The application of the bail-in from the perspective of insolvency law

TU / Europolis presentation

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Outline

- Description
- Analysis
- Consequences

Description 1

- The system is characterized by multidimensionality:
- → on a political level: safeguarding financial stability in a conglomerat of states with different attitudes towards tasks and purposes of financial institutions
- → on a national level (example Germany): The SAG is the transformation of the BRRD; it is to be aligned with other recovery and resolution statutes: KWG, KredReorgG, RestruktFG, InsO
- → on EU level: BRRD with national insolvency laws and assessments as to the importance of the respective institution and the gravity of the envisaged measures.
- → additional dimensions: internationality (globality) and group formation (SPOE and MPOE)
- → on an infrastructural level: competences vary dependant on importance and the relevant statutes (e.g. SRM-Reg)

Description 2

- **In short**: flagrant violation of the „kiss-principle“
- the system is overly complex due to the intention to harmonize opposing interests → i.e. a modern *concordantia discordantium*?
- Question: what can be done to facilitate applicability?

Analysis 1

- BRRD = attempt to harmonize two opposing concepts:
- Structure of insolvency law in theory:
  - Roman law: creditor driven
  - Salgado de Samoza (1595-1665): state driven
  - All existing insolvency laws can be classified on this spectrum
- Present commercial insolvency law → towards Romans
- BRRD → towards Salgado

Analysis 2

- The BRRD is based on the „no creditor worse off“-idea: Artt. 34(1) lit. g and 73 BRRD
- At almost each and every step of the resolution process (and also before) the bail-in-mechanism is to be aligned with an insolvency situation (just one out of dozens of examples: art. 32 BRRD for the determination of (likelyhood of) failing → two out of three requirements need to be set in comparison with an insolvency scenario)

Analysis 3

- The *discordantia* stems from the fact that the BRRD, for the sake of expedited results, relies on regulatory determination.
- In contrast, modern commercial insolvency law relies on negotiations among the stakeholders (good example: group insolvency law).
- Result: the determination process designs its contents in a way that it mirrors the outcome of negotiations!
- This is a great example for a courageous goal where halfway through the drafter‘s heart got lost (and it is an invitation to litigation)

Analysis 4

- Reason (?): Path dependency ... BRRD as special variant of insolvency law.
- If that is the case a better path would be to draft
  - a general part (Allgemeiner Teil) of insolvency law
  - plus a special part (Besonderer Teil) for commercial entities, for SMEs, for consumers, and for financial institutions....

Consequences 1

- The Salgado type of proceeding had many supporters and fans throughout history
- The main argument against it has always been that those proceedings are lasting too long
- What can and should be learned from this experience?

Consequences 2a

- (de lege ferenda): dare it to design a purely administrative proceeding – very questionably whether to be executed by the banking sector itself (*Luan*? vs. *Jay!*)

Consequences 2b

- (de lege lata): dare it to ignore the insolvency comparison! (at least to the extent possible) since
  - the result of negotiations is hardly suitable for the determination of a quick decision – i.e. any reference to a hypothetical insolvency result is pure guess-work anyway (cf. Kotnik par. 78);
  - which member state‘s insolvency law shall be used for the calculation? and ...

Consequences 2c

- the ECJ seems to be quite supportive towards banking recovery and resolution (cf. Kotnik, Dowling).... (a word on „cutting the conncetion between sovereigns and banks“ → „serious disturbance“ = „gravierende Störung“)

Consequences 3

- Ex post-protection pursuant to art. 74 BRRD suffices
- Ex ante-valuation pursuant art. 36(1) BRRD will hardly ever do (given the time constraints)
- Therefore, the preliminary resolution authority‘s valuation, art. 36(2) BRRD will anyway be the rule rather than the exception

Consequences 4

- Need for differentiation between bail-in in resolution situation and recovery situation?
  - Bail-in as a resolution tool, art. 37(3) BRRD
  - Bail-in as a write-down tool, art. 37(2) BRRD
- In sight of the abovementioned ECJ judgments unlikely

Thanks for your attention

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