



# ELI

EUROPEAN  
LAW  
INSTITUTE

# ELI SPECIAL REPORT

## ELI Instrument

### on the 'Rescue of Business in Insolvency Law'

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Dear Members and Friends of the ELI

Since the global financial crisis, insolvency and restructuring law have been at the forefront of law reform initiatives in Europe and elsewhere. The specific topic of business rescue appears to rank top on the insolvency law related agenda of both the EU and national legislators faced by a rapid growth of insolvencies, which clearly highlighted the importance of efficient mechanisms for dealing with financially distressed, but viable business. For the ELI, this fuelled the momentum to launch an in-depth project on furthering the rescue of such businesses across Europe.

On 3 September 2013, the ELI Council approved the proposal for a project on the 'Rescue of Business in Insolvency Law' ('Business Rescue Project'). Professors Bob Wessels and Stephan Madaus were appointed as Project Reporters to lead this two-stage project.

The first stage comprised the drafting of National Inventory and Normative reports by National Correspondents (NCs) from 13 EU countries. In addition, an Inventory report on international recommendations from standard-setting organisations was prepared. Based primarily on these detailed reports, the second stage consisted of drafting the ELI Instrument on Business Rescue with recommendations for a legal framework enabling the further development of coherent and functional rules for business rescue in Europe.

Now, the Project Team has finalised its draft Instrument and it is ready to be put to a vote of ELI Fellows and Members of the ELI Council. It consists of some 375+ pages and 115 recommendations. We invite all ELI Members to carefully read this draft Instrument and take part in the Panel Session and voting that will take place from 14:30–16:00 on Wednesday, 6 September 2017.

We look forward to meeting you at the ELI General Assembly and Annual Conference in Vienna (Austria).

The Reporters  
Bob Wessels and Stephan Madaus



## Overview of the Business Rescue Project

### Aim and Purpose

The ultimate aim of the project is to design (elements of) a legal framework that will enable the further development of coherent and functional rules for business rescue in Europe. This includes certain statutory procedures that could better enable parties to negotiate solutions where a business becomes financially distressed. Such a framework also includes rules to determine in which procedures and under which conditions an enforceable solution can be imposed upon creditors and other stakeholders despite their lack of consent. The project has a broad scope, and extends to consider frameworks that can be used by (non-financial) businesses out of court, and in a pre-insolvency context.

### Themes of the Project

During the course of the project, the following ten themes were studied:

1. Governance and supervision of a rescue in and out of court;
2. Financing a rescue;
3. Executory contracts;
4. Ranking of creditors and of the expenses of any Insolvency Office Holder;
5. Labour, benefit and pension issues;
6. Avoidance powers;
7. Sales of substantially all of the debtor's assets, including going-concern sales;
8. Rescue plan issues;
9. Multiple enterprise cases/issues;
10. Special arrangements for small and medium sized enterprises (SMEs).

### Methodology

The Business Rescue Project was designed as a two-stage project:

#### *Phase I: Data Collection*

For this phase the Reporters developed a detailed Inventory Questionnaire on ten themes to obtain information on the rescue-related laws of each selected jurisdiction. NCs were asked to respond to the Inventory Questionnaire and consider all (pre-

insolvency procedures supplied by national law) that could be used to achieve a business rescue outcome, and to identify other legal rules that facilitate the achievement of a business rescue outcome out-of-court (through a private work-out). In addition, they received a Normative Questionnaire with a set of eight questions developed to critically evaluate their national insolvency systems and present and report their own views on the desired changes in their respective legal systems.

The NCs from 13 EU jurisdictions were selected to be a representative sample of the legal traditions and range of insolvency laws and practices across Europe.

In addition, an Inventory Report on recommendations from standard-setting organisations was prepared. It provides a stock-taking analysis of matters in the area of business rescue from the perspective organisations such as the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank.

#### *Phase II: Drafting the ELI Instrument on Business Rescue*

Based on the full reports the Reporters received an extensive review of business rescue was prepared, resulting in the ELI Business Rescue Report. Developments in non-selected EU Member States have, of course, not been ignored but also influenced the present report, just as international developments and instruments have. The Reporters studied national laws and comparative legal studies from nearly all EU Member States. Conferences were organised to discuss intermediate results and interact with other experts in this field.

The topics addressed in this Report are intended to present a tool for better regulation in the EU, developed in the spirit of providing a coherent, dynamic, flexible and responsive European legislative framework for business rescue. Addressees, generally, are Member States, professional bodies (for insolvency practitioners or judges) and/or the European Commission.

## Outcomes

The ELI Business Rescue Project ran over a period of 42 months which resulted in the following two outcomes:

1. Inventory Report on national insolvency laws, in particular rescue-related tools, including empirical evidence and underlying policy choices from 13 selected EU countries. It also includes an Inventory Report on international recommendations from standard-setting-organisations (UNICITRAL; the World Bank; the Nordic-Baltic Recommendation on Insolvency Law regarding the ten themes of the Questionnaire).

2. The Rescue of Business in Insolvency Law Report, with some 375+ pages containing: (i) the reporters' methodology; (ii) a presentation of comparative overviews on these ten legal themes; and (iii) explaining existing rules and the Reporters' views and considerations, based on transparent and reasoned policy choices and comprising a catalogue of identified good & best practices which support and facilitate the rescue of business while striking a fair balance with creditors' interests and other recognised interests – 115 Recommendations.

(This Report is the Instrument the ELI Members will vote on at the 2017 ELI General Assembly).

## Related EU legislative Initiatives

Unlike harmonisation or convergence of company law, approximation, including achieving greater coherence or harmonisation of insolvency laws, is a rather new phenomenon in the European Union. However, during the six years after the European Parliament's 2011 call for harmonisation of certain matters relating to an EU corporate insolvency framework had broken an undiscussed taboo, the European Commission has worked on approximation of areas of insolvency law via several workstreams.

Though independent, the topic of the Business Rescue Project closely relates to several initiatives employed by the EU legislator since 2014:

### *Advisory Committee (AC)*

The Business Rescue Project was supported by an AC that sponsored renowned experts from very different fields of law (eg labour law, contract law, competition law, mediation and dispute resolution) and two Observers provided valuable input to the project.

### *National Correspondents and Members Consultative Committee (MCC)*

Furthermore, NCs provided insights into the national insolvency regimes of EU Member states by preparing Inventory as well as Normative reports. The project also draws from the expertise of the MCC consisting of ELI Members that took an interest in the project and its outcomes.



**2014** Commission Recommendation on a new approach to insolvency and business failure

**2015** Commission introduces seven year plan for a EU Capital Markets Union

**2015** European Insolvency Regulation (recast), broadening the scope of 'insolvency proceedings', to include collective proceedings for the purpose of rescue, adjustment of debt and reorganisation, effective from 26 June 2017

**2016** Commission's Proposal for a Directive on Preventive Restructuring Frameworks and Second Chance for Entrepreneurs

## ELI Business Rescue Report

The ELI Business Rescue Report identifies a number of topics that, in the Reporters' view, are ripe for further approximation or harmonisation across Europe. The present ELI Business Rescue Report contains 375+ pages (over 180,000 words) and includes 115 recommendations.

The Business Rescue Report is designed to assist those involved in a process of law reform and those setting standards for soft law in the business rescue context. The topics addressed in this Report, however, are intended to present a tool for better regulation in the EU, developed in the spirit of providing

a coherent, dynamic, flexible and responsive European legislative framework for business rescue.

The recommendations address a wide variety of themes affected by the rescue of financially distressed businesses: including topics such as legal rules for professions and courts, contract law, treatment and ranking of creditors' claims, labour law, laws relating to transaction avoidance and corporate law, all focused on business rescue, including specifying specific rules for Micro, Small and Medium sized businesses (MSMEs).

## Recommendations

The topics addressed in the Report are intended to present a tool for better regulation in the EU, developed in the spirit of providing a coherent, dynamic, flexible and responsive European legislative framework for business rescue.

Mindful of the European Commission's commitment to better legal drafting, the Report's proposals are formulated as comprehensibly, clearly, and as consistently as possible. Still, the recommendations are not designed to be overly prescriptive of specific outcomes, given the need for commercial flexibility and in recognition of the fact that parties will bargain in the 'shadow of insolvency law'. The Reporters cherish the belief that the report will assist in taking a next, decisive step in the evolutionary process of the European side of business rescue and insolvency law.

Impression of some of the topics addressed by the Business Rescue Recommendations:

- Reliance of restructuring and insolvency systems on the professionalism and competence of stakeholders that administer it, most specifically judges, insolvency practitioners and parties;
- Availability of specialised courts for restructuring and insolvency cases;
- Need for European and national legislators to set professional and ethical standards for insolvency practitioners;
- Availability of a safe harbour for directors in exploring restructuring options;

- Need for approval of creditors of any priority for new finance by including it in the restructuring plan;
- Right of an insolvency practitioner or debtor-in-possession to take out interim finance at its own discretion;
- The continuation of executory contracts upon commencement of restructuring and insolvency proceedings;
- Ability of creditors' committees to approve decisions in the administration of the estate that may have a significant effect at the subsequent distribution;
- Timely notice for employee's and workers' councils about an imminent restructuring or insolvency;
- Absence of avoidance powers in workout support proceedings;
- Availability of pre-packs and accelerated liquidation procedures (when a debtor's assets will decrease significantly within 30 days);
- Exclusive ability of the debtor, at least for an initial period of time, long enough to negotiate and modify a proposed plan, and have a vote;
- Participation in group coordination proceedings is voluntary, group members can decide to opt-out. Where 80% of equally affected members participate in group coordination proceedings, the court should assume that an opt-out was decided in bad faith, unless good faith is proven; and
- The availability of special treatment of small and micro businesses in restructuring and insolvency proceedings.



### Professor em Bob Wessels

'The ELI Business Rescue Report aims to invigorate current thinking on corporate business rescue. As Europe stands at the doorstep of approximating existing insolvency and restructuring laws, this Report puts forward recommendations to pursue a coherent system for the benefit of all involved stakeholders.'

### Professor Stephan Madaus

'The pace in which Europe embraces the Business Rescue Culture reflects the pressing call for state-of-the-art tools for rescuing business in distress. The ELI Business Rescue Report provides detailed and well-funded guidance for Member States, professional organisations, the European Commission and all those committed to realising this goal.'



## Project Timeline

A selection of activities that took place during the course of the project:

<b>Sep 2013</b>	ELI Council adopts the proposal for the design of an ELI Instrument on the 'Rescue of Business in Insolvency Law'
<b>Jan 2014</b>	Sending out detailed a Questionnaire for 13 national Inventory Reports to NCs
<b>Sep 2014</b>	Plenary session and MCC meeting on Business Rescue at the ELI Annual Conference in Zagreb (Croatia)
<b>Mar 2015</b>	ELI Business Rescue Conference in Vienna with NCs, AC and MCC.
<b>Sep 2015</b>	Panel session and MCC meeting on Business Rescue at ELI Annual Conference in Vienna
<b>Nov 2015</b>	Telephone Conference with representatives of Council of Bars and Law Societies of Europe (CCBE)
<b>Feb 2016</b>	Joint Conference of Stockholm Centre for Commercial Law (Stockholm University) and the ELI on Insolvency, Reorganisation and Liquidation in Stockholm (Sweden)
<b>Sep 2016</b>	Panel session on Business Rescue at the ELI Annual Conference in Ferrara (Italy)
<b>Oct 2016</b>	Plenary session on Business Rescue at the INSOL Europe Academic Forum Congress in Cascais (Portugal)
<b>Nov 2016</b>	Joint Conference of the ELI and the University of Leiden on Business Rescue with NCs, AC, MCC and judges from across Europe in Leiden (the Netherlands)
<b>Mar 2017</b>	Submission of draft Business Rescue Report to the ELI Executive Committee, Council, AC and MCC
<b>Sep 2017</b>	Panel session and voting on ELI Business Rescue Report at the ELI General Assembly in Vienna

## People Involved

### Project Team

Prof em Bob Wessels (University of Leiden, The Netherlands; Reporter)  
 Prof Stephan Madaus (Martin-Luther-University of Halle-Wittenberg, Germany; Reporter)  
 Gert-Jan Boon (University of Leiden, The Netherlands)

During the course of the project, the Project Team was kindly assisted by the ELI Bodies and the ELI Secretariat. The project has been highly reliant on the involvement of numerous experts in the field of insolvency and restructuring. The Reporters express their great appreciation for their continuous and close involvement.

### ELI Advisory Committee

Prof Jan Adriaanse (University of Leiden, The Netherlands)  
 Dr Catherine Bridge (European Bank for Reconstruction and Development, United Kingdom)  
 Prof Horst Eidenmüller (University of Oxford, United Kingdom)  
 Prof Damien Geradin (Euclid Law, Belgium)  
 Mr Robert Hodgkinson (Institute of Chartered Accountants England & Wales, United Kingdom)  
 Prof Francis Kessler (Sorbonne Law School University Paris I, France)  
 Mr Chris Laughton (Partner, Mercer & Hole, United Kingdom)  
 Justice Rimvydas Norkus (Supreme Court of Lithuania)  
 Mr Alberto Núñez-Lagos (Partner, Uría Menéndez, Spain)  
 Prof Paul Oberhammer (University of Vienna, Austria)  
 Justice Elizabeth Stong (US Bankruptcy Court, Eastern District of New York, United States)

Prof Matthias Storme (Universities of Leuven and Antwerp, Belgium)

Prof Onofrio Troiano (University of Foggia, Italy)  
 Prof Heinz Vallender Judge (ret) (Cologne Bankruptcy Court; Hon Professor University of Cologne, Germany)

### Observers

Ms Mihaela Carpus-Carcea (European Commission, Belgium)

Ass Prof Kristin van Zwieten (University of Oxford, United Kingdom)

### National Correspondents

Austria: Dr Friedrich Jergitsch and Dr Florian Klimscha

Belgium: Prof Melissa Vanmeenen and Dr Roel Fransis  
 England and Wales: Dr Michael Schillig and Mr Nick Segal

France: Ms Saliha Bardasi and Ms Sophie Vermeille, succeeded by Ms Hélène Bourbouloux and Mr Sylvain Hustaix

Germany: Prof Reinhard Bork and Prof Lucas Flöther

Greece: Mr Stathis Potamitis

Hungary: Dr András Osztovits

Italy: Mr Giorgio Corno and Prof Filippo Corsini

Latvia: Mr Helmut Jauja

The Netherlands: Prof Reinout Vriesendorp and Mr Rick van Dommelen

Poland: Prof Fryderyk Zoll and Mr Michał Barłowski

Spain: Prof Ángel M<sup>a</sup> Ballesteros and Mr Juan Ferré

Sweden: Mr Erik Selander

In addition, the Reporters have received valuable comments from the MCC for this project.



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### The ELI Mission

*Building on the wealth of diverse legal traditions, the European Law Institute's mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, the ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective.*