

Institution: The University of Leeds		
Unit of Assessment: 18 Law		
Title of case study: Shaping European law on business restructuring, insolvency and debt discharge		
Period when the underpinning research was undertaken: 2009-17		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Gerard McCormack	Professor of International Business Law	2007-
Andrew Keay	Professor of Corporate and Commercial Law	2002-
Sarah Brown	Associate Professor in Law	2006-
Judith Dahlgreen	Lecturer in Law	2006-16
Period when the claimed impact occurred: 2015-20		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact (indicative maximum 100 words)		
<p>Research by McCormack, Keay, Brown and Dahlgreen helped the European Commission (EC) to show the need for the 2019 European Directive on business restructuring, insolvency and debt discharge. The research shaped key provisions included in the Directive and influenced the drafting of crucial provisions on business feasibility, rescue financing and restoring the viability of heavily indebted entrepreneurs. All European Union (EU) member states must implement the Directive by mid-2021. The EC predicts that implementation will positively affect 50,000 businesses and lead to the creation of 3 million new jobs and promote economic growth, social inclusiveness and the free flow of capital across the EU. The EC has also used the research to determine whether general insolvency law reforms should be applied to bank insolvency; other European bodies have used it to press for reform on insolvency and restructuring law.</p>		
2. Underpinning research (indicative maximum 500 words)		
<p>Across the EU, insolvency (a state of financial distress where individuals or companies are unable to pay their bills) has led to business closures, individual bankruptcy and significant job losses. The EC reports that an average of 200,000 businesses close every year, with a loss of over 1.7 million jobs (EC, 2019). This has made the reform of insolvency law a top priority for the EC. It forms an integral part of the Capital Markets Union project, while the 'Five Presidents Report' on <i>Completing Europe's Economic and Monetary Union</i> (22 June 2015) highlighted the state of insolvency law as a significant bottleneck preventing the integration of capital markets (EC, 2015). Reducing insolvencies benefits the whole EU economy as insolvency hinders economic growth and leads to social problems for member states and their citizens. Inconsistencies in the way countries deal with insolvency exacerbates these issues, prejudicing debt and equity markets.</p> <p>In 2014-16, the research team undertook a comparative and empirical study on substantive insolvency law across the EU to ascertain how laws could be reformed and harmonised. Commissioned by the EC Justice and Consumers Directorate-General, the study [a] provided a comprehensive analysis of restructuring and insolvency laws in all EU member states with a view to advancing a common European legal framework for helping financially troubled businesses and individuals. The researchers formulated questionnaires, approved by the EC, to obtain data from 30 national reporters – the 28 EU member states and 2 comparators (US and Norway). The research provided a horizontal cross-cutting analysis of the data, identifying and advising on areas where disparities in domestic laws produced pan-European problems and identified examples of good practice.</p> <p>The EC study [a] was shaped and informed by a body of research on business restructuring, insolvency and over-indebtedness issues developed by the Leeds research team [2-6], and this body of work, as shown throughout the study, has influenced on insolvency reform in Europe. The</p>		

EC study advanced a theoretical framework for law reform and identified: 1) how reform should enable the assets of indebted and insolvent persons and entities to be most effectively used, especially by creditors; 2) how access to credit could be facilitated; 3) how economic recovery, job creation and a more inclusive society could be fostered; and 4) how directors of insolvent companies should be accountable and made liable for misconduct.

Findings

The research found:

- absences, shortcomings and inconsistencies in existing national laws on directors' duties and liabilities, the regulation of insolvency practitioners, and the priority of creditors and debt discharge procedures for individual entrepreneurs and over-indebted consumers. The different national approaches to insolvency that exist across the EU have created gaps and inconsistencies in adopting the 2014 [EC Recommendation](#) on business failure, which was not binding and which precipitated the research [1-2].
- advantages and disadvantages of particular types of EU action in tackling deficiencies in the national frameworks governing insolvency and the restructuring of distressed businesses [1-6]. This fed into the decision to draft the Directive. Having regard to the principle underpinning the EU Treaties (that action is only appropriate where objectives cannot be achieved satisfactorily at national level and should be proportionate to the objectives), the EC study concluded that there was sufficient evidence to make a case for binding legislative action in the form of a Directive [1-2].
- advantages and potential concerns in relation to reform of when directors should be made personally liable for company debts and/or be made subject to disqualification periods [1-3]; obstacles in relation to any harmonised rules concerning which creditors get paid first [1-2]; a need for more clarity as to when entrepreneurs should have their debts discharged [1-2]; and that consumer over-indebtedness may be alleviated by writing off debt (the research identified best practice in this regard) [1-2].

3. References to the research (indicative maximum of six references)

- [1] McCormack, G., Keay, A., Brown, S. and Dahlgreen, J. 2016. *Study on a New Approach to Business Failure and Insolvency: Comparative Legal Analysis of the Member States' Relevant Provisions and Practices*. Publications Office of the European Union. https://ec.europa.eu/info/files/study-new-approach-business-failure-and-insolvency_en.
- [2] McCormack, G., Keay, A. and Brown, S. 2017. *European Insolvency Law: Reform and Harmonization*. Edward Elgar. ISBN 9781786433305. Monograph based on [1], described in a review in *International Insolvency Review* as 'magisterial' (p. 350): <https://doi.org/10.1002/iir.1287>.
- [3] Keay, A. 2015. 'The shifting of directors' duties in the vicinity of insolvency'. *International Insolvency Review* 24, 140-64. <https://doi.org/10.1002/iir.1236>.
- [4] Keay, A. 2017. 'The harmonization of the avoidance rules in European Union insolvencies'. *International and Comparative Law Quarterly* 66, 79-105. <https://doi.org/10.1017/S0020589316000518>.
- [5] McCormack, G. 2009. 'Rescuing small businesses: designing an efficient legal regime'. *Journal of Business Law* 4, 299-330. PDF supplied on request.
- [6] McCormack, G. 2017. 'Corporate restructuring law – a second chance for Europe?' *European Law Review* 42, 532-61. <http://eprints.whiterose.ac.uk/117309/>.

The research was supported by grants secured in open peer-reviewed competition:

[a] **European Commission** 'Study on a New Approach to Business Failure and Insolvency', awarded to the University of Leeds as the result of a successful tender bid (EUR317,000; March 2015-Jan 2016, JUST/2014/JCOO/PR/CIVI/0075) (**McCormack** and **Keay** PIs; **Brown** and **Dahlgreen** Co-Is).

[b] **European Commission** Action Grant, 'Security Rights and the European Insolvency Regulation' Civil Justice Programme 2013 (EUR481,000; May 2014-May 2016,

JUST/2013/JCIV/AG/4631). This project helped create a Europe-wide network that led to the successful EC tender bid [a]. McCormack was PI.

4. Details of the impact (indicative maximum 750 words).

The research enabled EC policy-makers to make the case to the European Parliament for taking a new approach to business failure, restructuring, insolvency and a second chance for insolvent debtors within Europe. Key beneficiaries to date, therefore, include policy-makers, advisors, and legislative drafters. The three dimensions of impact are:

(i) Informing the drafting of the European Directive

While undertaking the EC study [a], the research team engaged with the EC and discussed, received, and actioned feedback on the team's interim research findings with EC officials in Brussels in two face-to-face meetings (14 April 2015; 8 October 2015). As a direct result of the research, the EC were able to make a case for binding legislative action in the form of the 2019 Restructuring and Second Chance Directive [A]. The research was pivotal in the EC's determination of whether, and how, to propose an appropriate legislative response to restructuring and insolvency issues, as manifested by the fact that the researchers' report [1] is the only document referenced as underpinning research on the [EC website's](#) introduction to the new law. The study convinced the EC that insolvency reform should come in the form of a legal instrument leaving more, rather than less, choice to member states. A former legislative assistant of the EC Justice and Consumers Directorate-General explained: *'Indeed, the study has shown that the divergence between national insolvency laws would make it difficult to propose an instrument such as a Regulation. Instead, a Directive focusing on minimum standards would be more feasible...'* [D]. The EC Staff Working Document, which made nineteen distinct references to the Leeds report, confirmed: *'This need for current action [Directive] is evidenced by...the independent external evaluation of the implementation of the Recommendation on restructuring in the Study on a new approach to business failure and insolvency performed by the University of Leeds (January 2016)'* ([B] p. 105). All EU member states are required to implement the terms of the Directive in their own domestic laws by mid-2021, subject to a possible one-year extension. The EC predicts that implementation of the Directive will lead to the creation of 3 million new jobs and positively affect 50,000 businesses [E].

In addition to making the case for the Directive, the research provided a robust evidence base for the Directive's provisions [A]. The research [1] informed the EC Expert Group on Restructuring and Insolvency's consideration of the issues surrounding insolvency and the advice they gave on drafting the proposed Directive. A member of the EC Expert Group (appointed to advise the EC and to assist in formulating a proposal for legislation) confirmed: *'[the] Study has... framed and influenced several of the most important discussions that took place within the Expert Group, not only with regard to the legal nature of the instrument but also to its substantive content'* [C]. The adopted Directive includes three key elements: i) common principles on restructuring frameworks for financially distressed businesses (Articles 4-18 of the Directive); ii) rules to allow natural debtors to benefit from a second chance (Articles 20-23); iii) targeted measures for EU Member States to make insolvency, restructuring and debt discharge procedures more efficient (Articles 25-27) [A]. The member of the EC Expert Group went on to state: *'Key provisions of the proposal were analysed and designed under the influence of the Study e.g. on the moratorium on creditor actions, debtor-in-possession restructuring, directors' duties, classification of creditors, or new financing'* [C]. The former legislative assistant of the EC Justice and Consumers Directorate-General confirmed: *'[T]he findings of the comparative study were used by the Commission services to justify both the form of the legislative instrument [the Directive] and particular provisions to be included in that instrument... the study has had a clear impact on the choice of the EU policy makers to focus on the rules to facilitate debt discharges for entrepreneurs rather than to cover all individuals. This explains the choice in the final text of the Directive to exclude binding rules on consumer over-indebtedness'* [D]. This last comment means that it is left to individual member states to decide whether and how to apply the provisions of the Directive to deal with debts owed by consumers.

As a result of the research, EC officials were better able to understand and explain how restructuring procedures should be crafted and nuanced, as evidenced by the EC impact

assessment of the Directive ([B] p.17). For example, the researchers' definitions of concepts in the study, such as 'bankruptcy' and 'going concern value', were adopted in the proposal ([B] pp.193-96). Officials also gained an understanding of how new legislative developments at the EU level could be formulated and adopted for optimum innovation and change. For instance, the EC used the research:

- (a) as the foundation for its arguments that there was a clear need to develop procedures designed specifically for insolvent small and medium sized enterprises (SMEs) and as to how such procedures might be advanced ([B] pp. 28, 172-174 and contained in, for example, Directive articles 8(2), 11(1) and 12(3) [A]);
- (b) to support proposals for discharge of natural persons (both entrepreneurs and consumers) from debt obligations ([B] pp. 26, 40-41, 106 and contained in, for example, Directive articles 20-22 [A]);
- (c) to determine whether rescue plans (i.e. plans to restore the financial viability of the debtor's business) should divide creditors into classes for voting purposes, and whether (and to what extent) consent of creditors within each class is necessary for a court or administrative authority to approve restructuring plans ([B] p.18 and contained in, for example, Directive articles 9-11 [A]).

The Directive is a game-changer, bringing about business rescue for financially distressed businesses, and relieving highly indebted individuals of their debts, giving them a 'fresh start' free from debt. The Directive will create and preserve jobs and foster economic growth, support cross-border cooperation and economic integration, facilitate access to credit and build a more economically inclusive society [D]. This is encapsulated in the statement of Josef Moser (Austrian Justice Minister) when speaking on behalf of the EU Council of Ministers in December 2018 in relation to the Directive: *'Every year, 1.7 million people lose their jobs because their company goes bankrupt. We must therefore have robust insolvency rules in place across the EU to reduce the number of bankruptcies, and ensure that reputable entrepreneurs are offered a second chance. I am glad we have reached an agreement with Parliament so quickly so the new rules can be adopted ...'* ([EU Council Press Release](#), 2018).

(ii) Framing policy and legal change in EU member states

The Directive requires fundamental change for some member states, who must make substantial amendments to their laws. By clarifying concepts and providing a theoretical framework, the underpinning research [1] has assisted national policy-makers and their advisors in responding to the Directive. For example, a member of the EC Expert Group explained: *'the Study is...very useful at a national level to facilitate the implementation of the Directive. Since many of the provisions included in the Directive are relatively new in several Member State [sic], like Spain, the Study is one of the main references used by experts and stakeholders to set the conceptual and policy frame when advising local authorities in the implementation process'* [C]. The research has been used in a report by the Public Policy and Management Institute (PPMI), a leading European research and policy analysis centre, advising the Lithuanian Government on how insolvency law reforms need a wider, complementary institutional framework supporting business restructuring [F].

The main features of the Directive were used to inform recent changes to the UK's corporate restructuring and insolvency laws (Corporate Insolvency and Governance Act 2020). They were discussed in a House of Commons briefing paper used by MPs and those that work for them [G] and subsequently embraced in the terms of the Act, such as the introduction of a new insolvency process allowing for a standalone stay (a temporary pause) in relation to credit enforcement actions.

(iii) Raising awareness of the need for further legislative and regulatory action

The research [1]:

- (a) provided the EC with a base for analysing whether general insolvency law reform and harmonisation measures should also be applied to bank insolvencies, as provided for in the tender for a 'Study on differences between bank insolvency laws and on their potential harmonisation' [H]

- (b) was used in an Opinion by the European Central Bank to demonstrate the need for a pan-European regime for bank insolvencies, setting trigger points for opening restructuring proceedings and building on common underlying concepts and harmonised key elements [I].
- (c) was used by the Conference of European Restructuring and Insolvency Law (CERIL), an independent and influential lobby group, to argue for the harmonisation of European law on the avoidance of pre-insolvency transactions (which may undermine the principle of equality of treatment of creditors and make business rescues more difficult) [J].

The research has had a timely and extensive influence on a major area of EU commercial life, namely the problems of debt, and the resultant Directive has ushered in a new era in the EU for addressing insolvency and its effects on all companies and individuals with significant debts.

5. Sources to corroborate the impact (indicative maximum of ten references)

[A] European Commission, in relation to 4(i). Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' (COM/2016/0723 final - 2016/0359 (COD)) (pp. 17-18).

http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf. Text of the Directive itself:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN>.

[B] European Commission, in relation to 4(i). Staff Working Document Impact Assessment Accompanying the document 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' {SWD(2016) 358 final} (pp. 7, 16-18, 21-22, 26, 28, 34, 41, 105-106, 172-173, 192-193): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0357&from=EN>.

[C] Member of EC Expert Group on Insolvency Law and consultant at international law firm, Linklaters, in relation to 4(i). Letter of corroboration received 21 February 2020.

[D] Former legislative assistant of the EC Directorate-General Justice and Consumers. Letter of corroboration dated 26 March 2020

[E] European Commission Fact Sheets, in relation to 4(i). 'Early restructuring and a second chance for entrepreneurs: a modern and streamlined approach to business insolvency', June 2019 (pp. 1-4): https://ec.europa.eu/information_society/newsroom/image/document/2016-48/eu_factsheet_40047.pdf.

[F] PPMI (Public Policy and Management Institute), in relation to 4(ii). 'The use of flanking measures in the EU and their implementation to the Lithuanian context'. Draft study report, 31 January 2019 (pp. 17, 19, 20).

[G] House of Commons, in relation to 4(ii). Briefing Paper, Number 8922, 1 June 2020 (pp. 10-11, 22-23): <https://commonslibrary.parliament.uk/research-briefings/cbp-8922/>.

[H] European Commission, in relation to 4(iii). Directorate-General Financial Stability, Financial Services and Capital Markets Union research tender FISMA/2018/053E, 'Study on differences between bank insolvency laws and on their potential harmonisation' (p. 23):

<https://etendering.ted.europa.eu/document/document-old-versions.html?docId=44666>.

[I] European Central Bank, in relation to 4 (iii). Opinion on a proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures, 7 June 2019 (CON/2017/22) (p. 2, fn. 5): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017AB0022>.

[J] CERIL (Conference on European Restructuring and Insolvency Law), in relation to 4(iii). Report on transactions avoidance laws (2017, pp. 5, 7, 9-12, 14): <https://www.ceril.eu/news/ceril-statement-2017-1-on-avoidance-actions>.