their insolvency legislation or part of other areas of law (tort law, commercial law, etc.) and that may be brought by creditors generally or by the bankruptcy trustee specifically. Unless harmonization of substantive insolvency law would include a harmonization of such types of actions as well, a harmonized insolvency law regime might still result in significantly different outcomes of similar cases across Member States.

The eighth and final issue that I would like to raise in this preliminary fashion is that a harmonized insolvency law regime for EU Member States may also need a harmonized approach to the recognition and enforcement in respect of non-EU bankruptcies. In this regard, the UNCITRAL Model Law might be useful. It has already been accepted in the US and UK and could therefore be the standard.[20]

4 Items to be considered in a harmonized approach

If it would be concluded that there is indeed a need for harmonization of substantive insolvency law across EU Member States – regardless of whether it would turn out that this is best to be achieved through legislation at EU level (through an EU Directive, assuming sufficient competency) or, probably more appropriately, through treaty law among participating Member States – it would be useful to consider which items might be covered in such an instrument. For starters, some inspiration may be drawn from the EU Bankruptcy Directive, which – in typical private international law fashion – outlines the applicable jurisdiction and substantive legal issues with reference to Member State laws (Arts. 6-18), in all areas where a form of harmonization may be more appropriate. More generally, it would be suitable to include those items that entail major interaction with private law issues that commonly arise in (impending) insolvency situations, as this is where most friction may be expected. Without pretending to be exhaustive, the following items would merit inclusion (or at least serious discussion). For reasons of conciseness – each item might be the topic of a separate article or even a book – they are only introduced in the briefest manner:

1. Opening requirements, bankruptcy jurisdiction, jurisdiction in related issues (*vis concursus attractiva*), summary or other proceedings to determine the bankrupt estate and the rights thereto, the role and limitation of appeals.
2. Initial effects of bankruptcy proceedings being opened and publication of the decree, its timing, the effect on ongoing business, and the status of post-bankruptcy transactions.
3. Immediate stay of executions especially by secured creditors and the status of prior attachments.
4. Disseisure of the debtor. The maturing of all claims. Appointment and powers of trustees, the authority of the bankruptcy court, and the organization of the proceedings.
5. Proof and allowance or verification of claims. Who must file? Its meaning in and outside the proceedings. The

19. Under the EU Regulation, a bankruptcy trustee's position in a bankruptcy opened in a EU country is in principle accepted and automatically recognized in the other EU countries provided the bankruptcy is opened in the centre of the main interests (COMI) of the debtor and subject always to public policy exception. Secondary bankruptcies may be opened elsewhere where assets can be found. They are not extraterritorial within the EU but may support the main bankruptcy (if there is one) and only lead to liquidation. A key issue is that all creditors may participate, although these secondary bankruptcies or local asset pools are foremost important in respect of domestically secured creditors and their priorities in local assets. Indeed, security interests remain governed by the law of the underlying assets, which in the case of receivables is defined as the law of the Member State where each receivable debtor has its COMI (Art. 2(9)(viii)). They are not subject to suspension rights of the lex concursus except if located in the country of the main bankruptcy, or, if located elsewhere, there is a secondary bankruptcy which imposes such a suspension. Under the Regulation, the basic tension arises here from the fact that a regulatory regime such as bankruptcy is still treated like a private law event under the traditional conflict of laws rules. The corrections are then found in an enhanced public policy bar to recognition.

20. Countries may operate a unilateral recognition regime based, as in the case of the US (under the 2005 Chapter XV of its federal Bankruptcy Code), UK, Japan, Mexico and South Africa, on the UNCITRAL Model Law of 1997. The US Code distinguishes between foreign main and non-main proceedings, comparable to primary and secondary bankruptcies. In the first case, the automatic stay and adequate protection clauses of Sections 362 and 363 apply to assets located in the US unless manifestly contrary to US public policy, not in non-main proceedings. Multiple proceedings in the US and abroad are co-ordinated and under them any relief elsewhere must be taken into account in the proceedings in the US, as it must in respect of a foreign non-main proceeding in a foreign main proceeding.

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position and involvement of secured creditors and status of finance sales (like finance leases and repos).
6. Sequestration of the debtor's estate, its determination and the finality thereof. Different rules in liquidation and reorganization proceedings?
7. Excluded and exempt property, the status of after-acquired property, of partnership and other forms of joint property, of custodial properties, of collections and the determination of other segregation issues.
8. The status of executory contracts, employment contracts, rental agreements, and market related transactions.
9. Specially included assets: the effect of bankruptcy on prior transactions or activity. The notion of retroactivity or relation-back of bankruptcy and the avoidance of preferential and fraudulent conveyances or transfers.
10. The status of new and pending law suits, foreign litigation, and international arbitrations.
11. The proprietary rights or preferences of creditors and similar rights of other third parties in liquidation and reorganisation proceedings. Notions of tracing, set-off, and subordination.
12. Are the rights to the estate and its assets differently handled in liquidation and reorganization proceedings? Release of excess asset backing, replacement, and cram down in reorganizations.
13. End of liquidation proceedings. Collection, execution sale, raking and distribution. After effects and discharge.
14. End of extensions, compositions, reorganizations and rehabilitation proceedings in and outside bankruptcy. Implementation, amendments, and defaults.

5 Conclusion

In conclusion, the legal basis of EU harmonization efforts may not cover all measures it would want to implement or which should be covered to make them credible and effective. This does not mean that harmonization cannot be attempted. Although harmonization of substantive bankruptcy law does not presuppose harmonization of main areas of private law (see the US system), there may be important ones that need consideration but cannot be harmonized through a EU Directive. For a more comprehensive approach, treaty law between participating Member States may be necessary and more appropriate.

Whatever approach is taken, it will leave much of the practical aspects of harmonizing insolvency law to (national or other) judges. These judges will need to be given a great deal of discretion in dealing especially with more modern commercial and financial needs and products in the international market place, their recognition and 'fitting in' in such a harmonized insolvency regime. It would appear, therefore, that a harmonized regime cannot be strictly rule-based. It shows that insolvency, if properly understood, is truly an administrative measure that is one the one hand highly policy-oriented, and, on the other hand, depends on a considerably degree of administrative discretion to work properly. If this was considered to be acceptable at least for banks in the Eurozone, even though its remit and effectiveness may be seriously questioned, it may also (to some degree) have to be accepted also for other commercial enterprises.

Noot van de redactie

De Europese Commissie heeft via een 'Inception Impact Assessment' de eerste stappen gezet naar een mogelijke harmonisering van het materiële insolventierecht van de lidstaten. Een dergelijk harmoniseringsproces raakt niet alleen het insolventierecht in de lidstaten, maar ook, of misschien wel juist, de 'traditionele' onderdelen van het vermogensrecht zoals het goederenrecht, verbintenissenrecht en aansprakelijkheidsrecht. Om die reden lijkt het de redactie van MvV zinvol om de verschillende aspecten van een mogelijk harmoniseringsproces nader te doordenken. Op verzoek van de redactie heeft prof. mr. J.H. Dalhuisen daartoe een eerste aanzet gedaan. Hij identificeert daarbij een aantal thema's die uitnodigen tot nadere gedachtenvorming, zoals de verhouding tussen insolventierecht en algemeen vermogensrecht, de bevoegdheid van de EU om tot harmonisatie over te gaan, de rol van de rechterlijke macht en de reikwijdte en inhoud van de verschillende facetten van een mogelijke regeling. De redactie nodigt andere auteurs van harte uit om op deze – en andere, samenhangende – thema's te reflecteren en hun bevindingen ter publicatie aan te bieden (al dan niet in het Engels).