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Supervision and liability of insolvency practitioners in EU and national law

Supervisão e responsabilidade dos administradores judiciais no direito europeu e nos direitos nacionais

Ana Filipa Conceição

Assistant Professor, ESTG-Polytechnic of Leiria

Campus 2, Morro do Lena, Alto do Vieiro, Apartado 4163, 2411-901 Leiria, Portugal

ana.conceicao@ipleiria.pt

https://orcid.org/0000-0003-4737-4010

Catarina Frade

Assistant Professor

University of Coimbra, Faculty of Economics and Centre for Social Studies

Faculdade de Economia, Av. Dr. Dias da Silva, 165, 3004-512 Coimbra, Portugal

cfrade@fe.uc.pt

https://orcid.org//0000-0003-1113-6977

Lorenzo Benedetti

Researcher, University of Pisa, Department of Economics and Management

Via Cosimo Ridolfi, 10, 56124 Pisa PI, Italy

lorenzo.benedetti@unipi.it

https://orcid.org/0009-0007-4824-971X

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Monika Maśnicka

PhD Student, Faculty of Law and Administration

University of Gdansk, Department of Commercial Law and Private International Law

ul. Jana Bażyńskiego 6 Gdańsk 80-309 Poland

monika.masnicka@prawo.ug.edu.pl

https://orcid.org/0000-0002-2053-8153

Ruben Hollemans

Researcher, University of Maastricht, Law School

Minderbroedersberg 4-6, 6211 LK Maastricht, Netherlands

ruben.hollemans@maastrichtuniversity.nl

https://orcid.org/ 0000-0002-8485-9933

Ruben Jesus

Justice Auditor, Center for Judicial Studies

Rua Limoeiro, 1149-048 Lisboa, Portugal

rubendcjesus@hotmail.com

https://orcid.org/0000-0001-9919-3962

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ABSTRACT: Insolvency practitioners are key actors in corporate restructuring and insolvency proceedings, balancing demands for justice with economic efficiency and protection of individual economic interests.

IPs performance considerably influences the outcome of the winding up of non-viable companies and may also promote successful corporate restructuring. As servers of justice and promoters of private economic interests, IPs performance requires an adequate monitoring system and an effective accountability system.

With the European legal framework as reference, we propose to analyze the solutions adopted by four different legal systems — Dutch, Italian, Polish and Portuguese — in order to identify the similarities and differences registered in those national legal frameworks regarding IPs' supervision and liability rules.

KEY WORDS: Insolvency practitioners; insolvency; corporate restructuring; supervision; liability; European and national law.

RESUMO: Os administradores de insolvência são um ator-chave nos processos de restruturação e insolvência de empresas, equilibrando exigências de justiça com eficiência económica e tutela de interesses económicos individuais.

O seu desempenho influencia significativamente o resultado da liquidação de empresas insolventes e pode contribuir também para a restruturação empresarial. Enquanto servidor da justiça e promotor de interesses económicos maioritariamente privados, desenvolve uma ação que carece de uma adequada fiscalização que esteja ancorada num sistema de responsabilização eficaz.

Partindo do quadro legal europeu de referência propomo-nos analisar as soluções sufragadas por quatro ordens jurídicas de perfil variado — Holandesa, Italiana, Polaca e Portuguesa — a fim de analisar as semelhanças e divergências registadas na consagração de regras de supervisão e de responsabilização dos administradores de insolvência.

PALAVRAS-CHAVE: Administradores Judiciais; insolvência; recuperação de empresas; supervisão; responsabilidade; direito europeu e nacional.

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1. Introduction

In many jurisdictions, insolvency practitioners (IPs)[1] play a key role in corporate insolvency and pre-insolvency procedures.[2] A diligent, professional and meticulous insolvency practitioner enables the efficacy and efficiency of the insolvency legal framework, by promoting promptness and trustworthiness in such proceedings and by favoring a higher percentage of debt recovery by creditors and/or a more successful restructuring strategy.

Among others, IPs tasks alternate between the supervision of the insolvency estate (as a provisional measure or after the insolvency is declared), and the liquidation features, verification of claims and the statement of payments. However, some of the features of insolvency proceedings require more specialized skills, such as avoidance actions; decisions regarding the sale of assets or concerning ongoing contracts; reports about culpability of the debtors or their administrators; the design of restructuring plans or reports about corporate viability. Additionally, IPs must establish a trustworthy relationship with both creditors and debtor, especially within negotiation procedures. He/she must have an extensive knowledge about market values and investors, to better sell or restructure insolvent companies.

IPs are at the cornerstone of the communication flow within the insolvency and restructuring procedures. Due to the centrality of their tasks, IPs act as assemblers of information, identifying, preventing or managing problems. Their extensive tasks are performed with a unique proximity to all stakeholders, regardless the institutional and legal framework where they operate. But this framework undoubtedly modulates IPs' room for maneuver. Legal rules and political choices determine who can perform insolvency administration tasks and to what extent. Insolvency administration may be carried out by public servants, liberal professionals, legal persons or individual practitioner.[3] This leads to the existence of two main models for organizing the insolvency administration system: a *public model*, where IPs are part of the state system, in the same way as judges or public prosecutors are; a *private/professional model*, according to which IPs are non-public employees that perform a task of public interest. Each jurisdiction choses a model — public or private/professional — but they all seem to share a common feature: the need to attract highly qualified professionals with training in Law, Economy, Accounting, Management, and specialized in restructuring, turnaround, liquidation and other specific needs that arise within insolvency or pre-insolvency proceedings.

A reality check shows that private/professional model is the preferred model across European jurisdictions (McCormack *et al.,* 2017: 70). Accordingly, we will focus our analysis on this

[1] The legal terminology regarding IPs is not unequivocal, as results from different international insolvency cooperation instruments, distinct national legal traditions and varied breadth of their powers. For the purpose of the article, IPs are administrators, trustees, liquidators, supervisors, receivers, mediators, curators, officials, office holders, judicial managers GERARD MCCORMACK, ANDREW KEAY, and SARAH BROWN, *European Insolvency Law — Reform and Harmonization*, Edward Elgar Publishing, 2017, p. 65.

[2] Usually, when it comes to hybrid procedures — a hybrid of out-of-court rehabilitation and formal rehabilitation procedures, as defined by the INTERNATIONAL MONETARY FUND, *Orderly and Effective Insolvency Procedures*, 1999, *in https://www.imf.org/external/pubs/ft/orderly/* (28.06.22).

[3] For more information about legal persons as IPs, a discussion about a Spanish company acting as an IP in Germany, and the advantages of that choice, such as the different professionals brought to the procedure as a team (lawyers, accountants, economists) see VERONIKA HEFNER, *Juristische Personen als Insolvenzverwalter? Spanien und Deutschland im Rechtsvergleich*, Nomos, 2020 p. 29.

model to discuss two challenging aspects concerning IPs' regimes: the legal framework of *IPs' supervision*; the *professional liability of IPs* due to negligent or illegal performance of their duties. Supervision and professional liability are two interrelated aspects of IPs' legal regimes. The supervision of IPs is a fundamental aspect of insolvency and pre-insolvency proceedings. Judges are the main supervisors, often relying in the cooperation of both debtor and creditors, who signal to the court actions or omissions of the IP that can jeopardize the procedure and/or cause damages to the parties' rights and interests (internal supervision). When the IP profession is a regulated one, an external supervision is also in order, namely to assess the compliance with ethical rules and standards of professional and personal behavior. Adequate and efficient internal and external supervision may, in return, give cause to civil and/or criminal liability proceedings, every time that an IP misconduct inflicts damages to the parties.

We will begin with a brief analysis of the European insolvency legal framework regarding these matters and proceed to a legal and jurisprudential analysis of IPs performance in four EU-Member States — Italy, Netherlands, Poland and Portugal — in light of the legal amendments brought by the Directive on Restructuring and Insolvency[4], enhanced by the Covid-19 pandemic impact on the economic environment. These four jurisdictions were subject to an extensive comparative analysis in a EU research project carried out by the authors between 2017 and 2019.[5] They were chosen because their restructuring and insolvency regimes bring forward dissimilar maturity and rules, but exhibit several common problems, including a low credit recovery rate and expensive and long-lasting proceedings.[6] The results obtained support an important part of our discussion in this article.

2. European framework regarding insolvency practitioners

The European Insolvency Regulation[7] (EIR) and the Directive on Restructuring and Insolvency dedicate some articles to the tasks/role of IPs: the EIR highlights the importance of cooperation between IPs in cross-border insolvencies and the Directive enables the creation of a *professional in the field of restructuring* (PIFOR), at a national level.

Generally, the EIR aims not only to enhance the efficiency of cross-border insolvency proceedings, but also to extend its scope to restructuring proceedings as well as to second chance mechanisms for honest bankrupt entrepreneurs.

[4] 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).

[5] Research project ACURIA — Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement, funded by DG Justice of the European Commission (JUST/2015/ACTION GRANT no. 723202).

[6] Besides the diversity of the legal regimes, judicial culture and institutional matrices, the selected countries differ in their economic, social and political conditions, their location (more central or more peripheral), their moment of accession to the European Union, including to the Euro zone.

[7] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

Conversely, the Directive demonstrates the European authorities' determination of promoting a minimum harmonization on what concerns the insolvency legislation in order to increase efficiency of restructuring, insolvency and discharge proceedings. By doing so, European institutions will seek to promote investment and employment opportunities, reduce the winding-up of viable companies, avoid the aggravation of job insecurity, favor and reduce restructuring costs of cross-border companies and grant an effective second chance for honest bankrupt entrepreneurs that during their activity faced serious economic and financial difficulties.

As mentioned above, in a somewhat restrictive notion, IPs are considered the person or bodies on article 2(5) and on Annex B that essentially verify and admit claims; represent the collective interest of creditors; have the duty to administrate the assets whenever the debtor has been divested; sell the assets; and oversee the administration of the debtor's affairs.

Regarding the IPs, the EIR is fundamentally concerned with the tasks of the national IPs vis-a-vis the provision of information to creditors — namely with the duty to inform creditors[8] — and the duties of coordination and cooperation between IPs[9],both in proceedings concerning groups of companies and main/secondary procedures — which are more frequent — among other duties.[10]

The Regulation holds, on articles 34 and following, a set of attributions of the insolvency practitioner within secondary insolvency proceedings — article 36 (1), allows the IP, in order to avoid the opening of secondary proceedings, to give a unilateral undertaking on what concerns the assets located in the Member State where the secondary proceedings could be opened, complying that, on the moment those assets (or the liquidation product) are to be distributed, the distribution and priority rights established by national law will be observed. It is, also, the insolvency practitioner's duty to inform local creditors that an undertaking has been given, the rules and procedures for its approval and, as well, inform if the undertaking was approved or rejected (article 36 (5)). But, even if an undertaking was given and approved and yet a secondary proceeding was, nevertheless, opened, the insolvency practitioner of the main proceedings must transfer to the one appointed in the secondary proceedings all assets which he has removed from that Member State after the undertaking was given (article 36 (6)). The article under scrutiny also includes a sanctioning rule, holding the practitioner liable for any damages caused to local creditors as consequence of the non-compliance of the imposed obligations (article 36 (10)). In turn, article 37 states all those who are allowed to

[8] Article 54 of the EIR, allowing the creditors to lodge claims in other Member State as the national creditors of that State.

[9] The designated three C's — Communication, Collaboration and Cooperation, as said by BERNARD SANTEN *Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts*, ERA Forum, 2015 p. 232. The author defends there is a scale of importance: the duty to communicate relevant information is the minimum, and the duty to cooperate the maximum.

[10] Duty to examine the *lex fori concursus* (article 4/2 EIR); the right to start insolvency-connected civil procedures in other Member States (article 6/2 EIR); the general powers over assets belonging to the insolvency estate, before the opening of secondary insolvency procedures, including liquidation powers (article 21 EIR); the duty to promote the registration on public registrations of other Member States where the debtor has immovable property and whose law establishes that specific obligation (article 29 EIR).

request the opening of secondary insolvency proceedings, namely the insolvency practitioner appointed in the main proceedings, according to the rules established by article 38.

Still within the scope of main and secondary insolvency proceedings, it is worth mentioning the duties of cooperation to which, according to articles 41 and 43, are bound all insolvency practitioners[11] In accordance with such articles, besides cooperation among practitioners, the insolvency practitioner appointed in the main proceedings ought to cooperate with courts responsible for the opening of secondary insolvency proceedings, while the practitioner appointed in secondary proceedings must work together with courts in which the opening of the main or other secondary proceedings has been requested.

As to the powers of the insolvency practitioner concerning the proposal of restructuring plans, article 47 establishes that it is within the sphere of competences of the practitioner appointed in the main proceedings to propose a restructuring plan on those cases in which the law of the Member State where secondary proceedings have been opened allows the possibility of closing insolvency proceedings without liquidation of assets. In turn, if, within secondary insolvency proceedings, the liquidation of assets has already taken place and all verified claims have been satisfied, the remaining assets shall be transferred to the insolvency practitioner appointed in the main proceedings (article 49).

Also, a novelty of the EIR are the new rules on groups of companies, stating the duties of the insolvency practitioner within proceedings concerning members of a group of companies in articles 56 and following, which include a large set of rules regarding cooperation within these procedures, including principles of transparency, swift transfer of information, and freedom to choose the most adequate model of cooperation.

The EIR has good intentions, especially regarding the equilibrium between the debtor and the creditors from several Member States, generating confidence in the system of cross-border insolvencies. However, the reality has shown that the full implementation of these rules is made difficult by practical aspects[12] — the language barrier; the difficulties of finding translated national legislation; the difficult access to national public insolvency registries[13] and the differences concerning the available information; the inexistence of a list of contacts of IPs across Europe; the insufficient funds for translation of documents, travels or even hiring a local lawyer or representative.

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[11] The importance of fostering cooperation between insolvency practitioners' and between practitioners' and courts has been, also, stated in other research papers. For example, such relevance was already underlined in INTERNATIONAL INSOLVENCY INSTITUTE, *Global Principles for Cooperation in International Insolvency Cases,* 2012, https://www.iiiglobal.org/, (28.06.2022) (concretely, principles 9, 23, 26, 27, 29 and 33); and also JAN ADRAANSE, IRIS WUISMAN, and BERNARD SANTEN, *European Principles and Best Practices for Insolvency Office Holders,* Leiden University, 2014 (especially, principle 6), https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/rep3.pdf, (28.06.2022).

[12] Cfr. ILARIA QUEIROLO and STEFANO DOMINELLI, *Cooperation and Communication Between Parties in the Management of Cross-Border Parallel Proceedings Under the European Insolvency Regulation Recast*, in LAZIĆ, VESNA / STUIJ, STEVEN (eds.), Recasting the Insolvency Regulation Improvements and Missed Opportunities, Asser Press, 2020, p. 122.

[13] Only nine Member States participate in the registry, which presents very limited information, as seen in https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-pt.do.

Regarding the Directive, which focuses on a minimum harmonization of business restructuring instruments, the professional on the field of restructuring (PIFOR) defined in article 2(12) is not necessarily an insolvency practitioner, but a professional who is appointed to facilitate negotiations and the elaboration of a restructuring plan — bringing together creditors and debtor — and supervise the debtor in possession or assume, totally or partially, the administration of the debtor's estate. The appointment of the PIFOR, as established in article 5(2), can be optional.

First, by reaffirming the non-mandatory nature of the appointment of the professional in the field of restructuring, the European authorities' goal seems to be that restructuring mechanisms work, as much as possible, based on a direct relationship between debtor and creditors, limiting the existence of third parties within these proceedings only to cases of strict necessity. Secondly, it cannot help to be perceived, in our perspective, as a signal towards de-judicialization of insolvency and restructuring proceedings. As such, the intention of the European authorities seems to be the improvement of proceedings' flexibility. Nevertheless, the Directive does not cease to consider two situations in which Member States may require the appointment of a professional in the field of restructuring, namely: *a)* when the debtor is granted a general stay of enforcement actions; *b)* when the restructuring plan needs to be confirmed by a judicial or administrative authority (article 5 (3)).

Concerning the appointment, dismissal, and resignation proceedings of practitioners in the field of restructuring, insolvency and second chance matters, the proposal for a Directive assigns the Member-States the responsibility of guaranteeing its clarity, predictability, and impartiality, in accordance with the conditions established on the numbers 2, 3 and 4 of article 26.

Regarding the supervision of the activity performed by these practitioners, it is, in our perspective, appropriate to split the analysis of the provision in two parts. In one hand, in the first part of article 27 (1), the Directive establishes that it is up to the Member States the development of adequate oversight and regulatory structures. The intention of the European authorities is to give a wide margin of discretion to Member States in the conception and development of such structures, refraining, in this matter, from promoting any legal harmonization. In spite of what was stated above, the European legislator did not fail to mention one aspect which, in accordance to the second part of article 27 (1), must assume a commonplace for all Member States: an appropriate and efficient sanctioning regime for practitioners who fail to comply with their duties. It is, in fact, essential for efficient insolvency and restructuring proceedings the existence of appropriate consequences destined to discipline practitioners that do not comply with their professional obligations. Otherwise, we would be promoting the unaccountability of those who, within insolvency and restructuring proceedings, play a major role.[14]

[14] See GERARD MCCORMACK, ANDREW KEAY, SARAH BROWN and JUDITH DAHLGREEN, *Study on a new approach to business failure and insolvency — Comparative legal analysis of the Member States' relevant provisions and practices*,

3. IPs' supervision in national jurisdictions

To ensure the quality of the performance of insolvency practitioners it is necessary to build efficient regulatory structures, capable of supervising the practitioner's work within insolvency and restructuring proceedings. Such supervision may be carried out in two ways: internally and externally.

Internal supervision is considered the oversight promoted by the court and by creditors within the concrete proceedings in which the insolvency practitioner is appointed. This can be considered the first line of control regarding the practitioner's performance, being up to the judge and creditors to ensure that the tasks and duties of the insolvency practitioner are being carried out in a timely and transparent fashion. The breach of duties can be officially known, not only by the non-fulfilment of direct court orders, but also through the complaints made by creditors, the debtor or even third parties. Such supervision can lead to the removal and replacement of the IP or, ultimately, to civil liability.

On the other hand, the insolvency practitioners' activity can also be supervised by external entities (i.e. external to proceedings), whether they are regulatory bodies or even the State itself. This second line of control has, generally, a broader purpose, aiming to ensure the quality standards of the profession. These external entities are, also, usually in charge of promoting disciplinary action towards defaulting professionals and may define ethical rules or codes of conduct.

Efficient supervisory structures must include a combined use of these two types of mechanisms, only, thus, being possible to ensure the transparency and efficiency of insolvency practitioners' performance within proceedings. However, there is no unitary supervisory system available for implementation and, as such, regulatory or oversight solutions vary from country to country.

3.1. Internal supervision

The main features of the IP's duties may differ according to appointments in insolvency or pre-insolvency procedures.

During insolvency procedures, one can identify three major groups of functions: tasks related with the administration, liquidation, and restructuring; operational or practical tasks; supervision of the debtor's administration, previously or during insolvency procedures. The court's supervision will normally focus on a general duty of good administration and the balance between the maximization of creditors' interests and the debtor's restructuring that the performance of the IP has into account. In addition, depending on national law principles,

2016, p. 101, *in* https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en (29.06.2022).

specific legal duties, including the duty to inform the court and the creditors, meet the internal supervision standards. The court also has into account that the insolvency administration is not a sole man's work, since the IP acts in cooperation with the debtor, workers, public services and is usually assisted by creditors, including committees or general creditors' meetings.

Regarding the administration of the estate, the main tasks are the seizure and listing of assets; its conservation or monetization; analysis of avoidance actions and pending contracts; liquidation proceedings — including market search — and the report on the debtors' administration or insolvency plan.

About practical or operational aspects, the IP must list and verify creditors' claims; has the duty to inform both the court and the parties; to update public registries; communication duties with other courts where relevant judicial procedures are still pending; to lead lay-off and dismissal procedures, when necessary; to perform the payments to creditors; debtor's representation, payment of taxes, and the final report about the insolvency estate.

To supervise the debtor's administration, provisional IPs may be appointed as an interim measure during the insolvency proceedings.[15] In this case, not only IPs generally supervise day-to-day administration, but also may be called to authorize/sanction certain categories of ordinary or extraordinary administration acts. IPs must also report periodically to the court and elaborate reports about insolvency classification (blameworthy or not), payment plans and fresh start proceedings. Finally, IPs may also act as supervisors during the execution of restructuring plans.

With regards to pre-insolvency procedures, IPs functions depend on the legal framework — in a classic hybrid procedure, IPs elaborate the list of claims, supervises the debtor's administration, and may propose a restructuring plan, or simply act as a mediator in negotiations. One last note to the functions performed in cross-border procedures, where the internal supervision is shared by both the main and secondary procedures courts, as established in the general cooperation rules on article 42 EIR.

In Poland, the supervisory judge, and the creditor's committee are responsible for ensuring internal supervision. The supervisory judge has general powers, such as to ask for information, admonish or fine the insolvency practitioner in case of violation of duties[16]. The court may dismiss the IP in insolvency/restructuring proceedings in the case of gross breach of duties.[17] Certain IP's actions require the approval of either the creditors' committee or the supervisory judge otherwise being null and void.[18] Supervisory judges can also establish a set of actions that require an approval by them or by the creditors' committee in order to be validly performed.[19] As for the creditor's committee supervision powers, they can also request for information and dully inform the supervisory judge about any concerns regarding the

[15] Article 31.2 Portuguese Insolvency Act.
[16] Articles 152.1,169a, 19.1 and 30.2 Polish Restructuring Act. Fines may vary between PLN 1000 and PLN 30000.
[17] Article 170.1 Polish Insolvency Act.
[18] Articles 206 and 129 Polish Restructuring Act.
[19] Article 152.1 Polish Insolvency Act.

insolvency practitioner's performance.[20] At last, any creditor has the possibility of filing a complaint in court. Insolvency practitioners are also obliged to regularly report to the supervisory judge, namely about the preparation or implementation of restructuring plans (in restructuring cases)[21] and about the liquidation of debtor's assets (in insolvency cases) along with a financial report,[22] as well as to submit a final report at the closing of proceedings, that shall be ratified by court. Court may refuse the ratification in face of a poor-quality performance of the practitioner.[23]

In Portugal, internal supervision duties are also attributed to the court[24] and, if appointed, to the creditors' committee.[25] Both the court and the creditor's committee may request for information, documents, or expense justifications. The court is also allowed to ask for detailed reports about the state of proceedings, although quarterly reports are mandatory. Similarly, to the Polish case, at the closing of insolvency proceedings, the appointed practitioner must deliver a final report within 10 days after the termination of duties.[26] The court may also remove the IP on its own motion or following complaints from creditors, debtor or third parties, based on due cause.[27]

Likewise, in Italy[28], the internal supervision powers are given to the court and the creditors' committee.[29] The court can ask for information in chambers at any time during the proceedings[30] and, more specifically, the presiding judge can summon the IP and the creditors' committee whenever deemed appropriate for the prompt and correct conduct towards the benefit of insolvency proceedings[31]; also, within fifteen days, the court rules on the complaints against the acts of the trustee and the creditors' committee.[32] The IPs have also a general duty to report about their activities every six months, and the creditor's committee can make observations, and also keep a record of day by day activities. At last, a final report must be presented.[33]

The court also has the power to remove the IP, ex officio or by proposal of the presiding judge or the creditor's committee; complaints can also be made to the delegated judge within eight days after the knowledge of the act by the debtor, creditors or other third parties.[34] [35]

[20] Article 205 Polish Insolvency Act.
[21] Articles 31 and 32 Polish Restructuring Act.
[22] Article 168 Polish Insolvency Act.
[23] Articles 168.5 and 33 Polish Restructuring Act.
[24] Articles 58 and 68 Portuguese Insolvency Act.
[25] Article 66 Portuguese Insolvency Act. The nomination of the creditors' committee is not mandatory, especially in simple procedures, in liquidation procedures or when there are few assets. The ultimate decision belongs to creditors (article 67).
[26] Articles 61 and 62 Portuguese Insolvency Act.
[27] Article 56 Portuguese Insolvency Act.
[28] Legge Fallimentare, Regio Decreto 16 marzo 1942, n. 267, amended since 2006, and the new Codice della crisi d'impresa, Decreto Legislativo 12 gennaio 2019, n. 14, that will enter into force when the working group nominated by the Italian Government finishes the analysis of the covid-19 situation, and also the transposition of the Directive.
[29] Article 41 of Italian Insolvency Act.
[30] Article 23/1 Italian Insolvency Act and article 122 of the New Italian Insolvency Act.
[31] Article 25/1 Italian Insolvency Act and article 130 of the New Italian Insolvency Act.
[32] Article 25/5 Italian Insolvency Act.
[33] Article 33 Italian Insolvency Act.
[34] Articles 36 and 37 Italian Insolvency Act and 123, 134 and 135 of New Italian Insolvency Act.
[35] Article 38 and 116 of Italian Insolvency Act and article 136 of New Italian Insolvency Act.

At last, as far as the Netherlands[36] go, the supervisory judge (within the district court) has the general power to foresee the management of the insolvency estate[37], and the IP must report every three months to the court[38]. The creditors' committee has also the power to ask for information[39] and both the committee and the debtor may submit a complaint to the supervisory judge about the IP's actions.[40]

Concerning the removal of the IP, the court has the power to dismiss the IP at any time, based on the breach of duties, either on the recommendation of the supervisory judge, or at the reasoned request of one or more creditors, the committee, or the debtor.[41] [42]

3.2. External supervision

External supervision of IPs can rely on different models: a specific external regulatory body, in line with the Directive; supervision by the State; supervision by other professional bodies (lawyers, economists, accountants) or self-regulation (within professional bodies). Supervision will refer to ethical and deontological duties and, indirectly, to legal obligations, whenever courts have a duty to report removals or breaches of duty of IPs during insolvency procedures.

The Directive encourages the implementation of ethical codes[43], following the models of both INSOL EUROPE — professional, ethical and governance principles; state of art performance and knowledge; acting impartially, independently and with good reputation, with honesty, transparency and integrity — and INSOL INTERNATIONAL — also highlighting integrity, transparency, high morals and professional standards morals, including communication and organization skills.[44]

Professional duties for IPs can also be divided in three categories: ethical rules; general and specific conflicts of interests; professional duties *strictu sensu.*

Ethical rules vary according to national legislation, despite the extent of soft law instruments. IPs must act following the rule of good administration, with independence and transparency. They should operate according to the principles of insolvency proceedings, act civilly, show

[36] Faillissementswet, last version entered into force in January 1st 2021.
[37] Article 64 of Dutch Insolvency Law.
[38] Article 73a Dutch Insolvency Act.
[39] Article 76 Dutch Insolvency Act.
[40] Article 69 Dutch Insolvency Act.
[41] Article73/1 Dutch Insolvency Act.
[42] The removal is rare in the Netherlands, since courts maintain a trustworthy relation with IP's. For more information, M.J. GERADTS and R. HERMANS, "The Netherlands", in HEINS VALLENDER *et al* (eds.), *The Role of the Judge in Nomination, Supervision and Removal of the Insolvency Representative*. Judicial Wing of INSOL Europe. INSOL Europe 2014, p. 99 ff.
[43] See BOB WESSELS and GERT-JAN BOON, *Soft law instruments in restructuring and insolvency law: exploring its rise and impact*, 2019 p. 12 e ss., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397874 (27.06.2022), indicating the main difficulties on applying soft law rules to professional standards, especially in cross-border insolvency procedures.
[44] INSOL INTERNATIONAL, *Ethical Principles for Insolvency Professionals*, Insol Internacional, 2018, *in* https://cdn.website-editor.net/c1bf33c37353462b802fc473aaf1a7f1/files/uploaded/Ethics%2520Principles%2520for%2520Insolvency%2520Practitioners%2520-%2520from%2520INSOL_64I2neSe44VEULhbTQXZ.pdf

good communication and cooperation with other bodies or parties, and maintain a good personal and professional reputation. Conflicts of interest may be defined or analyzed case-by-case. Since the IP profession is not exclusive, general conflicts of interests include the prohibition of appointment in insolvent businesses operating in the same activity sector where the IP also acts privately as a company administrator or entrepreneur; in addition, IPs may not personally benefit from insolvency procedures by acquiring insolvency estate' assets, for instance.

Specific conflicts of interests may include the prohibition of acting as IPs in their own insolvency procedure or any other to which the IP has personal or professional connections. In these situations, IPs must immediately communicate to the court and the external supervision body the existence of such a conflict and ask for replacement.

At last, professional duties may include the refusal of appointments by lack of technical competence or inability to manage all the procedures; the duty to maintain a civil liability insurance; the duty to attend ongoing training sessions; and the duty to pay fees, for instance.

The breach of duties may result in disciplinary proceedings or in the application of fines or penalties.

Italy and the Netherlands do not have specific regulatory bodies for insolvency practitioners. In the Italian case, external supervision is conducted by the regulatory bodies of each of the qualified professionals[45], while the internal oversight is carried out by the court and the creditors, on a case-by-case basis. In the Netherlands, complaints may be filled against the lawyers registered in the association INSOLAD. INSOLAD is not a public entity and is not supervised by the Ministry of Justice either, so the oversight coming from this professional organization is considered more as a set of self-regulatory rules of conduct. Regarding internal supervision, the court, the creditors (isolated or in assembly) and even the debtor are called upon this task[46].

In Poland, supervision is carried out by the Ministry of Justice. Relevant rules on the supervision were introduced into the Polish insolvency framework in 1 January 2020.[47] It was pointed out that the previous model of regulation regarding IPs did not allow for a comprehensive and systematic supervision over IP's performance outside of the court procedure. According to the Polish legislator, it was necessary to come up with solutions which would enhance the supervision over the IPs profession. Therefore — apart from the existing supervision within the insolvency proceedings by insolvency courts and supervisory judges — the Ministry of Justice was given the general yet very broad competence to independently supervise IP's performance.[48] Under the "supervisory radar" is the violation of legal or ethical duties, or even

[45] Notwithstanding, some professional associations may be found in Italy, such as the *Associazione Curatori Fallimentari.*
[46] Articles 69 and 224/2 Dutch Insolvency Act.
[47] Act on the amendment of Insolvency Practitioner License Act and some other acts of 4 April 2019, which entered into force on 01 January 2020.
[48] Justification of the Amendment to IRLA p. 1, available at https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2089 (09.12.2022).

conviction for fiscal felonies. The insolvency practitioner may be suspended by the Minister of Justice [49] or have his license revoked.[50] If the reason for revoking the licence was improper performance of IP's duties, the licence cannot be granted to the infringer in the future.[51]

A novelty is the broad supervision powers of the Minister of Justice over IP's performance. Within the scope of supervisory actions — apart from suspending and revoking IP's license — the Minister of Justice may inspect and assess all the IP's activity and demand IP's documentation regarding the performance of their duties as well as debtors' books and records.[52] However, the Minister of Justice may not assess the legitimacy of actions performed directly on the instructions, with the permission or consent of the court or supervisory judge.[53]

In the Portuguese case, as in Poland, insolvency practitioners are also a regulated profession. On the one hand, external oversight is ensured by the IPs' supervisory body (Comissão para o Acompanhamento dos Auxiliares da Justiça — CAAJ), a public body dependent of the Ministry of Justice.[54] Insolvency practitioners may be submitted to disciplinary action or, even, fined[55], if a breach of legal or ethical duties is detected. CAAJ is informed by courts, by the Public Prosecutor or by any creditor regarding the existence of serious or repeated violations. Besides, the removal of the insolvency practitioner by the court on a concrete situation is reported to this Commission.[56]

3.3. Removal and disciplinary proceedings

Breach of duties during insolvency proceedings is normally met with the removal of the IP determined by court decision — based on direct observation or due to complaints of the parties or ordered by the external supervisor.[57] The court will evaluate the situation and substantiate the decision on a significant or reiterated breach of duties, negligence or malice and not less important, on the lack of confidence of creditors, the inability of the IP or as consequence of a disciplinary sanction. All of these are considered due reasons to remove the IP from office.

There is some jurisprudence in cross-border insolvencies, specially about the information duties that emerge from the European Insolvency Regulations.[58]

[49] In case criminal proceedings are initiated against the IP — Article 20 IRLA.
[50] The IP's licence may be revoked if the IP was convicted of an intentional crime; or was dismissed by the court due to improper performance of duties; or has committed a persistent or gross violation of the law in connection with IP's duties, which was established under the supervision of the Minister of Justice — Article 18.1 IPLA.
[51] Article 18.3 IPLA.
[52] Article 20b.3 IPLA.
[53] Article 20b.1 IPLA.
[54] Article 31 IPS. This Commission was created by Law 77/2013, of 21st November. There is also an association of insolvency practitioners, the "*Associação Portuguesa dos Administradores Judiciais*", but it does not have supervisory powers.
[55] Article 18 Insolvency Practitioner Statute.
[56] Article 56 Portuguese Insolvency Act and article 25 IPS.
[57] SAJADOVA, VERONIKA, Consumer Insolvency Proceedings: Comparative Legal Aspects, *in* THOMAS KADNER GRAZIANO, JURIS BOJARS, and VERONIKA SAJADOVA (eds.) *A Guide to Consumer Insolvency Proceedings in Europe*, Edward Elgar Publishing, 2020, p. 46.
[58] Most of them respect to the European Insolvency Regulation (No 1346/2000) — Gfv.VII.30.044/2014/6., Hungarian Supreme Court — failure to inform a Romanian creditor that the lodge of claims would require the

At a national level, a more significant number of court decisions about removals is shown, and the justifications for due cause are varied, despite the fact that the failure to provide information is the more common breach of duties. These include omissions, such as the IP who simply does not liquidate assets in a timely manner, and then fails to deliver the assets to buyers[59]; lack of confidence, when the debtor claims for a removal after the IP files a criminal complaint against him on the grounds of defamation and therefore arising a conflict of interests[60]; the systematic breach of the duty to inform the court, leading to an abnormal length of insolvency proceedings[61]; lack of authorization from creditors to reach an agreement in a civil suit[62]; lack of due diligence on hiring a bookkeeper that committed numerous irregularities and had had professional relations with the debtors' family, facts not unknown by the IP[63];providing false declarations to the court about giving powers to access the insolvency estate bank account[64]; lack of courtesy to the court, after the judge considers that reproachable language was used in the request made to ask for a special remuneration.[65]

As for Italy, the main justifications for due cause are the delay in the assessment of the assets to liquidate; the lack of distribution of the liquidation profits among creditors; the general breach of duties[66]; or incompatibility reasons with the IP's office.[67]

Regarding the Netherlands, as said above, removals are rare, especially given the inherent costs.[68] There is, however, a pattern to be found in the grounds that courts find important enough to dismiss an IP, despite the objections mentioned above, namely conflicting interests,

payment of a fee; BIN — Trgovina, turizem in storitve d.o.o. Izola, Izola — Isola, Dantejeva ulica 2, Izola — Isola" v "Salumificio Piovesana S.r.l., Via Isonzo 18, I — 34070 — Mossa (GO): Cst 78/2011 (St 10/2011) in Ljubljana Appelate court and Société DHL Global Forwarding (UK) Ltd v S.A.S. TOE Transmanche & Société Mc Namara Freight Limited: CA Orléans, 8 October 2009, RG n°: 07-02272, Orleans Appeal Court — failure to inform the foreign creditors of the deadline for lodging claims. All these decisions are available at the Insol Europe EIR Case Register, available at www.lexisnexis.com (09.12.2022).

[59] Porto Appeal Court decision 1350/17.2T8AVR.P1, available at www.dgsi.pt (29.06.2022).

[60] Porto Appeal Court Decision 4183/16.0T8VNG-H.P1, available at www.dgsi.pt (29.06.2022). In another case, the IP is accused of persecutory and threatening behavior towards the administrator of the insolvent company, leading him to suicide — Lisbon Appeal Court Decision 1516-14.7T8SNT-E.L1-6, available at www.dgsi.pt (29.06.2022).

[61] Lisbon Appeal Court Decision 3431/15.8T8BRR-F.L1-1, available at www.dgsi.pt (29.06.2022).

[62] Guimarães Appeal Court Decision 363/11.2TJVNF-H.G1 available at www.dgsi.pt (29.06.2022).

[63] Guimarães Appeal Court Decision 4397/15.0T8GMR-H.G1 available at www.dgsi.pt (29.06.2022).

[64] Évora Appeal Court Decision 23/14.2TBEVR-C.E1, available at www.dgsi.pt (29.06.2022).

[65] Porto Appeal Court Decision 561/09.9TBVFR-E.P1, available at www.dgsi.pt (29.06.2022).

[66] There has to be a legal reason, and not only an unmotivated request by the majority of creditors as said in Cassazione Civile, Sez. I, 13 marzo 2015, n. 5094 available at https://www.unijuris.it/node/2984 (27.06.2022).

[67] Tribunale di Milano, 29 dicembre 2018, available at https://www.unijuris.it/node/4788 (27.06.2022). In this particular case, the existence of a special relation between the judge and the appointed IP.

[68] I*t is left to the discretion of the court to judge what best serves the interests involved* (when deciding to dismiss the IP (RH)) - *including first and foremost the interests of the joint creditors. But given the fact that a change of IP involves considerable costs - the new IP will have to familiarise himself with the often extensive insolvency file (cf. Rb. Amsterdam 6 March 2014, ECLI:NL:RBAMS:2013:5972, JOR 2014/80) - it is not obvious that a decision to dismiss is taken too quickly."* (F.M.J. VERSTIJLEN, 'Faillissementswet. Artikel 73. Aant. 3, *in* A. J. VERDAAS (ed.), Groene Serie Faillissementswet, Deventer: Wolters Kluwer, 2015.

no objectivity, no impartiality; working relationship with the supervisory judge, breach of trust bankrupt/creditors[69], violating the performance of his/her fraud detection task.[70]

In Portugal a disciplinary proceeding may be opened based on the breach of ethical duties or after the court communicates the removal from office (articles 18 and 21 of the IP Statute), with or without provisional suspension, leading, in the more serious cases, to the removal from the official lists of IPs. Also, article 19 provides a set of fines for breaching ethical or legal duties.[71] [72]

Unlike attorneys-at-law and other public trust professions, in Poland there is no regulated professional association regarding IPs, responsible for training and disciplinary proceedings.[73] The out-of-court supervision over IPs performance is conducted by the Minister of Justice. In the case of court supervision, IPs were punished for slow operation[74] and sale of debtor's assets without prior consent.[75]

4. Civil liability rules for IPs

The European legislator did not fail to mention one aspect which, in accordance with the second part of article 27 (1), must be a commonplace for all Member States: an appropriate and efficient disciplinary regime for practitioners who fail to comply with their duties. It is, in fact, essential for efficient insolvency and restructuring proceedings the existence of appropriate consequences destined to discipline practitioners that do not comply with their professional obligations.

Otherwise, we would be promoting the unaccountability of those who, within insolvency and restructuring proceedings, play a major role.

As we have seen, the performance of the insolvency practitioners' activity within insolvency and restructuring proceedings can have serious repercussions. In fact, a less transparent behaviour of such professionals may deeply damage the rights of both creditors and debtors, and, as such, it is essential that an effective liability framework is available, in order to promote

[69] Although the Gederland District Court decision states otherwise, indicating that a relationship of trust between the trustee and the applicants is not necessary - *the examining magistrate is of the opinion that the applicants' dissatisfaction seems to arise from the idea that the trustee must represent their interests — and in particular their interest in being released from debts — and that the interests of the creditors in a proper inventory and enforcement of all assets of the estate would have to give way*. - ECLI:NL:RBGEL:2019:2692, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2019:2692&showbutton=true&keyword=curator (28.06.2029).
[70] Article 68(2) Dutch Insolvency Act.
[71] Since 2013 and until May 2021, 1032 disciplinary/penal procedures have been opened against IP's, as told by the CAAJ.
[72] Ranging from €1000 to €500 000, applied by the Disciplinary Commission. Thus far, one IP is provisionally suspended, and four have been fined, three of them suspended between one year and 24 months. Data available at https://caaj.justica.gov.pt/Comissao-de-Disciplina-dos-Auxiliares-da-Justica-CDAJ/Administradores-Judiciais-Medidas-cautelares-contraordenacoes-e-sancoes/Coimas-e-Sancoes-Acessorias-AJ (25.06.2022).
[73] Professional associations may also be found in Poland, such as the National Chamber of Insolvency Advisors (www.kidr.pl), of voluntary membership.
[74] Decision of the District Court in Szczecin of 23.04.2015 Case No. VIII Gz 284/14.
[75] Decision of the District Court in Warsaw of 08.11.2018 Case No. XIII Gz 1185/18.

truth, competence and confidence in the insolvency practitioner's profession. In order words, in their activity, insolvency practitioners must observe all legal duties and act in good faith when striving to accomplish the goals of both insolvency and restructuring proceedings. If they fail to act accordingly, then liability mechanisms must be available to both debtor and creditors, in order for them to timely salvage their rights.

On a comparative perspective, we were able to witness that such liability mechanisms are available in all analysed countries.

In Italy, where the law imposes due diligence as a general criterion, if the insolvency practitioner is removed of its duties by court decision, the new insolvency practitioner may file a liability action against the former, with the previous consent of the court or the creditors' committee.[76]

In the Netherlands, the IP may become liable before creditors, the debtor and even the company's workers, for instance, depending on the degree of the violation of legal duties.[77] The IP must adhere to the 'Maclou standard' (named after a landmark ruling). The Maclou standard, which thus has been developed in case law, entails that the IP should act as may reasonably be expected from an IP who has sufficient insight and experience and who should perform his duties with precision and diligence.[78] [79]

In Poland insolvency practitioners shall be liable for any harm caused by improper performance of duties.[80]

In Portugal, insolvency practitioners can also be held accountable for serious or repeated breach of legal obligations. According to article 59 of the Portuguese Insolvency Act, insolvency practitioners may be held responsible[81] for the damages caused to the debtor and to creditors (both creditors already existent at the time insolvency was declared and creditors whose claims were constituted after the opening of insolvency proceedings) if a guilty violation of duties is verified. The evaluation of a guilty conduct is based on the due diligence of a judicious and orderly professional.

Article 59 (2) adds that the appointed practitioner is, even, held liable for the damages caused to creditors whose claims arose after the opening of insolvency proceedings if the debtor's assets are insufficient to satisfy the creditors' rights, unless such insufficiency is due to

[76] Article 38 Italian Insolvency Act. The liability has a contractual nature, as said by the decision of Corte di Cassazione, Sez. I civ., 02 luglio 2020, n. 13597 available at https://www.unijuris.it/node/5253 (09.12.2022). Also, the IP's are not responsible for tasks not defined by law, as said by the Decision of Tribunale di Mantova, 21 marzo 2020, https://www.unijuris.it/node/5136 (09.12.2022).

[77] Article 72 Dutch Insolvency Law. This article exemplifies some of the violations, such as non-authorized acts, the lack of payment to secured creditors due to insufficiency of acts or unlawful dismissals. Insolvency practitioners may also face civil liability (article 6:162 Dutch Civil Code).

[78] ECLI:NL:HR:1996:ZC2047 Maclou & Prouvost/Curatoren van Schuppen.

[79] Even when the IP "*could have paid more attention to the bankruptcy* ", that is not sufficient to conclude that he/she is personally liable, as the Amsterdam Court of Appeal stated in ECLI:NL:GHAMS:2015:4031, at 3.11, *in* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:4031&showbutton=true&keyword=curator (09.12.2022).

[80] Article 25/1 Polish Restructuring Law and article 160/3 Polish Insolvency Law.

[81] The civil procedure is independent of the insolvency procedure. Portuguese Supreme Court decision 4488/11.6TBLRA-M.C1S1 indicates that the IP is accountable for failing to inform the secured creditor about the liquidation of the secured asset, as established in article 164 of Portuguese Insolvency Act, even when depreciation and promptness to sell are invoked by the IP. Available at www.dgsi.pt (09.12.2022).

unpredictable circumstances. Nevertheless, the practitioner's liability prescribes in two years after the damaging facts come to the knowledge of the claimant.[82]

As we could see, the professional activity of the insolvency practitioners may entail serious risks for the prerogatives of both debtor and creditors. As such, according to the Insolvency Practitioner's Statute, such professionals are required to possess personal liability insurance.[83]

5. Final Remarks

Insolvency practitioners serve justice and contribute to the functioning of markets through their action in corporate restructuring procedures and, above all, in the winding up of business that no longer meet the conditions to continue operating. A good performance of their mission contributes, in a decisive way, to establish a fair balance between the conflicting interests of debtors, creditors and the State itself. Similarly, a poor performance may lead to significant economic losses for the other parties involved in the proceedings, in particular creditors seeking the reimbursement of their claims and/or the debtor wishing to restructure. Thus, both the European and Member States' legal systems devote special attention to the issues of IP supervision and liability.

It is clear from the combination of the EIR and the Directive on Restructuring and Insolvency that regulation of IP's profession is crucial to achieve the goals of the internal market and the effectiveness of the judicial system in economic matters and, in the intersection of these objectives, the operationalisation of cross-border insolvencies. Such harmonised regulation implies the adoption of national supervisory systems that are complemented by clear and effective accountability rules and procedures regarding IPs performance. Following up on the requirements of European law the four national jurisdictions analysed in this article show that, in spite of different systemic characteristics and legal provisions, there are common challenges and solutions in the configuration of IPs' role. The analysis shows that in all of them there is a dual structure of supervision — internal and external — and a system of multivariate liability (professional, civil and even criminal) that embodies the concerns established by the European legislator.

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