One Size Fails All? EU Insolvency Law between Harmonisation and 28th Regime

Law Working Paper N° 924/2026

May 2026

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ECGI Working Paper Series in Law

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Abstract

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Keywords: insolvency, harmonisation, 28th regime, European Union

JEL Classifications: G33, G38, K22

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Against this background, the article considers the idea of an optional '28th regime' as a more flexible alternative. A supranational regime available for voluntary adoption could, in principle, combine legal certainty with respect for national diversity and allow for gradual learning through practice. Yet this approach, too, is plagued by design challenges and political constraints, and its success would depend heavily on its institutional detail. Rather than offering a simple solution, the 28th regime illustrates that EU insolvency integration requires experimentation, caution, and a recognition that one size cannot – and should not – fit all.

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I. Introduction

Harmonising the EU's national insolvency laws is in political vogue. Two major recent reports on the future of the European Union—authored by Enrico Letta and Mario Draghi, respectively—emphasise the urgent need to align national insolvency frameworks across the EU.[1] The long-standing EU agenda for a Capital Markets Union likewise calls for progress on this front.[2] International actors such as the International Monetary Fund[3], the European Central Bank[4] and various think tanks, interest groups, and other institutions have also urged the EU to further harmonise domestic insolvency rules.[5] Pressed by these initiatives, the European Union has now completed a first partial harmonisation project, prescribing Member States to align certain aspects of their national frameworks by early 2029.[6]

In parallel, the EU is also pushing for another legal instrument, which is known as the '28th Regime'. Rather than prescribing mandatory harmonised standards that Member States need to implement, the 28th Regime is planned as an optional instrument that firms and other market participants can choose as an alternative to the existing national legal systems. As a first step of this approach, the EU Commission has just proposed 'EU Inc.', a new legal form that offers optional corporate law standards for targeted mainly at innovative startup firms.[7] The EU Inc. also features a range of insolvency-

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[1] Enrico Letta, Much More Than a Market – Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens (April 2024) 35; Mario Draghi, The future of European competitiveness (September 2024), Part A, 64, 65; Part B, 283 f., 293.

[2] See below section II.3.

[3] International Monetary Fund, *IMF Staff Discussion Note: A Capital Market Union for Europe*, SDN/19/07 (September 2019), 24 f.

[4] European Central Bank, *ECB Contribution to the European Commission's Consultation on the Capital Markets Union Mid-Term Review* (12 May 2017) 13 <https://www.ecb.europa.eu/pub/pdf/other/ECB_contribution_to_EC_consultation_on_CMU_mid-term_review_201705.en.pdf>; European Central Bank, *ECB Banking Supervision Annual Report 2022* (March 2023) 82 available at <https://www.bankingsupervision.europa.eu/press/other-publications/annual-report/pdf/ssm.ar2022~e4b57f3b89.en.pdf>.

[5] See, e.g., European Economic and Social Committee, *Establishing the 28th Regime in Europe: A Unified Legal Framework to Support Growth and Business* (October 2025), available at <https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/establishing-28th-regime-europe>.

[6] Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law [2026] OJ L799.

[7] European Commission, 'Commission presents proposal for EU Inc. – unlocking the full potential of the Single Market for Europe's entrepreneurs' (18 March 2026), <https://ec.europa.eu/commission/presscorner/detail/en/ip_26_614>.

related rules, and it is possible that further steps in the 28th Regime agenda will bring further convergence at this front.[8]

What is striking about the EU Inc proposal is that many commentators converge on the view that the current impediments to scaling innovative firms in Europe cannot be attributed primarily to deficiencies in corporate law. Rather, most scholars emphasise that the more significant constraint lies in the limited capacity to effectuate firm exit, downsizing, or restructuring in a manner that is both timely and predictable.[9] From this perspective, a common approach to insolvency law assumes a pivotal function in shaping the conditions for, and ultimately enabling, a coherent and effective market for innovation within the EU.

In this prevailing climate of harmonisation enthusiasm, critical perspectives are often marginalised. Harmonisation is frequently portrayed as 'without alternative'. Yet it is precisely for this reason that the potential drawbacks and systemic risks of a harmonised European insolvency regime deserve careful scrutiny. This contribution aims to highlight where the current trajectory may be problematic and argues for a more balanced and differentiated approach to further integration in this field.

Lessons from past harmonisation attempts demonstrate that a common EU standard is not without significant downsides. For example, it is by no means clear that a harmonised EU instrument would have equal effects everywhere in the Union, given different business realities and market structures across Member States. At the same time, a harmonised standard suffers from ossifying the law, which may be heavily influenced by interest groups and political bargaining. A 28^{th} regime principally involves similar risks but would still be preferable due to its optionality and dynamic flexibility.

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[8] The Commission's Q&A make it clear that EU Inc. is only part of a larger project: 'The 28th regime represents Europe's broader offer to its businesses to help them seize the benefits of the Single Market. It includes EU Inc., but also sets out other measures for innovative companies to get access to funding, and operate seamlessly across borders, in all matters concerning their business. This includes measures on digitalisation, access to finance, measures to attract and retain talent, taxation, and to ensure a clear, predictable and swift legal framework.' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_26_615>.

[9] Jesús Alfaro Águila-Real, 'Completing the EU Inc Regime: A VC-Gated Startup Sandbox', Oxford Business Law Blog (28 April 2026), <https://blogs.law.ox.ac.uk/oblb/blog-post/2026/04/completing-eu-inc-regime-vc-gated-startup-sandbox>.

This paper proceeds as follows. Section II traces the development of European insolvency law from the original EU Insolvency Regulation to recent directives and proposals. Section III outlines the recently adopted Directive to harmonise substantial elements of domestic insolvency law. Section IV provides a normative analysis, focusing in particular on the structural weaknesses and risks of the harmonisation path. Section V discusses the alternative approach, known as the 28th Regime. Section VI summarises the key conclusions.

II. The Long Road to Harmonisation of Insolvency Law

1. Foundational Principles and EU Insolvency Regulation

The initial steps toward a European insolvency regime were not aimed at harmonisation in the substantive sense. The cornerstone of the European Insolvency Regulation (EIR)[10] adopted in 2000 was—and remains—conflict-of-law coordination. The Regulation leaves domestic insolvency laws intact while determining which national law applies in cross-border cases and which Member State holds jurisdiction.[11] This approach likely reflects the political constraints at the time, which made broader harmonisation unfeasible. It also acknowledges the considerable diversity across national insolvency systems, rendering harmonisation a technically and politically complex undertaking.[12]

Unsurprisingly, this coordination-based regime has exhibited structural weaknesses. By leaving national frameworks untouched while enshrining a broad right to freedom of establishment at the primary law level[13], the EIR inadvertently incentivised regulatory arbitrage and forum shopping. Market participants have long sought to engineer jurisdictional outcomes favourable to their interests by relocating their 'centre of main interests' (COMI) to another Member State.[14] The ability of companies and

[10] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1.

[11] EIR 2000, Articles 4 and 3.

[12] See EIR 2000, recital 11.

[13] TFEU Articles 49, 55.

[14] Wolf-Georg Ringe, 'Forum shopping under the EU Insolvency Regulation', (2008) 9 European Business Organization Law Review (EBOR) 579.

individuals to shift their COMI in order to access a more advantageous insolvency regime has raised persistent concerns in legal practice and academia. The recast EIR of 2015 attempted to curb 'abusive' forms of forum shopping through tighter COMI criteria and enhanced scrutiny.[15]

Why were EU policy makers initially so reluctant to embark on any harmonisation effort? One explanation surely lies in the absence of political consensus within the EU institutions, compounded by the pronounced heterogeneity of legal approaches among Member States. A further explanatory factor is the inherently sensitive nature of insolvency law, which is shaped by the historical and cultural context of each jurisdiction.[16] Insolvency law, a field strongly organised and influenced by court rulings and statutory procedure, is closely intertwined with national policy priorities and socio-economic choices. This encompasses divergent attitudes towards indebtedness and the social stigma attached to financial failure, both of which vary markedly across legal systems.[17] Differences also persist regarding the goals of an insolvency procedure,[18] the role of companies and their stakeholders in society, the weight accorded to freedom of contract, and the way in which jurisdictions navigate tensions between social and economic policy objectives.[19] These elements are difficult to reconcile, and their persistence has contributed to a protracted process marked by several unsuccessful beginnings.[20]

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[15] See, for example, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19, Article 3(1).

[16] Jennifer L. L. Gant, 'Insolvency Law Harmonisation: Pre-packs, Employees, and the Spirit of EU Law', in: Obiajunwa Ama (ed), *International Investment Law Reform: Contemporary Issues and Solutions* (Routledge 2025) 117, 118; Emilie Ghio, 'Crossing borders, breaking barriers: the EU's struggle for insolvency harmony' University of Edinburgh School of Law Working Paper No 2025/20, 5, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5346582>.

[17] On the difficulties of insolvency harmonisation generally, see Emilie Ghio, 'Harmonising Insolvency Law Around The World: Successes and failures' in: Bruno Zeller and Camilla Baasch Andersen (eds), *Routledge Handbook on Transnational Commercial Law* (Routledge 2025) 203.

[18] Christoph Paulus, 'The Eternal Struggle for Supremacy Between Creditor and Debtor' (2022) 31 Juridica International 59.

[19] Horst Eidenmüller, 'Comparative Corporate Insolvency Law' in Jeffrey N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (2nd edition, OUP forthcoming).

[20] In greater detail, see Jennifer L. L. Gant, 'Social Policy and Insolvency: Struggles toward Convergence' (2014) 2(4) Nottingham Insolvency and Business Law e-Journal 49 and 'Path Dependent Obstacles to Cross-Border Insolvency: A Social Darwinian Perspective' (2015) 3(7) Nottingham Insolvency and Business Law e-Journal (Special Edition) 101.

2. Early harmonisation attempts

More recently, EU legislation has taken a more ambitious turn. In response to the 2008–2009 financial crisis, the Union adopted the Bank Recovery and Resolution Directive (BRRD) in 2014, introducing harmonised rules for the resolution of credit institutions.[21] The 2019 Preventive Restructuring Directive marked a further shift: for the first time, the EU sought to standardise corporate restructuring mechanisms.[22] Inspired by Chapter 11 of the US Bankruptcy Code, this directive significantly expanded the space for business reorganisation within the EU. In many Member States, provisions on early-stage restructuring or second-chance regimes for entrepreneurs were previously inadequate or entirely lacking.[23]

However, these measures did not achieve complete harmonisation in their respective fields. The Preventive Restructuring Directive introduced many options and non-binding elements, which resulted in a menu of dozens of options for Member States.[24] The new 'non'-level playing field for restructuring efforts may ironically lead to a new wave of forum shopping, this time for example initiated by shareholders who look for the jurisdiction that best protects their own interests.[25]

Accordingly, recent data confirms the remaining diversity in effectiveness across national insolvency regimes. A 2020 study shows that creditors' recovery rates vary greatly and range between 7 % in the Czech Republic and 95.2 % in Denmark.[26]

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[21] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text [2014] OJ L173/190.

[22] 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, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18. On this, see Lydia Tsioli, *Viability in Corporate Debt Restructuring Law* (Edward Elgar 2025).

[23] Green Paper (n 29) 28.

[24] José Garrido, Chanda DeLong, Amira Rasekh, and Anjum Rosha, 'Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive' IMF Working Paper WP/21/152 (May 2021); Bob Wessels, 'As the Wheels [sic] Turns: On Paradigm Shift and New Dynamics in European Insolvency Law – Part Two' (2024) 21 International Corporate Rescue 4, 7.

[25] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (2nd edn, OUP 2022) para 1.100. In a similar vein, concerning the proposed Harmonisation Directive of today (see below), see Emanuella Agostinelli, 'The Path to Harmonisation of EU Insolvency Legislation: The Italian Perspective' (2024) 21 International Corporate Rescue 292, 297.

[26] European Banking Authority, *Report on the Benchmarking of National Loan Enforcement Frameworks – Response to the European Commission's Call for Advice on Benchmarking of National Loan*

Similar variance can be observed when looking at recovery time during insolvency proceedings, which ranges between one and seven years on average across Member States.[27] This persisting stark diversity was the main driver behind the European Commission's renewed attempts to call for harmonisation.

3. Capital Markets Union

Ultimately, it took a strategic relaunch of its efforts and a rebranding for the Commission to finally make progress. While previous attempts had been made under the heading of 'judicial cooperation', the new Commission under Jean-Claude Juncker from 2014 onwards framed the need for insolvency harmonisation as a necessity to promote capital markets development. That new positioning of the project was a bold political move, but a successful one – capital markets integration is a much more compelling story, which moves insolvency out of the technical field of judicial cooperation and tells a more forward-looking and growth-oriented story.[28]

Accordingly, when Juncker assumed the presidency of the European Commission in 2014, he launched his 'Capital Markets Union' (CMU) agenda, which aimed to deepen the integration of national capital markets across the EU and generate scale effects through a unified financial services framework.[29] A core component of this initiative was the convergence of insolvency regimes, given the crucial role insolvency law plays in shaping lending decisions.[30] Creditors must be able to price insolvency risk accurately, and divergent national standards create informational burdens and cost inefficiencies that fragment the European market.

The Commission argued that aligning insolvency laws would support the gradual emergence of truly EU-wide markets for debt and equity securities by reducing legal

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Enforcement Frameworks (Including Insolvency Frameworks) from a Bank Creditor Perspective, EBA/Rep/2020/29 (November 2020) 24-25 (Table 8).

[27] ibid 40-41 (Table 20).

[28] It should be remembered that, in 2014, EU policy makers were still under the impression of the 2008 global banking crisis. Promoting capital markets integration therefore also served an additional purpose, namely to strengthen alternative financing avenues for European firms, instead of relying too heavily on banking. See, on this point, Wolf-Georg Ringe, 'Capital Markets Union for Europe: a commitment to the Single Market of 28' (2015) 9 Law & Financial Markets Review 5.

[29] European Commission, *Green Paper: Building a Capital Markets Union* (18 February 2015) COM(2015) 63 final.

[30] Green Paper (n 29) 28.

uncertainty for cross-border investors.[31] It also noted that domestic insolvency procedures often suffer from excessive delays and costliness, resulting in low recovery rates and deterrence effects for market participants.[32]

In September 2020, under President Ursula von der Leyen, the Commission published a new Action Plan for the Capital Markets Union (2020–2024), reiterating the CMU's original objectives while aligning them with broader goals of green, digital, inclusive, and resilient recovery.[33] Among 16 proposed measures, it called for improved access to capital and liquidity for companies, enhanced financial literacy, increased legal certainty, stronger consumer protection, and the reduction of administrative and cross-border barriers.[34] In her second term, von der Leyen reframed the initiative as the 'Savings and Investment Union', though its core thrust has remained similar.[35]

Despite this rhetorical emphasis, little concrete progress was made on insolvency law harmonisation for some time. Political resistance and legal divergence among Member States remained formidable. During the Covid-19 pandemic, it was primarily national governments that introduced temporary insolvency measures in response to the anticipated wave of corporate distress.[36] It was not until December 2022 that the Commission took a decisive step forward by publishing a draft directive on the harmonisation of certain aspects of insolvency law.[37]

Subsequent negotiations produced a series of compromise proposals aimed at streamlining the text, clarifying Member State obligations, and enhancing

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[31] See also Ashok Vir Bhatia and others, *A Capital Market Union for Europe*, International Monetary Fund Staff Discussion Note (SDN/19/07) 10 September 2019.

[32] Green Paper (n 29) 28.

[33] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for People and Businesses – New Action Plan (24 September 2020) COM(2020) 590 final.

[34] A Special Report by the European Court of Auditors, *Capital Markets Union – Slow start towards an ambitious goal* (2020), available at <https://www.eca.europa.eu/Lists/ECADocuments/SR20_25/SR_CMU_DE.pdf> (accessed on 18 July 2025), confirms the need of further action in these fields.

[35] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Savings and Investments Union – A Strategy to Foster Citizens' Wealth and Economic Competitiveness in the EU (19 March 2025) COM(2025) 124 final.

[36] Emilie Ghio and others, 'Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic', (2021) 30 International Insolvency Review 427, 436 ff.

[37] European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (7 December 2022) COM(2022) 702 final.

convergence. In May 2025, the Council of the EU agreed on a general approach to insolvency harmonisation.[38] And in March 2026, the European Parliament gave its consent.[39] This marks the first time a substantive convergence of national insolvency laws has gained broad political backing – an undeniable breakthrough in a long and contested process.

III. The new Harmonisation Directive

The final version of the Harmonisation Directive adopted in March 2026[40] does not endorse all elements of the Commission's proposal; in particular, it removed the proposed section concerning the liquidation of insolvent microenterprises.[41] Nonetheless, consensus has emerged on several key provisions.

1. Avoidance Actions

A central pillar of the Directive – retained in the final version – concerns the harmonisation of avoidance actions.[42] These are intended to prevent debtors from depleting the insolvency estate to the detriment of creditors. Specifically, they allow for the unwinding of transactions carried out by the debtor prior to the opening of formal proceedings, thereby protecting the integrity of the estate.

Under the final text, the following types of transactions may be declared void: (i) preferential payments to individual creditors, (ii) transactions without or for manifestly inadequate consideration, and (iii) transactions carried out with the intention of harming creditors, provided the counterparty knew or ought to have known of the debtor's intent. The relevant look-back periods are three months, one year, and four years respectively

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[38] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – General approach (23 May 2025) Council document 9257/25.

[39] European Parliament, Legislative resolution of 10 March 2026 on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, P10_TA(2026)0057.

[40] Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law [2026] OJ L799.

[41] Cf. European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (7 December 2022) COM(2022) 702 final.

[42] Directive (EU) 2026/799, Articles 6 ff.

prior to the filing of the insolvency petition—or after the filing but before the opening of proceedings.

Member States had called for greater flexibility in this area. The final version thus introduced technical and linguistic refinements aimed at enhancing clarity while avoiding unnecessary detail.

2. Tracing Assets Belonging to the Estate

The Directive also obliges Member States to designate courts or competent authorities that, upon request by an insolvency practitioner, may access and search centralised national bank account registers and other relevant databases (so-called 'asset tracing').[43] The objective is to improve access to information about assets that either form part of the estate or should rightly be included in it.

The European Parliament's Legal Affairs Committee had further advocated granting cross-border access to the EU-wide interconnection system for bank account registers (BARIS).[44] The final version of the Directive follows this approach and allows in particular insolvency practitioners the ability to access national registers and courts in other Member States under the same conditions as domestic practitioners, regardless of their state of appointment.[45]

3. Pre-Pack Proceedings

The Directive also calls for the introduction of a 'pre-pack mechanism' across all Member States.[46] This will allow the sale of a debtor's business – or parts thereof – to be prepared and negotiated prior to the formal opening of insolvency proceedings. The transaction could then be executed shortly after proceedings commence.[47]

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[43] Directive (EU) 2026/799, Articles 14 ff.

[44] See the Report by the Committee on Legal Affairs by Rapporteur Emil Radev: Report on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)), 1 July 2025, https://www.europarl.europa.eu/doceo/document/A-10-2025-0126_EN.pdf.

[45] Directive (EU) 2026/799, Articles 15 ff.

[46] Directive (EU) 2026/799, Articles 21 ff.

[47] In further detail on this aspect of the harmonisation project, see Gant (n 16).

Under this mechanism, contracts that are essential for the continuation of business operations could be transferred from the debtor to the buyer without the counterparty's consent. The Council has introduced a range of safeguards to ensure respect for contractual freedom.

4. Duties of the Company's Management in Financial Distress

According to the final text of the Directive, directors must file for insolvency within three months of becoming aware of the company's financial distress.[48] This is a minimum standard, and stricter filing duties continue to be allowed.

At the same time, Member States are allowed to introduce a certain flexibility in this regard. For example, they may suspend this obligation if the management takes action aimed at protecting creditors' interests and ensures a level of protection equivalent to that provided by the duty to file. Likewise, they may allow directors to fulfil this duty by publicly disclosing the company's insolvency in an official register.

Member States shall ensure that directors not complying with this duty are personally liable in accordance with national laws.

5. Creditors' Committees

The Directive also introduces the obligation to establish creditors' committees under certain conditions in all Member States.[49] Such committees are intended to strengthen creditor participation in insolvency proceedings, particularly for those with limited resources or located abroad. The Directive seeks to standardise key aspects of the committee's structure, including its composition, rights and duties, and the personal liability of its members.

6. Transparency Obligations

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[48] Directive (EU) 2026/799, Articles 40 ff.

[49] Directive (EU) 2026/799, Articles 44 ff.

Finally, Member States will also be required to produce an information sheet summarising the key features of their national insolvency regimes.[50] This transparency measure aims to reduce barriers to cross-border investment and has been broadly accepted in the most recent Council compromise.

7. Outlook

At the time of writing, the Directive has just been finalised and published in the Official Journal. Member States have to implement the harmonisation obligations by 2029.[51] Even if the negotiations were fierce, even if the Directive only covers certain (limited) aspects of insolvency law, and even though many parts of the Directive were watered down during the negotiations – one thing is clear: the momentum toward substantive harmonisation of insolvency law in the EU is now irreversible.

IV. Economic Rationale and Critical Assessment

Given the political momentum surrounding the harmonisation project, a moment of reflection is warranted—particularly on the functional merits of the reform. While the Harmonisation Directive enjoyed broad political support, its practical necessity and systemic effects deserve closer scrutiny.

As outlined above, the general concept of harmonising insolvency regimes across the EU is backed by many policy makers.[52] The rationale is intuitive: it is widely perceived as a necessary complement to the EU's internal market as the diversity of national insolvency regimes complicates cross-border investment, lending, and restructuring.[53] Creditors dealing with debtors in other Member States must understand the debtor's insolvency risk, which may differ significantly from the insolvency law of the creditor's

[50] Directive (EU) 2026/799, Article 51.

[51] Directive (EU) 2026/799, Article 55.

[52] See above section I.

[53] Diego Valiante, 'Harmonising Insolvency Laws in the Euro Area: Rationale, stocktaking and challenges', CEPS Special Report No. 153 (December 2016); Emilie Ghio, 'Crossing borders, breaking barriers: the EU's struggle for insolvency harmony' University of Edinburgh School of Law Working Paper No 2025/20, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5346582>. There is also (limited) economic evidence on the impact of legal harmonisation. See Franziska Bremus and Tatsiana Kliatskova, 'Legal harmonization, institutional quality, and countries' external positions: A sectoral analysis' (2020) 107 Journal of International Money and Finance 102217.

home country. In addition, creditors from outside the EU are facing many different national traditions. The associated uncertainty regarding the creditor's legal position undoubtedly increases the transaction costs for loan and security agreements.[54] This is because creditors must obtain information about their position under another or an uncertain legal system when granting a loan or entering into other contractual agreements.[55] While this appears possible with some effort for multinational banking groups or large global corporations, the effort required for creditors from small and medium-sized enterprises is disproportionate and may even be prohibitive. In such cases, creditors will either demand exorbitant interest rates or collateral to manage the legal uncertainty and the associated risk, or they will refrain from entering into the contract altogether. In particular, the different hierarchies and priorities for creditors in different legal systems are seen as a barrier.[56] There are also significant differences between EU countries regarding insolvency requirements, procedural rules, priority of claims, and restructuring mechanisms.[57]

Furthermore, in several Member States, national insolvency laws are outdated or poorly functioning, which creates additional costs for businesses.[58] The Commission and other stakeholders cited the absence of effective restructuring tools in certain jurisdictions as one of the main justifications for the 2019 Preventive Restructuring Directive.[59]

Another often-cited benefit is the creation of a 'level playing field', meaning that a common EU insolvency standard can strengthen the common business framework for companies in the EU and avoid possible distortions.[60] Harmonised rules would reduce

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[54] See for example Reinhard Bork and Michael Veder, *Harmonisation of Transactions Avoidance Laws* (Intersentia 2022) para 1.3.; Helmut Wagner, 'Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union', in: Jan Smits (ed), *The Need for a European Contract Law. Empirical and Legal Perspectives* (Europa Law Publishing 2005) 27.

[55] Bo Becker and Martin Oehmke, 'Restructuring and insolvency – opportunities for reform in Europe', European Systemic Risk Board ASC Insight No. 4 (May 2025) 14.

[56] Draghi Report (n 1), Part A, 65.

[57] Draghi Report (n 1), Part B, 284.

[58] Sergei A. Davydenko and Julian Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.', (2008) 63 Journal of Finance 565, 603-604

[59] European Commission, Commission Staff Working Document – Impact Assessment: Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency (12 March 2014), SWD(2014) 61 final.

[60] 'Harmonisation of insolvency regimes will further promote a level playing field', see INSOL Europe, *Harmonisation of Insolvency Law at EU Level: Report to the European Parliament's Committee on Legal Affairs* (2010), 26.

regulatory arbitrage and ensure that companies compete on economic rather than legal grounds.[61] This could also enhance the competitiveness of the European economy as a whole.[62]

Finally, harmonisation is expected to curb forum shopping—an objective expressly mentioned in the legislative materials.[63] The argument behind this is that a common European standard removes the incentive for firms to arbitrage for the most attractive regime, simply because harmonisation ultimately assimilates different Member States' legal systems. Additionally, a harmonised EU standard appealing to business participants may remove the incentive to forum shop in third countries: For example, the EU Directive on Preventive Restructuring may have reduced the number of EU companies filing in the UK or US because the implementation of the Directive has improved restructuring options and legal framework in many EU countries.[64] Whether curbing forum shopping is always desirable if of course an open question, and there are good reasons to believe that some form of 'beneficial' forum shopping exist, and that it is not desirable to eliminate these options.[65]

While most of these arguments are compelling at first glance, a more critical view reveals a range of structural concerns that are often overlooked in the policy discourse. Legal and political documents[66] frequently emphasise the advantages of harmonisation while only briefly touching on its potential downsides.[67]

The following analysis identifies several core weaknesses of the harmonisation agenda, calling into question whether the promised benefits will materialise in practice.

[61] European Commission, 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) 723 final (22 November 2026) 2 ff.

[62] See also Jason Jack, 'A Missing Variable: The Impact of Cross-Border Insolvency Laws on Foreign Direct Investment' (2018) 27 Minnesota Journal of International Law 287.

[63] European Commission (n 59) 19-20.

[64] In that case, the question arises whether the reduction in forum shopping is a result of harmonisation efforts or rather of the improvement in legal quality itself.

[65] See below section IV.3.

[66] See above section I.

[67] For example, see Issam Hallak, *Harmonisation of insolvency laws: Economic perspectives*, European Parliament Briefing (January 2025).

1. A Fragmented Internal Market

The 'one size doesn't fit all' argument aptly captures the core problem that a uniform regulatory standard is often ill-suited to reflect the diversity of real-world constellations. Applied to our context, the question arises whether a harmonised insolvency standard can adequately accommodate the heterogeneous corporate landscape within the European Union.

There is broad agreement that the fundamental economic rationale underlying insolvency law is essentially the same across jurisdictions: it serves to prevent an inefficient race among creditors to enforce their claims. Insolvency law achieves this by converting individual creditor rights into collective ones, thereby removing the incentive for economically detrimental and destructive creditor behaviour.[68] In practice, however, the economic conditions in which this problem arises vary considerably across Member States. One important factor in this regard is the degree of concentration in the creditor and banking sectors, which differs significantly between jurisdictions.

For example, Germany has traditionally exhibited a relatively low degree of concentration in its banking sector. The German market is characterised not only by a few large banks but also by a wide array of smaller institutions, such as local savings banks (Sparkassen) and cooperative banks (Volksbanken and Raiffeisenbanken). In contrast, in France and in many smaller Member States, the banking sector tends to be much more concentrated and dominated by several large financial institutions.[69] This divergence is well illustrated by the Herfindahl-Hirschman Index (HHI), a widely recognised and frequently used measure of market concentration.[70]

If these indicators and empirical studies confirm a highly heterogeneous banking structure within the internal market, the question of whether a uniform insolvency regime is appropriate becomes even more pressing. An insolvency regime that grants

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[68] John Armour, 'The Law and Economics of Corporate Insolvency: A Review', ESRC Centre for Business Research, University of Cambridge Working Paper No. 197, 2001.

[69] See, for example, Olivier de Bandt, 'EMU and the structure of the European banking system', in: Michael Artis, Axel Weber and Elizabeth Hennessy (eds), *The Euro – A Challenge and Opportunity for Financial Markets* (Routledge 2000) 121; International Monetary Fund, *Integrating Europe's Financial Markets* (IMF 2007).

[70] See European Central Bank, *Structural Indicators for the EU Banking Sector* (June 2020), table 2.

strong rights to creditors may be justified in a market where the banking sector is fragmented and creditor concentration is relatively low. In markets dominated by a small number of powerful banks, however, these institutions are likely to possess strong bargaining power and are capable of contractually enforcing favourable terms on their own. In such cases, they do not require additional statutory reinforcement. Accordingly, there is a risk that a harmonised EU insolvency framework may lead to excessively creditor-friendly outcomes. The concern that overly pro-creditor regimes can have adverse macroeconomic consequences – such as dampening firms' willingness to take entrepreneurial risk and, ultimately, reducing the innovative capacity of an economy – is well established in the economic literature.[71]

A current example from new Harmonisation Directive illustrates the point. One of the central objectives of the new Directive is to unify the rules on avoidance actions across the EU. The relevant provisions in the final text of the Directive[72] closely resemble the existing German law and will require only minor amendments to the German Insolvency Code (Insolvenzordnung, InsO) once they are implemented into German law.[73] Within the broader spectrum of possible regulatory approaches, these rules may therefore be regarded as relatively creditor-friendly. Yet it remains an open and rarely addressed question whether this regulatory approach is suitable and reasonable for all EU Member States – including those with far more concentrated banking sectors and thus, in principle, creditors with greater enforcement power.

A similar argument against the 'one size fits all' approach can be made with reference to the still highly heterogeneous industrial structures across EU Member States, many of which are dominated by very different economic sectors. These structural differences, too, point to the need for a differentiated legal framework.[74] Overall, there is a considerable risk that harmonisation of insolvency laws could lead to unintended

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[71] See, for example, Viral Acharya, Yakov Amihud and Lubomir Litov, 'Creditor rights and corporate risk-taking', (2011) 102 Journal of Financial Economics 150.

[72] See Directive (EU) 2026/799 (n 40), Articles 6 ff.

[73] Christoph Thole, 'Der Kommissionsvorschlag für eine Richtlinie zur Harmonisierung bestimmter Aspekte des Insolvenzrechts, COM (2022) 702', [2023] Zeitschrift für Wirtschaftsrecht (ZIP) 389, 392; Stephan M. Schubert, 'Das deutsche Insolvenzanfechtungsrecht und die Mindestharmonisierungsvorgaben des Richtlinienentwurfs COM(2022) 702 final', [2023] Neue Zeitschrift für Insolvenzrecht (NZI) 193, 195.

[74] See the seminal work by Peter A. Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2001).

distortions by standardising legal norms that do not reflect the economic realities and institutional contexts of the respective national economies.

2. The Harmonisation Dilemma

One of the core challenges of harmonisation is selecting the appropriate normative model. Which Member State's law should serve as the template for a European standard? With 27 insolvency regimes in play, the drafting of a 'common European line' inevitably becomes a political exercise.

Each Member State has an incentive to present its own model as efficient and exemplary. This generates political competition to shape the final outcome in line with national preferences. The danger is that the most politically persuasive – not necessarily the most functionally effective – model may become the EU standard.

Another frequent dynamic is to default to a particularly strict or 'maximalist' model to bridge divergent national regimes. The General Data Protection Regulation (GDPR) is one example: by setting a high baseline, it was intended to forge consensus.[75] Yet in practice, such approaches may prove overly rigid – especially in fields like insolvency law, where flexibility and responsiveness are key.

Rather than relying on political bargaining, a more desirable route would be to develop common standards based on empirical data, cost-benefit analysis, and functional assessment. However, the EU's legislative process is often shaped by lobbying, interest-group pressure, and ideological assumptions[76] – factors that are again evident in the new Harmonisation Directive.[77]

To a certain extent, regulatory competition can serve as a corrective against such tendencies. When national legal systems compete with one another – such as in the present-day context of forum shopping – a functioning market can, through the

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[75] To be sure, theoretically the opposite would also be conceivable: that the mildest standard would prevail; but this seems rather unlikely for reasons of political economy.

[76] See generally on the EU Restructuring Directive Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union', (2019) 20 European Business Organization Law Review 547, 559.

[77] To illustrate, see e.g. the detailed commentary and diverging positions concerning Titles IV and VII of the (now-adopted) Directive in: Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – Comments on Title IV and Title VII*, Council Document 5904/25, 4 February 2025.

voluntary adoption and imitation of successful models, identify the most efficient solutions. This dynamic has been observed, for instance, in corporate law, where a limited degree of regulatory competition following the *Centros* decision led to the establishment of a market standard within the EU.[78] Specifically, the British private limited company and its lack of minimum capital requirements gained popularity, prompting other Member States to adopt similar reforms. Improvements in the speed and cost of company formation were also introduced as a result of this competitive pressure.[79]

Comparable signs of such regulatory competition can be observed in the area of insolvency law. For example, the German legislature responded to international developments and the growing availability of foreign alternatives long before the adoption of the EU Restructuring Directive. This led to the introduction of a restructuring-oriented insolvency plan procedure (Insolvenzplanverfahren),[80] which was further expanded in 2011 through the Act to Facilitate the Restructuring of Enterprises (ESUG).[81]

3. Legal Competition as a Discovery Mechanism

Further arguments emphasise the general advantages of regulatory competition over harmonisation. Every harmonisation measure deprives Member States of the ability to test innovative solutions and experiment with novel regulatory approaches.[82] It has long been recognised that decentralised regulatory competition can function as a 'discovery procedure', leading to improved legal solutions.[83] This notion of discovery is

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[78] Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10 European Company and Financial Law Review (ECFR) 230; Simon Deakin, 'Regulatory Competition versus Harmonization in European Company Law', in: Daniel C. Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (OUP 2001), 190 ff., speaks of 'negative harmonization'.

[79] See Wolf-Georg Ringe, 'Sparking regulatory competition in European Company Law – The impact of the *Centros* line of case-law and its concept of abuse of law', in: Rita de la Feria and Stefan Vogenauer (Hrsg.), *Prohibition of Abuse of Law – A New General Principle of EU Law* (Hart Publishing 2011) 107.

[80] §§ 217 ff. InsO, modelled on the American chapter 11 procedure.

[81] Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) of 7 December 2011, BGBl. I 2011, 2582.

[82] See Eidenmüller (n 76) 560.

[83] Friedrich August von Hayek, 'Der Wettbewerb als Entdeckungsverfahren', in: *Freiburger Studien* (Mohr Siebeck 1969) 249 ff.

a central insight of ordoliberal and institutional economic theory: legal diversity is not a problem, but a functional component of adaptive and learning-capable systems.

Harmonisation, by contrast, restricts the scope for experimentation, innovation, and the productive incorporation of national particularities into legal design.[84] Uniform rules may effectively amount to a legal monopoly – with all the associated risks: overregulation, standardisation despite underlying differences, increased complexity, and reduced adaptability. These risks are particularly pronounced in dynamic areas such as corporate or financial law, where a lack of flexibility poses a serious challenge for market participants.

The danger lies not least in institutional inertia: once a regulatory framework is adopted at the European level, it is – based on past experience – extremely difficult to update and reform later on, even when practical shortcomings become evident. The consequence may be a form of normative ossification that stifles innovative national reform efforts.[85] Such legal immobility ultimately undermines the goal of effective, market-oriented, and functional regulation.

From this perspective, regulatory competition in insolvency law within the European Union deserves greater recognition – not as a threat to integration, but as an institutional mechanism for optimising legal standards. The gradual construction of a common internal market must not be equated with the simultaneous elimination of legal diversity and regulatory discretion. On the contrary, it is precisely this diversity that holds epistemic potential which, in the long term, can also benefit the development of a shared European regulatory approach. It is in this context that most commentators – and the EU Commission itself – agree that at least some degree of forum shopping is welcome in the Internal Markt: the distinction between positive and negative forum shopping is the implicit recognition that some freedom of choice for firms can serve as a useful market mechanism and is preferable over one size fits all rules.[86]

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[84] Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1998) 107 Yale Law Journal 2359; Deakin (n 78).

[85] An example is the so-called second Company Law Directive, which enshrines the concept of minimum capital for public companies in the EU (see now Company Law Directive (EU) 2017/1132, Article 45), which has not been changed for decades.

[86] For greater detail, see Wolf-Georg Ringe, 'Article 3' in Reinhard Bork and Kristin van Zwieten, *Commentary on the European Insolvency Regulation* (2nd edition, OUP 2022) para 3.69 ff.

4. Interactions and Frictions with other Areas of Law

Another challenge arises from the fact that any harmonisation of insolvency law provisions can, by necessity, only encompass a portion of the broader legal system and will inevitably generate frictions with adjacent areas of law. Insolvency law does not exist in isolation; by its very nature, it intersects with numerous related legal fields.

It cannot be easily separated from property law, tax law, labour and social law, contract law, and the procedural laws of other Member States. As long as these areas remain divergent, it will be impossible to achieve full harmonisation of the effects and functioning of insolvency law.[87] For instance, due to the significant differences in the structure and role of the judiciary and court organisation in insolvency proceedings across Member States, it is unlikely that judicial oversight of officeholders and insolvency administrators can be meaningfully harmonised. To mention another example, some Member States introduce elements of social justice and redistribution into their legal systems, while others leave those aspects out of insolvency law and refer so their general social safety net and taxation system.[88]

Moreover, insolvency law and company law are often deeply intertwined. What is regulated under company law in one jurisdiction may fall within the scope of insolvency law in another.[89] This divergence is also reflected in the way different EU legal instruments treat company and insolvency law—an inconsistency that can lead to significant practical problems and legal frictions.[90]

It is very telling that, as recently as in 2016, the European Commission itself acknowledged the interconnectedness of insolvency law with other branches of law. It stated: ‘Prescriptive harmonisation [of insolvency law] could require far-reaching

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[87] Insol Europe (n 60) 27.

[88] Stephan Madaus, ‘Harmonisierung der Insolvenzrechtsregime der Mitgliedstaaten – eine substanzielle Verbesserung des Sanierungsrechts?’, in: Christoph A. Kern, Christopher Seagon and Sascha Haghani (eds), *Aus Theorie und Praxis der Unternehmenstransformation* (Nomos 2024) 25.

[89] See, for example, the discussion on the liability of directors under corporate or insolvency law according to Section 15b InsO (previously § 64 GmbHG); on this Wolf-Georg Ringe and Charlotte Willemer, ‘Zur Anwendung von § 64 GmbHG auf eine englische Limited’ [2010] Neue Zeitschrift für Gesellschaftsrecht (NZG) 56, 57.

[90] Carsten Gerner-Beuerle and Edmund Schuster, ‘The Costs of Separation: Friction Between Company and Insolvency Law in the Single Market’ (2014) 14 Journal of Corporate Law Studies 287.

changes to commercial law, civil law and company law, whereas flexible provisions risk not bringing about desired changes.'[91]

Anyone advocating for the harmonisation of insolvency rules must therefore first grapple with the fundamental question of what exactly falls within the scope of 'insolvency law' and how conflicts and inconsistencies with other areas of law should be managed. To achieve the intended effects, changes to related legal frameworks may be required; otherwise, a partial harmonisation limited solely to insolvency-specific provisions may remain ineffective—or worse, prove counterproductive.[92]

5. Enforcement and Institutional Capacity

A final structural concern relates to enforcement. Genuine harmonisation cannot succeed as long as legal enforcement continues to be handled differently across EU Member States. It is often assumed that once Member States adopt harmonised rules, those rules will be applied uniformly. But this assumption is flawed—particularly where the implementation and enforcement of harmonised rules remain decentralised and lie within the discretion of national authorities.

Experience in other fields—such as capital markets law or consumer protection—shows that identical legal texts can produce widely divergent enforcement practices. In capital markets law, for example, the EU has increasingly sought to harmonise procedural enforcement mechanisms, but progress in this area has been slow and tentative.[93]

The reasons are manifold: institutional capacity, judicial culture, administrative infrastructure, and even informal norms all influence how laws are implemented.[94] In

[91] European Commission (n 61).

[92] For a critical analysis of incomplete harmonisation efforts in the context of pre-insolvency restructuring procedures, see Reinhard Bork, 'Pre-insolvency frameworks: Developments in the European Union' (2024) 33 International Insolvency Review 6, 18 ff.

[93] See, for example, the new chapter VI A 'sanctions and measures' of Transparency Directive 2004/109/EC, introduced by Directive 2013/50/EU.

[94] To mention just two examples: in the variables assessing efficiency in civil justice in the Rule of Law index, Italy and Greece are traditionally classified far behind most EU countries. Also, when comparing judges' experience, Dutch judges are probably more international and financially experienced than many other EU judges.

the context of insolvency law, where court supervision and practitioner expertise are crucial, these disparities are particularly significant.

The US experience is instructive. Despite having a uniform Bankruptcy Code, American insolvency practice varies considerably across jurisdictions. Regional courts have developed different interpretations, giving rise to persistent forum shopping even within a federal framework.[95]

For Europe, this implies that as long as structural differences in enforcement persist, the mere harmonisation of substantive norms will not be sufficient to achieve the intended regulatory objectives. Without effective, uniform, and enforceable procedural standards, the project of achieving a functionally effective harmonisation remains incomplete.

V. A Compromise Solution? The '28th regime'

There is a different option on the table. Instead of promoting substantive harmonisation across the EU via a directive, policy makers have recently pushed the project of developing an optional, supranational legal framework—commonly referred to as a '28th Regime'—intended to complement, rather than replace, the existing national regimes of the Member States.[96] The hope is that this approach will be easier to agree on and thus will be able to 'cut the Gordian knot'.[97] Just like traditional harmonisation attempts, the underlying rationale is to provide companies operating across borders with a coherent and predictable legal environment, thereby reducing transaction costs and legal uncertainty.[98] While the concept has an earlier pedigree in many EU private law debates, it has gained renewed momentum in light of broader efforts to foster

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[95] Cf. Jared Ellias, 'Bankruptcy Claims Trading', (2018) 15 Journal of Empirical Legal Studies 772.

[96] This was inter alia proposed by the Letta Report of 2024 (n 1).

[97] J. Scott Marcus and Maria Alessandra Rossi, *Strengthening EU digital competitiveness – Stoking the engine* (EUI 2024) 73.

[98] European Parliament, *Identification of hurdles that companies, especially innovative start-ups, face in the EU justifying the need for a 28th Regime*, In-Depth Analysis (July 2025), available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2025/775947/IUST_STU(2025)775947_EN.pdf>. See also European Parliament, *The Scope of the 28th Regime – A legal framework for innovation the European way* (July 2025), available at <https://www.europarl.europa.eu/RegData/etudes/IDAN/2025/776311/IUST_IDA%282025%29776311_EN.pdf>.

innovation, promote cross-border start-ups and scale-ups, and deepen the integration of the internal market.

As a first step, the European Commission proposed a Regulation for a new corporate form, known as ‘EU Inc.’, in March 2026.[99] This proposal provides the legal framework for a new company type which would be optional for business participants. Different from the 2001 Societas Europaea (SE),[100] which is targeted at large, public companies, the EU Inc is geared at small, startup companies. The proposal mostly covers corporate law rules and proposes a fast and digital incorporation process, which is likely to be attractive for entrepreneurs. On the positive side, the legal framework envisaged is a Regulation, which means that it will be a standalone EU regime which will not have to be transposed into national laws but becomes directly applicable as a pan-European legal instrument.[101] At the same time, however, the proposal retains a gap-filling reference to national law, which undermines the desired uniformity of the regime and may disappoint investors.[102]

The proposal is part of a greater project with more elements to follow.[103] For now, it includes only few rules on insolvency. Specifically, for an EU Inc. that meets the criteria of being an ‘innovative’ startup, the proposal provides for a simplified winding-up procedure and a framework for electronic auction of assets within such a procedure.[104] Ironically, these rules appear to have been taken from a part of the Harmonisation Directive that did not find political agreement at the time.[105] They lack a common

[99] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the 28th Regime Corporate Legal Framework – ‘EU Inc.’, COM(2026) 321 final* (18 March 2026).

[100] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L294/1.

[101] That is, it is unlike a Directive, which would have required national implementation steps – at the risk of diverging interpretations.

[102] For more detail, see Wolf-Georg Ringe, ‘EU Inc: Why Startups Gain – and Venture Capital Hesitates’, Oxford Business Law Blog (30 March 2026), <https://blogs.law.ox.ac.uk/oblb/blog-post/2026/03/eu-inc-why-startups-gain-and-venture-capital-hesitates>.

[103] See above n 8.

[104] Commission Proposal (n 99), chapter X.

[105] Namely, the proposed rules on the insolvency of ‘microenterprises’ (Art. 38 ff. in the Commission Proposal, n 37).

definition of ‘insolvency’[106] trigger and provide no clarity on questions such as creditor hierarchy.

Still, the Commission argues that national insolvency frameworks are not always fit to treat innovative startups ‘properly and proportionately’ and that the 28th regime therefore needs to provide a ‘swift and cost-effective proceeding’.[107] This proposed regime relies on digital communication and a standard form. Per default, the debtor’s assets should be realised through an electronic public auction. And finally, the proposal obliges Member States to interconnect their electronic registers so that information is circulated across the EU. This optional regime leaves all other instruments of EU insolvency law in place.[108]

While this proposal is only providing for a limited range of insolvency-related rules, the previous policy thinking in some quarters had been to create a more ‘complete’ 28th regime, governing the entire framework for business organisation, with insolvency law to be included in the optional regime. And as explained above, a coherent and predictable insolvency regime across the EU may play a much more important role than a harmonised set of corporate law rules.[109] Accordingly, the Commission’s exploratory work, reflected in its public consultation and related studies,[110] had aidentified insolvency proceedings as a domain in which legal fragmentation continues to impede cross-border activity and corporate restructuring.[111] This would have meant a much more ambitious approach to insolvency, in particular a standalone, elective framework offering streamlined procedures, clearer creditor hierarchies, and more efficient restructuring or liquidation mechanisms for firms that opt in.[112] In any case, this approach is conceived not as a wholesale harmonisation of Member States’

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[106] The starting point in Art. 89(2) of the Commission Proposal (n 100) is cash-flow insolvency. But the text adds that ‘Member States shall set out clear, simple and easily ascertainable conditions under which an EU Inc. innovative startup is deemed to be generally unable to pay its debts as they mature.’

[107] Commission Proposal (n 100) 21-22.

[108] Commission Proposal (n 100) 3.

[109] See above p 3.

[110] European Commission, ‘Public Consultation on the 28th Regime’ (2025), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14674-28th-regime-a-single-harmonized-set-of-rules-for-innovative-companies-throughout-the-EU_en>.

[111] ibid.

[112] European Law Institute, ‘ELI Response to the European Commission's Public Consultation on 28th Regime’ (2025) https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_to_the_EC_Public_Consultation_on_28th_Regime.pdf.

insolvency laws, but rather as a parallel regime, accessible on a voluntary basis, that coexists with domestic insolvency systems.[113]

Even though the first limited proposal is now on the table, the political and legal feasibility of this initiative remains uncertain. While some commentators are critical of the EU Inc. proposal,[114] some have completely rejected the idea.[115] Others are more positive and develop specific proposals and formulate key criteria that should be included in a 28th regime.[116]

1. Political difficulties

Taking a step back, the central question for the present analysis is whether an 'optional' regime constitutes a preferable course of action to further the creation of an efficient and coherent insolvency framework within the European Union.

Some commentators contend that political agreement on such a regime would be easier to achieve than on traditional harmonisation, as Member States would not be required to overhaul their existing domestic insolvency systems. Instead, they would merely have to accept the coexistence of a parallel, optional set of rules operating alongside national legislation.[117]

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113 European Parliament, 'Workshop on the 28th Legal Regime' (2025) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/776367/IUST_BRI%282025%29776367_EN.pdf>.

114 Luca Enriques, Casimiro Nigro and Tobias Tröger, 'Why the 28th Regime Proposal Falls Short of Europe's Challenge', Oxford Business Law Blog (19 March 2026), <https://blogs.law.ox.ac.uk/oblb/blog-post/2026/03/why-28th-regime-proposal-falls-short-europes-challenge>.

115 BusinessEurope, '28th Regime – A New Optional EU-Wide Company Statute to Enhance European Competitiveness and Innovation' (26 September 2025) <https://www.businesseurope.eu/wp-content/uploads/2025/10/2025-09-26-BusinessEurope-reply-on-the-28th-Regime-consultation.pdf>; Paul Oudin, 'The 28th Regime and the False Promise of a European Delaware', Oxford Business Law Blog (8 January 2026), <https://blogs.law.ox.ac.uk/oblb/blog-post/2026/01/28th-regime-and-false-promise-european-delaware>.

116 See, for example, Ringe (n 102); European Law Institute (n 112) section V.3. See also European Business and Innovation Centre Network, *EBN Position Paper: The 28th Regime – A strategic necessity for scaling European innovation* (8 October 2025), <https://ebn.eu/2025/10/08/ebn-position-paper-in-the-28th-regime-a-strategic-necessity-for-scaling-european-innovation/>; European Economic and Social Committee (n 5) section 5.3.

117 Francisco Garcimartin and Christoph Paulus, 'The 28th insolvency law: Reflections on a *lex concursus europaea*' (2025) 34 International Insolvency Review 428, 430; Bo Becker and Martin Oehmke, 'Restructuring and insolvency – opportunities for reform in Europe', European Systemic Risk Board ASC Insight No. 4 (May 2025) 16.

In many respects, the idea of a 28th regime echoes the concept of 'regulatory dualism' – a strategy originally devised to overcome domestic resistance to economic reform by allowing new, more flexible rules for stock market reform to coexist with incumbent structures.[118] This approach aims to circumvent political gridlock by offering firms a choice between the status quo and a more liberal alternative, thereby introducing a dynamic of voluntary convergence.

Yet it is submitted that, in practical terms, the effect of an optional regime would likely be very similar to that of substantive harmonisation. If the optional EU framework were designed to be less restrictive or more efficient than national insolvency laws, firms would have a strong incentive to opt into it, effectively abandoning their domestic regimes. Where the 28th regime genuinely offers superior outcomes, widespread voluntary adoption would make it the de facto standard across the Union. Consequently, the political negotiations leading to such a regime are unlikely to be less contentious than those surrounding mandatory harmonisation.[119] Put differently: it would be surprising if political opposition against a harmonised approach is any different from opposition against an optional regime which would allow firms to opt out from national standards.

National lawmakers, in particular, would remain reluctant to endorse an optional regime that undermines entrenched domestic policy choices or imposes significant 'switching costs' on domestic firms. Similarly, domestic elites and other beneficiaries of existing legal frameworks can be expected to resist the erosion of their established privileges. This dynamic mirrors the experience with earlier optional regimes, most notably the Societas Europaea (SE), the negotiations over which revealed deep-seated national reservations and a tendency to dilute ambitious reform proposals.[120]

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[118] Ronald J. Gilson, Henry Hansmann and Mariana Pargendler, 'Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union' (2011) 63 Stanford Law Review 475.

[119] This corresponds to current expectations of the lawmaking process. See Jan Strupczewski, 'Commission wants pan-EU rules for innovative firms to leverage EU single market', Reuters (21 January 2015), <https://www.reuters.com/markets/europe/commission-wants-one-set-rules-across-eu-innovative-firms-2025-01-21/>.

[120] The Societas Europaea is an EU-wide company type, which was first proposed in 1970; after more than 30 years (!) of negotiations, the regime was finally adopted in 2001.

Also, previous projects that were similar to the idea of a 28th regime like the 2008 initiative European Private Company (SPE)[121] and the 2014 proposal Single-Member Company (SUP)[122] failed miserably, due to unsurmountable political disagreement. Trade unions, in particular, are usually rather sceptical on such pan-European corporate reform plans, as they perceive the risk of them undermining established workers' rights: predictably, the European Trade Union Institute ETUI is already arguing against the 28th Regime project.[123]

This political reality helps explain why progress on both harmonisation measures and optional regimes within EU company and insolvency law has historically been slow and incremental.[124] Substantive change has tended to occur only in moments of acute crisis, when political resistance was temporarily weakened by the perceived need for decisive reform. Outside such circumstances, the development of the European corporate and insolvency acquis has often been described as 'trivial', reflecting a pattern in which Member States agree only on issues of secondary importance while avoiding core areas of corporate governance and creditor protection.[125]

Where political consensus is eventually reached—typically after long and protracted negotiations—the resulting legal text frequently bears the marks of compromise: gaps, lacunae, and extensive options for national deviation. Again, the SE Regulation offers a telling example.[126] It may therefore be feared that a proposed optional 28th insolvency regime, despite its conceptual promise, could ultimately suffer the same fate—emerging only as a heavily negotiated, politically diluted framework with limited transformative potential. Finally, many of the downsides of the 'full harmonisation'

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[121] European Commission, *Proposal for a Council Regulation on the Statute for a European private company* (25 June 2008), COM(2008) 396 final.

[122] European Commission, *Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies* (9 April 2014), COM(2014) 212 final.

[123] Marcus Meyer-Erdmann and Aline Hoffmann, 'How a 28th company law regime jeopardises workers' rights' ETUI Policy Brief 2025.05 (September 2025), <https://www.etui.org/publications/how-28th-company-law-regime-jeopardises-workers-rights>.

[124] Cf. Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (2019) 20 European Business Organization Law Review 547, 551.

[125] Luca Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 University of Pennsylvania Journal of International Economic Law 1.

[126] The EU Directive on Takeover Bids 2004/25/EC is another excellent example. After various unsuccessful attempts, the version eventually adopted in 2004 is largely optional for Members States to implement.

option – such as the potential frictions with adjacent areas of law, and the lack of a coherent enforcement institutions, will apply to the 28th regime in the same way.[127]

In this difficult political minefield, some commentators see ‘enhanced cooperation’ a possible way forward.[128] Enhanced cooperation allows a group of Member States to go ahead with a new project without the need for consensus amongst all 27 Member States.

2. Advantages

If, however, these political and institutional obstacles can be overcome and a 28th regime of genuine substance can be achieved, such an optional framework could indeed offer several distinct advantages over a mandatory harmonisation approach.[129]

A core attraction of the 28th regime lies in its voluntary nature. Firms would be free to opt into the EU framework whenever they perceive it as more efficient, predictable, or cost-effective than their respective national insolvency law.[130] Importantly, the decision on the merits of the new regime is thus left to the market. This mechanism introduces an element of competitive federalism, encouraging Member States to modernise and rationalise their domestic insolvency regimes in response to the competitive pressure generated by the EU alternative. Such ‘regulated competition’ would stimulate convergence through market incentives rather than political compulsion.[131]

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[127] See above section IV. For a critical view on the 28th regime in this context, see Luca Picotti, ‘Un droit sans pays ? Géopolitique du « 28e État » européen’, Le Grand Continent (3 July 2025), <https://legrandcontinent.eu/fr/2025/07/03/un-droit-sans-pays-geopolitique-du-28e-etat-europeen/>.

[128] See, for example, Alexia-Styliani Arampatzi and others, *Capital markets union: a deep dive – Five measures to foster a single market for capital*, ECB Occasional Paper Series No 369 (revised May 2025) 43-45.

[129] For a similar debate in contract law, see eg Wolfgang Kerber and Stefan Grundmann, ‘An Optional European Contract Law Code: Advantages and Disadvantages’ (2006) 21 European Journal of Law and Economics 215; Fernando Gomez and Juan Jose Ganuza, ‘An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?’ (2011) 7 European Review of Contract Law 275.

[130] Stefania Cirillo, ‘The New Architecture of ‘Choice’: Forum Shopping and the Emerging 28th Regime’, Oxford Business Law Blog (12 January 2026), <https://blogs.law.ox.ac.uk/oblb/blog-post/2026/01/new-architecture-choice-forum-shopping-and-emerging-28th-regime>.

[131] Cf Daniel C. Esty and Damien Geradin, ‘Regulatory Co-opetition’ (2000) 3 Journal of International Economic Law 235; Horst Eidenmüller, ‘The Transnational Law Market, Regulatory Competition, and Transnational Corporations’ (2011) 18 Indiana Journal of Global Legal Studies 707.

This design also mitigates concerns about national sovereignty. Member States would retain their domestic insolvency systems intact, while granting firms the freedom to choose between national law and the optional European regime.[132] Such a model aligns with broader trends in EU private and business law, where optional instruments – for example, the Societas Europaea (SE), the European Patent with Unitary Effect, or the once-proposed Common European Sales Law (CESL) – have served as vehicles of bottom-up integration.[133] These instruments have allowed for incremental unification without mandating wholesale legal convergence, thereby respecting Member State autonomy while enabling voluntary experimentation at the European level.

One may even speak of a self-correcting nature of an optional regime. If the 28th regime proves dysfunctional, overly complex, or economically unattractive, it will simply fail to attract users, thereby limiting its real-world impact.[134] Conversely, harmonised regimes apply *erga omnes*: if their provisions turn out to be inefficient or poorly designed, Member States are nonetheless bound to implement them, and market participants are compelled to operate under their constraints. Optionality thus provides an in-built safeguard against regulatory error, enabling innovation without imposing uniformity.

3. Practical considerations and design choices

Another point to consider is that harmonisation inevitably leads to a patchwork of national implementations, since directives must be transposed into domestic law and interpreted by national courts. Even with detailed provisions and the CJEU as the final arbiter, legal divergence persists because of differences in procedural law, creditor hierarchies, and institutional capacities.[135] By contrast, a 28th regime would ideally be an autonomous and directly applicable EU instrument (a Regulation), creating a near-

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[132] Cf Jan Smits, 'Optional Law, A Plea for Multiple Choice in Private Law' (2010) 17 Maastricht Journal of European and Comparative Law 347, 351.

[133] William Bull, *Optional Instruments of the European Union: A Definitional, Normative and Explanatory Study* (Intersentia, 2018).

[134] To be sure, the costs of the legislative process will not be negligible, along with the cost of adjustment for market participants.

[135] Cf Wolfgang Hau, 'Europeanisation of Civil Procedure: Overcoming Follow-Up Fragmentation through Bottom-Up Harmonisation?', in Anna Nylund and Magne Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Cambridge University Press 2019) 61.

uniform body of insolvency law operating identically across all Member States.[136] This would substantially enhance legal certainty, especially in cross-border contexts, by eliminating interpretative discrepancies and national variations. It would also avoid the need for continuous monitoring of Member State compliance and transposition, which has been a persistent challenge in previous insolvency harmonisation efforts.[137]

Further, because harmonisation must operate within the boundaries of national legal systems, it often results in compromise. A 28th regime, in contrast, could serve as a laboratory for regulatory innovation – a model of 'experimental integration'. It could be designed from scratch around modern restructuring principles, including early intervention, digitalised proceedings, and group coordination mechanisms, drawing inspiration from best practices in jurisdictions such as the US, UK, and the Netherlands. Moreover, as a self-contained EU framework, the optional regime could be revised and updated swiftly through EU legislative procedures without the need for domestic transposition. This flexibility would allow the EU to respond more effectively to economic and technological developments, including the rise of digital assets and cross-border financial instruments. This point may also serve as a response to the commonly heard critique that regulatory arbitrage is already now widely available in the EU today – there is not yet a 28th regime, but firms can simply choose a foreign legal system by relocating their COMI to another EU Member State.[138] That may be true, but is a nationally controlled competition, which leaves political choices in the hands of an individual Member State and is influenced by legacy issues and domestic politics. In contrast, a 28th regime has the advantage of being a new, EU centred project, which can be fine tuned to the EU agenda of competitiveness and capital markets integration, among other things.

Finally, the 28th regime could function as a transitional step towards full harmonisation. By introducing an optional, pan-European framework, the EU could test the model's practical viability and gradually expand its scope. If widely adopted and proven

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[136] As explained above, the current EU Inc. proposal however only partially covers aspects of insolvency law; with potentially more to follow in the future.

[137] See European Commission, Justice & Consumers 2023 – Annual Report on Monitoring the Application of EU Law (2023); European Parliament, Resolution on Monitoring the Application of EU Law in 2020-2022 (23 Nov 2023); INSOL Europe, 'Tracker on the Implementation of the EU Directive on Restructuring and Insolvency' (INSOL Europe) https://www.insol-europe.org.

[138] For this argument, see Oudin (n 115). On relocation options under the EU Insolvency Regulation, Article 3, see in detail Wolf-Georg Ringe, 'Article 3' in Reinhard Bork and Kristin van Zwieten, *Commentary on the European Insolvency Regulation* (2nd edition, OUP 2022) paras 3.63 ff.

effective, the regime might evolve organically into a general European insolvency system, paving the way for yet deeper legal integration in insolvency without imposing it prematurely.[139]

Ultimately, much will depend on how the 28th regime is designed in practice. Key considerations include the adoption mechanism—whether it will be 'opt-in' or 'opt-out'—and the timing of the choice.[140] Will firms be permitted to opt into the regime at formation only, or also mid-stream (i.e., for existing companies)? Additionally, determining who holds the authority to decide on the firm's adoption decision or a subsequent change is of paramount importance.[141]

Unlike traditional harmonisation, an ex-post adoption model introduces potential risks. Specifically, it may impose unintended negative externalities on stakeholders who cannot anticipate the shift to the optional regime.[142] For instance, a creditor extending a loan to a firm does so under the assumption that their position will be governed by a specific national (insolvency) law.[143] If the company (more specifically, the managers and/or the shareholders) later opts into a supranational EU regime that potentially weakens the creditor's position, the creditor bears an economic cost that was not factored into the original agreement.[144] Another aspect that can be relevant is the possibility of changing the previously chosen regime. For instance, if a company opts into the 28th regime and later (for whatever reason) wants to return to its national insolvency regime or another country's legal system, the law should provide a mechanism on how to deal with that change. One model would be to give firms free choice on the mechanism of subsequent alterations in their insolvency regime.[145] Such

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139 On the experimental nature of the 28th regime, see Silvie Rohr, 'The 28th Regime: Make It a Sandbox, Not Another Paper Form', Verfassungsblog (29 October 2025).

140 See the seminal work by Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale Law Journal 87.

141 Horst Eidenmüller, 'Contracting for a European Insolvency Regime' (2017) 18 European Business Organization Law Review 563.

142 To be sure, this risk already exists today, under the unregulated regime. European Parliament, *Harmonisation of Insolvency Laws: Economic Perspectives* (European Parliamentary Research Service 2025).

143 Within the EU, that will be the national law of the company's COMI.

144 Peter O. Mülbert, 'A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection' (2006) 7 European Business Organization Law Review (EBOR) 357.

145 See Anthony Casey and Jonathan Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 Emory Bankruptcy Developments Journal 463.

an approach is intellectually attractive, but it would require that sophisticated actors are able to price their exposures in light of the mechanism chosen by the debtor and that non-sophisticated actors would be protected separately.

All of these concern and challenges underscore the importance of carefully considering the adoption process, transparency and timing of the 28th regime to ensure that stakeholders are adequately protected and that the regime functions as intended.[146] And whatever its design, the implementation of the regime will require some protection mechanism against opportunistic changes of the applicable law.[147]

VI. Conclusion and Summary

The preceding analysis has shown that the widely celebrated project of EU insolvency law harmonisation is not without significant concerns. The oft-repeated assumption that such harmonisation is both necessary and inevitable for completing the internal market proves, upon closer inspection, to be both overly simplistic and normatively overstated.

This article does two things: it pleads for a more balanced analysis of the harmonisation benefits, which are currently largely ignored in the legislative debate, and it juxtaposes the harmonisation project with its alternative, the idea to create a 28th regime.

I do not argue to reject the harmonisation agenda wholesale. Nor do I deny that convergence in certain areas may yield clear benefits. Rather, I advocate for a more

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[146] See, for example, the ‘wish list’ of criteria drawn up by ICISA, the International Credit Insurance & Surety Association: ICISA, ‘Response to EU Late Payment and the ‘28th Regime’ for Cross-Border Trade’ (10 October 2025), available at <https://icisa.org/news/icisas-response-to-eu-late-payment-and-the-28th-regime-for-cross-border-trade/>.

[147] There is a long-standing literature advocating choice in insolvency law and forum, also discussing adequate safeguards to protect stakeholders’ interests. See, e.g., Randall Thomas and Robert K. Rasmussen, ‘Timing Matters: Promoting Forum Shopping by Insolvent Corporations’ (2000) 94 Northwestern University Law Review 1357; Wolf-Georg Ringe, ‘Forum Shopping Under the EU Insolvency Regulation’ (2008) 9 European Business Organization Law Review 579; Horst Eidenmüller, ‘Abuse of Law in the Context of European Insolvency Law’ (2009) 6 European Company and Financial Law Review 1; Aurelio Gurrea-Martínez, *Reinventing Insolvency Law in Emerging Economies* (Cambridge University Press 2024) chapter 8; Anthony J. Casey, Aurelio Gurrea-Martínez and Robert K. Rasmussen, ‘A Commitment Rule for Insolvency Forum’ (2025) 4 The University of Chicago Business Law Review 51, 66.

measured and evidence-based approach — one that engages seriously with functional considerations, empirical data, and competing normative values. Harmonisation should be pursued where it clearly adds value, not where it merely aligns with the prevailing political zeitgeist. But the regulatory discussion surrounding both the harmonisation project and the parallel effort to create an optional regime do not adequately take into account the downsides of any EU instrument seeking to converge national insolvency laws. In comparison, the 28th regime seems to the preferable choice between the two federal ideas on the table.

The debate on the harmonisation of insolvency law in the European Union is, at its core, a debate about method rather than objective. Few would dispute that greater legal coherence across Member States is desirable. Yet the means by which this goal should be pursued remain deeply contested. The prevailing assumption—that ever more detailed harmonisation will automatically yield a more efficient and integrated market—risks overlooking the political, institutional, and economic diversity that continues to shape insolvency practice across Europe.

Experience with previous harmonisation efforts shows that the pursuit of uniformity often produces compromise rather than convergence. National transpositions of EU directives have tended to result in partial implementation, divergent interpretation, and enduring procedural heterogeneity. As a consequence, even substantial EU initiatives – such as the Preventive Restructuring Directive – have delivered less functional uniformity than their legislative ambition would suggest. In light of these realities, it may be time to reconsider the path of 'one-size-fits-all' harmonisation and to explore more flexible instruments of integration.

An optional 28th regime offers such an alternative. Properly designed, it could reconcile the goals of market efficiency and legal pluralism. Its voluntary character would allow firms to select the most suitable regime for their needs, while leaving national systems intact. This would enable a form of 'regulated competition' between legal orders, encouraging Member States to modernise their frameworks without coercive harmonisation. Over time, such competitive pressures could lead to functional convergence driven by market preferences rather than legislative fiat.

Yet the promise of an optional regime must not be overstated. If it merely replicates existing national frameworks or fails to offer clear procedural advantages, it will attract little adoption. Conversely, if it significantly alters stakeholder rights – particularly those of creditors – it risks provoking the same political resistance that has hampered past harmonisation attempts. The design of the regime will therefore determine its legitimacy and success: questions of who decides, when, and under what conditions a company may opt in will be critical to ensuring fairness and predictability.

Ultimately, the future of European insolvency law will depend less on the breadth of harmonisation than on the quality of experimentation. Europe's legal order has evolved not through grand design but through iterative learning – testing, revising, and adapting rules to practical experience. The 28th regime could become a new institutional laboratory for that process, allowing the EU to advance integration through voluntary participation and evidence-based refinement. If European insolvency law is to become both efficient and legitimate, it must therefore embrace diversity as a resource rather than treat it as an obstacle. True progress will come not from uniformity imposed from above, but from innovation cultivated from within.

In contrast, the current course pursued by the EU institutions seems to be full speed towards harmonisation. The trend appears overly driven by political momentum. 'More harmonisation' has become a goal in itself – disconnected from a coherent strategy or rigorous policy evaluation. What is lacking is a transparent prioritisation of regulatory objectives, a careful functional assessment of whether the proposed rules will in fact achieve them, and whether an optional instrument would not provide a more appropriate and more functional alternative.

The legislative approach (as evidenced by the new Harmonisation Directive) currently unfolding falls short of this standard. It lacks conceptual rigour, methodological depth, and openness to alternative policy pathways. A resilient and effective European legal order will not be built on regulatory enthusiasm alone. It requires carefully crafted instruments that are responsive to empirical realities and respectful of the legal cultures in which they operate. Insolvency law, perhaps more than any other field, highlights the challenges of legislating across systems—yet it also offers a unique opportunity to set new standards for thoughtful and context-sensitive lawmaking at the European level. A genuinely resilient European insolvency framework must evolve through experimentation and evidence, not enthusiasm.

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