

# US-style restructuring for Europe?

Benn Richards discusses proposals published by the European Commission in relation to a joined approach to the restructuring of corporate entities within the EU



**Caption:** While the UK remains in the EU, the proposed Insolvency Directive remains relevant.

Given the current political and legal climate, it does seem slightly odd discussing EU laws and the effect those laws may have within the UK given the EU referendum result, the fallout from that, and the pending Supreme Court decision concerning to what extent Parliament and the executive are empowered to trigger Article 50 and thereby give notice of the UK's intention to exit the EU.

However, and for present purposes, the UK remains in the EU, and therefore the proposed EU Insolvency Directive remains relevant. The Directive, which deals with insolvency reforms, appears to be a positive step towards improving business rescue packages across Europe.

# **What is being proposed under the Directive?**

Broadly speaking, it seeks to create a restructuring “framework” throughout Europe aimed at achieving the rescue of corporate entities facing financial distress. The idea will be that each EU member state has in place a common structure aimed at giving effectiveness to company rescues and restructuring. This, as some commentators have noted, will in turn create an entrepreneurial culture, with less stigma on company failure.

In addition, it is also proposed that each respective member state will have in place efficient restructuring processes. As part of the drive toward efficiency, the aim is that each member state will have more evolved insolvency laws, competent processes, highly skilled courts, judges and insolvency professionals.

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## **What are the differences with what we already have in the UK?**

Although, ultimately, it will be up to each respective member state to enact domestic laws to bring the Directive into effect, it is only right to consider the Directive and contrast it with the current laws in England and Wales.

We are fortunate within England and Wales that we have well evolved restructuring and insolvency processes, an established body of law, and well trained insolvency professionals, judges and court systems.

To some extent, the Enterprise Act 2002 sought to create a more restructuring and rescue-type culture, as it included changes such as out of court administrations.

However, the EU Directive is not yet law, and it will be up to each respective member state to make necessary domestic changes to their own laws. It may be that the UK already meets many of the fundamental objectives of the Directive.

# Is the Directive a US-type law?

Understandably, comparisons have been made between the EU Directive and US chapter 11. The US legislation is an insolvency process under chapter 11 of its Bankruptcy Code (its domestic insolvency law).

In order to properly compare and contrast the Directive with US chapter 11, much will depend upon each of the respective member state's domestic law, and what steps are taken to enact the Directive take. For example, it is not necessarily correct to compare UK company administrations with chapter 11, as there are material differences in relation to the two processes. And does it really matter for the UK given we are due to leave the EU?

Given that the UK's proposed exit from the EU, it is quite right to question whether the Directive will have any effect, if at all. It is likely that the Directive will be implemented within the two year period following the Article 50 Notice being given, so the Directive is very likely to have an effect. The bigger question is whether, and to what extent, the UK is required to implement the Directive.

England and Wales are currently carefully considering their own corporate and insolvency processes, and it may well be that many of the matters proposed under the Directive are already within the body/framework of current UK law.

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