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RELATIONSHIP AND EFFECTS OF EUROPEAN INSOLVENCY LAW ON NATIONAL INSOLVENCY LAW*

Wpływ europejskiego prawa upadłościowego na krajowe prawo upadłościowe i restrukturyzacyjne

Artykuł poświęcony został relacjom europejskiego prawa upadłościowego do krajowego prawa upadłościowego i restrukturyzacyjnego i wpływowi prawa europejskie na prawo krajowe. Autor ukazuje, jak zmieniało się prawo krajowe pod wpływem prawa europejskiego w ciągu ostatnich dwudziestu lat, od europejskiego rozporządzenia upadłościowego (EIR) i jego dwudziestoletniego oddziaływania. Wówczas kwestia współpracy administracji i sądów, uznawania orzeczeń sądowych upadłościowych itp. Było rewolucyjne. Dzisiaj już tak nie jest, bo istnieje też Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/1023 z dnia 20 czerwca 2019 r. w sprawie ram restrukturyzacji zapobiegawczej, umorzenia długów i zakazów prowadzenia działalności oraz w sprawie środków zwiększających skuteczność postępowań dotyczących restrukturyzacji, niewypłacalności i umorzenia długów, a także zmieniająca dyrektywę (UE) 2017/1132 (dyrektywa o restrukturyzacji i upadłości). Jest ona częścią europejskiego prawa upadłościowego i poprzez procesy implementacji zasadniczo wpływa na prawo krajowe. Autor przedstawia krytyczną analizę procesów implementacji dyrektywy, pokazując gdzie popełniono błędy w Niemczech i jak należałoby tego uniknąć.

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Pojęcia kluczowe: Europejskie prawo upadłościowe; krajowe prawo upadłościowe i restrukturyzacyjne; Dyrektywa restrukturyzacji i upadłości; implementacja dyrektyw

I. Introduction

The European Insolvency Regulation (EIR) is undoubtedly part of European insolvency law. If one looks at the twenty-year history of the EIR and compares it with the development of international insolvency law before 2002, the year in which it entered into force, it can already be stated at this point that this European law has taken a tremendous step forward[1]. This ranges for example from automatic recognition and the filability of foreign tax claims to communication between administrators and courts. Today, we are talking about things that would have been considered revolutionary 20 or more years ago[2]. In addition to the EIR, the 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 (short: EU Restructuring Directive) is also part of European Insolvency law. This is already made clear by the title of the directive and, in particular, by the provisions of Articles 20 to 28. When I use the term European insolvency law in my following remarks, I understand it to include both the EIR and the Restructuring Directive.

II. The relationship between the EIR and the Restructuring Directive as European insolvency law to national law

For a better understanding, I allow myself to briefly outline the basis for these European laws. EIR and Restructuring Directive are decided by the European Parliament and the Council of Ministers. They are legitimised to do so on the basis of the EU treaties and primary law. The legal acts of the European Parliament and the Council of Ministers are therefore referred to as secondary. Secondary legislation includes regulations, directives, decisions and recommendations.

The Treaties of the European Union are a set of international treaties between the European Union (EU) and member states which sets out the EU›s constitutional basis. The two core functional treaties are

[1] Paulus, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2012, p. 297.
[2] Ibidem.

the Treaty on European Union (originally signed in Maastricht in 1992, aka The Maastricht Treaty) and the Treaty on the Functioning of the European Union (originally signed in Rome in 1957 as the Treaty establishing the European Economic Community, aka The Treaty of Rome). The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement that amends these two treaties. This Treaty, which was signed by the EU member states on 13 December 2007, entered into force on 1 December 2009. It amends the Maastricht Treaty and the Treaty of Rome, known in updated form as the Treaty on the Functioning of the European Union (2007) or TFEU.

1. Relationship between the European Insolvency Regulation and national law

Article 288 Para 2 TFEU provides that a regulation is to be of general application, binding in its entirety and directly applicable in all Member States. By virtue of their direct application, regulations form an integral part of the legal order in force in the Member States. This means that, when they enter into force (Article 297 TFEU), they authorise and bind legal entities "without any measures being required to convert them into national law"[3]. At the same time, the direct application of the Regulation implies its unconditional primacy over national law[4]. The provision in Article 288(2) TFEU would be 'irrelevant if the Member States adopted it by means of legislative acts [. . .] could unilaterally deprive them of their effectiveness'.[5] The primacy of application of a regulation the ECJ has formulated in its fundamental decision "van Gend & Loos"[6] and has since developed in many directions.

In the light of the foregoing, the EIR, as directly applicable European secondary law, takes precedence over national law of whatever rank. National law that my be in conflict with it is to be disapplied.[7] When developing local rules, Member States have to ensure the EIR is given full effect. This follows from the principle of effet utile (see Art. 4 (3) Treaty establishing the European Union).

Despite its primacy, in some respects the EIR needs implementing provisions in the national laws in order to be executable in the Member States. For example, the laws in the Member States deter-

[3] European Court of Justice (ECJ) 94/77 [1978] ECR 99 paragraphs 22, 27 – Zerbone.

[4] The scope of the EIR and thus their primacy is only open if the following four criteria are met: cross border implications, territorial, material and temporal scope (see Vallender in Vallender, EuInsVO, 2nd edition, 2020, Art. 1 para 2, 8, 66, 89).

[5] ECJ 6/64 [1964] ECR 1141 (1269) – Costa v. ENEL.

[6] ECJ 26/62(1963) ECLI:EU:C:1963:1– van Gend&Loos v. Netherlands Inland Revenue Adminsitration.

[7] ECJ 50/76 /1977) ECLI:EU:C:1977:13 – Amsterdam Bulb B.B.V. v. Produktschap voor Siergewassen.

mine, which national courts have jurisdiction to open insolvenvcy proceedings. The laws of the Member States also define the time limitations and formal requirementsthat apply to the remedies mentioned in Art. 5 EIR.[8]

Notwithstanding to the clear rule in Art. 288 (2) TFEU, questions of doubt remain. Let me give you an example, which is based on considerations by Christoph Thole[9]. Art. 23 EIR grants the administrator a genuine substantive right to restitution of what has been "obtained". How this claim relates to claims under national law has not been conclusively clarified. In the light of the foregoing, it is true that national law is likely to be superseded by the provision. Does this mean that bases of claim under national law are blocked? A differentiated approach is necessary in this respect.[10]

Art. 23 EIR does not contain a limitation of the administrator's powers, but is intended to ensure that the administrator has a uniform basis of claim for the surrender of what has been "obtained". This blocks a plea of lapse of enrichment, but conversely does not exclude the possibility of further, competing claims, for example claims for damages against the creditor. It is neither evident nor would it be justified that the legislator intended to exclude such claims, which may be dependent on fault, if the damages exceed what has been obtained.[11]

2. Relationship between the Restructuring Directive and national law

Under Article 288 para 3 TFEU, a directive is binding on each Member State to which it is addressed as to the result to be achieved, but leaves it to the national authorities to choose the form and methods.[12] They are binding on the institutions of the Union or the Member States because they are genuine legal norms/acts with binding effect, even if they merely prescribe 'objectives' but leave the choice of means free. However, this property is not referred to as "direct effect" in the sense that it has found its way into the case law of the ECJ. For the purposes of this predicate, the rules in question shall be presumed to be unconditional, complete and legally perfect and do not require any further action by the Union institutions or the States in order to fulfil or give effect.

[8] Brinkmann, European Insolvency Regulation, 2019, Introduction Para 37.
[9] Thole, in MünchKomm-InsO, Art. 20 EuInsVO 2000, Para. 31.
[10] Ibidem.
[11] Ibidem; disagree Vallender/Hänel, EuInsVO, 2 edition 2020, Art. 23 Para 72.
[12] W. Schroeder in Streinz, EUV/ÆUV, 3rd edition, 2018, Art. 288 ÆUV para 71.

In so far as direct application of a directive is excluded, national courts are obliged to interpret national law in conformity with the directive.[13] As the ECJ first stated in 1984, when applying national law, including in particular the provisions of a law specifically adopted to implement a directive, there is an obligation on national courts "to interpret that national law in the light of the wording and purpose of the directive in order to achieve the objective referred to in Article 189(3) TEC" (now Article 288(3) TFEU).[14] The ECJ bases the obligation to interpret directives in conformity with the directive on the requirement to transpose directives under Article 288(3) TFEU and the requirement of compliance with EU law under Article 4(3) TEU.

III. The impact and effects of European insolvency law on national law

1. The impact and effects of the EIR on national law

The impact and effects of the EIR on national law can be vividly demonstrated by an example that Professor Paulus from Humboldt University in Berlin has submitted in an essay published in 2012[15]:

On 10.1.2012, the High Court of Justice Northern Ireland had found in a meticulously deliberate decision that the centre of the main interests of the Irishman Sean Quinn was not in Northern Ireland, but in the Republic of Ireland. The consequence of this spectacular case there – Quinn was still the richest man in Ireland in 2008, but had to file for private bankruptcy in 2011 – is of course a reaction that was hardly conceivable before, but has almost become a familiar pattern since the adoption of the European Insolvency Regulation: Just two weeks after this Northern Ireland decision, the Irish legislator presented a bill that was intended to modernise the domestic bankruptcy law, which was not accessible at the time, in particular to reduce the period for obtaining discharge of residual debt from twelve years to three. This shows that the EIR exerts considerable pressure to modernise, if necessary also to adapt the respective national insolvency laws.

A similar development can also be observed in German law. The Act to Shorten Residual Debt Discharge Proceedings and Streng-

[13] Settled case law since ECJ 14/83 (1984), ECR 1984, 1891 -von Colson and Kamann v. Land Nordrhein-Westfalen; Case 79/83 [1984] ECR 1921 -Harz/Deutsche Tradax. See also Ruffert in Callies/Ruffert, EUV/AEUV, 6th edition, 2022, Art. 288 para 78.

[14] ECJ 221/83 (1984) ECLI:EU:C:1984:284 - Commission of the European Communities v. Italian Republic.

[15] Paulus, EuInsVO: Änderungen am Horizont und ihre Auswirkungen, NZI 2012, 297.

then Creditors' Rights of July 2013[16] enabled debtors for the first time to terminate residual debt discharge proceedings early after three or five years if they meet a minimum satisfaction quota within the the above-mentioned periods of time or at least bear the costs of the proceedings. The German legislator thus also reacted to the residual debt discharge tourism of German debtors to Great Britain promoted by the COMI regulation of the EIR, where debtors could regularly be discharged of their remaining debts after one year. In implementation of the Restructuring Directive, the obove mentioned SansinFoG now provides the granting of residual debt discharge after three years have elapsed since the opening of insolvency proceedings. A minimum satisfaction rate is no longer required.

2. The implications and effects of the Restructuring Directive on national insolvency law

Article 34 para 1 of the Restructuring Directive provides that Member States have until 17.7.2021 to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive. In the event of particular difficulties in implementation, the deadline may be extended by one year. Member States can choose the form and methods for transposing directives into national law. However, they are bound by the terms of the directive as to the result to be achieved and the deadline by which the transposition should take place.

a. The German option: StaRUG

In the absence of detailed knowledge of Polish insolvency and restructuring law, I can only show how the German legislator could have fulfilled its obligation to transpose. He could have made a selective addition to the Insolvency Code and company law with provisions on preventive restructuring and extensive references to insolvency law norms. He could also have anchored the framework in the Civil Code and supplemented it with provisions in the Code of Civil Procedure and other laws.[17] The German legislator finally opted for the possibility of adopting its own law on preventive restructuring frameworks, the new Act on the Stabilisation and Restructuring Framework for Businesses (StaRUG), which came into force on 1 January 2021. It is a part of the new German Act on the Further Development of Restructuring and Insolvency Law, or Sa-

[16] BGBl I 2013 p. 2379.

[17] Morgen, in Morgen, Präventive Restrukturierung, 2019, Einleitung para 21.

nInsFoG[18], which was passed in December 2020 and came into force 1.1.2021. The StaRUG creates a legal framework to enable restructuring to avert insolvency. It enables companies to restructure themselves on the basis of a restructuring plan adopted by a majority of creditors. This legal framework closes the gap left by the former restructuring law between the area of free restructuring, which is dependent on the consensus of all parties involved, on the one hand, and restructuring in insolvency proceedings, with its costs and disadvantages, compared with free restructuring.

b. Applications for the StaRUG

So far, there are not many applications for the StaRUG. According to consultants, however, the mere existence of the procedure has already had a helpful effect in negotiations. The modular structure of the restructuring instruments was also rated positively. The framework is a suitable tool, especially for pandemic-related financial restructuring. The fact that the "shift of duties" of the managing directors was not implemented is still critically evaluated. Accordingly, the notification of such proceedings without the consent of the shareholder could be relevant to liability for the managing director. For small and medium-sized enterprises (SMEs), the procedure is often too complex and too expensive. In the case of operational restructuring, the applicability is often not expedient, since contractual relationships cannot be interfered with and employee claims cannot be regulated directly. On the part of the banking industry, one would like to see an extension of the regulation of § 12 StaRUG. Accordingly, a restructuring plan can include provisions for the commitment of loans or other loans that are necessary for financing on the basis of the plan (so-called new financing). New financing is also considered to be their collateral. In the opinion of the banking industry, new loans should also include prolongations. This is also a credit decision.

c. Assistance by the German Ministry of Justice

In the meantime, the German Ministry of Justice has provided important assistance, especially for SMEs. Section 16 of the Corporate Stabilisation and Restructuring Act (StaRUG) provides for the provision of a checklist for restructuring plans that is to be specifically geared to the needs of small and medium-sized enterprises (SMEs). The Minsitry of Justice has fulfilled this obligation in July 2022. It submitted a checklist for restructuring plans for SMEs to

[18] BGBl. I 2020, p. 3256.

stakeholders. The BMJ points out that the checklist cannot and should not replace expert advice in individual cases and must therefore be limited to providing a structured overview of the individual requirements and thus an initial orientation. At the same time, in accordance with its obligation under section 101 StaRUG, it has provided information on its websites on the instruments provided by public authorities for the early identification of corporate crises (early warning systems).

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