Basic Aspects of Approximation of Ukrainian Insolvency and Restructuring Law with European Union Legislation

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Summary: The urgency of the approximation of Ukrainian Insolvency Law with EU legislation was justified in the article. The definitions "insolvency" and "bankruptcy" were analyzed. The main goals and principles of EU Insolvency Law were described. The main aspects of the Insolvency Law in Ukraine were characterized. The state of approximation of Ukrainian Insolvency Law with EU legislation and outstanding issues of this process were analyzed. Restructuring as a new approach to business failure and insolvency was characterized. The main conclusions about the next stages of approximation were given.

Keywords: approximation, insolvency, bankruptcy, restructuring.

1. Introduction

Today insolvency is recognized as a natural phenomenon of the market environment. With the mechanisms contained in the insolvency law, mixed economy "cleans" itself from unpromising business entities, which are due to the use of bankruptcy procedures restructure their activities or leave market.

Despite the fact that the insolvency legislation is not mentioned as a subject for immediate approximation with European Union law, it is an important indicator of market reforms, and also acts as an indicator of a certain degree of success of reforms in the sphere of economics and law.

Actuality of approximation insolvency law may be proved by the fact that insolvency is one of civil matters. The field of judicial co-operation in civil matters is designated as an area of shared competence and the principles of subsidiarity and proportionality rule the division of powers between the Union and the Member States. Within this category, the EU has produced a number of legislative acts aimed at unifying the rules between member states and thus facilitating access to justice, including Regulation on insolvency proceeding.

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2. Bankruptcy versus Insolvency

The term insolvency is commonly confused with bankruptcy. Although both insolvency and bankruptcy refers to a situation whereby a legal entity's liabilities exceeds assets, insolvency refers to a financial state where as bankruptcy is a distinct legal concept as a matter of law.

Insolvency is defined as a financial condition or state when:

- a legal entity or a person's debts exceeds their assets;
- when a legal entity or person can no longer meet their debt obligations on time as they fall due.

Upon becoming insolvent, the legal entity or person must take immediate action to rectify the situation as soon as possible, in order to avoid possible bankruptcy.

Bankruptcy is defined as the result of a successful legal procedure that results from:

- an application to a relevant court by a legal entity or a person to have themselves voluntarily declared bankrupt;
- an application to the relevant court by a creditor of a legal entity or a person in order to have that legal entity or person declared bankrupt;
- a special resolution which a legal entity files with the Registrar of Companies in order to be declared bankrupt.

A state of insolvency can lead to bankruptcy. However, it is also possible that the state of insolvency could be temporary and fixable. Thus, insolvency does not necessarily lead to bankruptcy, but all bankrupt legal entities or persons are deemed to be insolvent.

3. EU Insolvency Law

Today in Europe half of all businesses do not survive the first 5 years of their existence. In the EU 200,000 firms go bankrupt per year – that is 600 a day, resulting in direct job losses of 1.7 million every year. Around a quarter of these bankruptcies concern businesses that work cross-border. This information reflects the importance of the development and improving of insolvency regulation.

At the beginning of the European unification process, cross-border insolvencies were governed by the international insolvency laws of the member states – as modified by bilateral treaties – only. It soon became clear that there was a need to establish common rules governing cross-border insolvencies. However, it took several decades to agree on such rules.

On 29 May 2000, the Council of the European Union adopted the Regulation on Insolvency Proceedings[1]. The European Insolvency Regulation was followed by two directives on the reorganisation[2] and winding-up of insurance undertakings and, respectively, credit institutions[3], both adopted by the European Parliament and the European Council.

The EU Insolvency Regulation entered into force on 31 May 2002. As a regulation, it does not need to be implemented by the member states but has to be directly applied by national courts. The most part of member states have also implemented both directives and amended their national laws accordingly.

EU Insolvency Regulation contains:

1. Insolvency procedural law – regulates the jurisdiction for insolvency proceedings, and some aspects of their course.
2. Insolvency substantial law – regulates e.g. the position of „liquidator".
3. Insolvency conflict rules – regulates the law applicable for the concrete proceedings.

The main purposes of the Regulation are to impose rules governing the jurisdiction in which an insolvency proceeding in the EU can be opened and subsequently administered, and to set rules for the recognition in other member states of those insolvency proceedings and the enforcement of those proceedings.

One of the main points that makes difference between European and International Insolvency procedural law is principle of controlled universality.

The international insolvency law is based upon principle of universality, i.e. the intention is to cover all debtor's assets no matter whether they are situated. The European insolvency law is based upon principle of controlled universality. According to it:

1. one insolvency proceeding shall exist, so called primary insolvency proceeding, which affects all the assets of the debtor;
2. the liquidator appointed in this proceeding may exercises his powers in another Member State, as long as no other proceeding has been opened there (Liquidator – any person of body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs);
3. beside this primary proceeding, secondary proceeding may exist in another state which may affect only the assets situated on the territory of that state and support the primary proceeding.

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[1] Council Regulation (EC) No 1346/2002, OJ L160/30.6.2000

[2] Directive 2001/17/EC on reorganisation and winding up of insurance undertakings of 19 March 2001 entered into force on 20 April 2003

[3] Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit instituti-ons entered into force on 5 May 2004

Besides of this key principle, there are some another principles of EU Insolvency Law. They have been captured in the Principles of European Insolvency Law that have been presented in Brussels in June. The Principles are the result of looking beyond and behind these differences in structure, scope, concepts and formulation.

The Principles were presented as "….. the essence of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States". The other aim of the Principles is to provide a foundation for greater harmonization.

These Principles are dealt with the following topics:

§ 1 Insolvency proceeding
§ 2 Institutions and participants
§ 3 Effects of the opening of the proceeding
§ 4 Management of the assets
§ 5 Obligations incurred by, and fees of, the administrator
§ 6 Treatment of contracts
§ 7 Position of employees
§ 8 Reversal of juridical acts
§ 9 Security rights and set-off
§ 10 Submission and admission of insolvency claims
§ 11 Reorganization
§ 12 Liquidation
§ 13 Closure of the proceeding
§ 14 Debtor in possession

The Principles are followed by a General Commentary[4]. It starts with a brief introduction to the problem, followed by an explanation of the Principle itself. The Commentary does not provide exhaustive comparative reflections, but sketches in charcoal with references to approaches and solutions of national insolvency law systems. It furthermore indicates where these systems substantially deviate from a particular Principle and refers, where appropriate, to articles of the EU Insolvency Regulation[5]. The Principles focus mainly on business insolvency, do not deal with insolvency proceedings concerning e.g. insurance undertakings and credit institutions, do not address voluntary debtor-creditor-arrangements ("work outs") outside insolvency law, do not include obligatory information systems which have been set up in some countries

[4] Written by professors McBryde (Scotland) and Flessner (Germany).

[5] The EU Insolvency Regulation has chosen – not unquestionably – to refer to the "liquidator" as the person who administers or liquidates assets. The Principles use the term "administrator".

and do not address the issue of liabi1ity of directors and shareholders, as the grounds of liability can be manifold and vary from country to country. The Commentary is followed by ten National Reports. These reports are all structured in more or less the same manner and contain information on the most important types of insolvency proceedings, the players (institutions and participants involved in these proceedings), the protective effect of insolvency proceedings, the position of creditors and other important issues such as the reversal of juridical acts, set-off, the effect of insolvency on existing contracts and the adoption, contents and effects of reorganization plans and compositions. These National Reports are written with admirable oversight and clarity. The Principles, with its Commentary and the National Reports, here serve two other aims. They will enable lawyers with different national backgrounds to understand better the existing systems of insolvency law in Europe. With the coming into effect of the EU Insolvency Regulation there clearly is a need to understand the insolvency laws of the Member States better. It therefore may be regretted that the publication[6] lacks reports from Austria, Greece, Finland, Portugal and Sweden. It may be noted however that Principle 14 recognizes the DIP principle, where according to the Commentary every jurisdiction covered nowadays provides for an alternative, next to the classic insolvency (liquidation) proceeding, where the debtor is left in possession during a reorganization of his liabilities.

The Principles, although limited in scope and concerned countries, are a first attempt to tackle an area of (international trade) law that is of great commercial importance. After several decades of discussion and studying the differences some would never have thought that common foundations in Europe in this domain could be revealed. In the much shorter term the Principles, its Commentary and the National Reports provide scholars and practitioners with a much needed catalogue raisonné, bringing to the surface common foundations, policies and effects in constituent parts of Europe's insolvency law.

4. Ukrainian Insolvency Law

In Ukrainian Insolvency law in the section "General provisions" the definition of bankruptcy and insolvency are given:

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[6] W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Kluwer Legal Publishers, Deventer, The Netherlands, 2003; ISBN 90 130 0597 7.

- Bankruptcy – an economic court established inability of the debtor to restore its solvency and fulfill the creditors' claims allowed by the court, other than through liquidation procedure[7].
- Insolvency – inability of a subject of business activities to fulfill its pecuniary obligations to its creditors, other than through solvency restoration[8].

In EU Insolvency Law there is no strict definitions, but in our opinion, the definitions of Ukrainian law are similar or even the same like in international insolvency law.

The main legal act in the field of insolvency in Ukraine is Law "On Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy" which was adopted on 14 May 1992.

It includes insolvency procedural and substantial law which are reflected in ten sections of this legal act.

It was the first attempt to regulate lawfully the legal relationships of insolvency. The Law was rather poor and had only 22 articles which did not provide the necessary detailed regulatory requirements. The declared goal of the law was to regulate the judicial procedure of the bankruptcy (liquidation) of legal entities in order to satisfy creditors' claims.

The main drawback of the law was that it did not provide specific mechanisms for stoppage of the fulfillment of monetary obligations and tax obligations (mandatory payments) by a debtor, as well as the stoppage of legal measures to enforce these obligations. Since, at that time, the institute of professional insolvency practitioners (asset managers) did not exist, their functions were performed by creditors (who usually do not have the knowledge needed to carry out liquidation procedures). Technical and legal flaws of this Law were exclusively resolved by legal practice and relevant interpretations of the Supreme Economic Court of Ukraine. The said Law also contained provisions on reorganization, but the mentioned flaws prevented their use. And the unfavorable investment climate in Ukraine combined with the procedures of restoring solvency inhibited foreign investors from participating in the process.

In 1994, the Agreement on Partnership and Cooperation (hereinafter – PCA) was signed between Ukraine and the European Community and its Member States. Ukraine began the process of bringing national legislation up to EU standards, especially in certain priority areas (Article 51 of the PCA), including bankruptcy of companies. It was the improvement of bankruptcy law in order

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[7] p. 2, The Law of Ukraine on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy

[8] p. 2, The Law of Ukraine on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy

to bring its provisions to EU norms and standards, in particular, to Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings.

Unlike previous versions of the law, the mechanism of the proceedings in bankruptcy cases was built on the principles of competition of creditors as the orderly collective satisfaction of creditors' claims. This version remained very far from perfect but eliminated many of the shortcomings of its predecessor. Specifically, a moratorium on the satisfaction of creditors' claims, a bankruptcy law sub-institute, was founded. Creditors were divided into two groups, long-term and current ones. Creditor's status (rights and obligations) in the bankruptcy case was determined by the nature of its claims against the debtor, its security, the time the commitment was incurred and its social significance. The particular emphasis of the Law was solvency restoration procedures. Accordingly, the debtor was granted more rights and preferences.

The adoption, in 2004, of the Commercial Code, which provided clarification of substantive norms in insolvency procedures, became an important development in the reform of bankruptcy law.

But as the law was developed by foreign advisers, it was not duly mesh with the existing legislative system, containing legal constructions which had been unknown in Ukrainian legislation and did not take into account the legal practice. Accordingly, many gaps and inconsistencies of the Law were settled by case-law, and with information letters and interpretations of higher courts. This state of the regulation, coupled with the significant growth of corruption in the judiciary of Ukraine led to that the proceedings in the bankruptcy cases in fact became a procedure for legitimizing crimes in the economic sphere and a tool for dispossession of participants in economic relations.

So, according to Doing Business, bankruptcy procedure in Ukraine lasts an average of 2.9 years, and the recovery rate is 8.2 cents per 1 dollar. It is among the worst in the region. Based on these data the IMF required the insolvency procedures to be reformed as one of the basic requirements for continued cooperation with the Government[9]. The main goal of the reforms should have been to provide a reliable protection of creditors' interests and to reduce the duration of the procedures in bankruptcy cases and the costs of these procedures. Moreover, the updated regulation should have been based on the proposals of the experts and consultants of the World Bank and the International Monetary Fund. In particular, the need to reform the bankruptcy system in the context of improving other areas of legislation was emphasized, including adapting the juridical system to the needs of effective bankruptcy proceedings through the implementation of appropriate corporate governance and institutional support

[9] p. 22 of the Memorandum of 2010

for the effectiveness of the bankruptcy system and appropriate state and non-state regulation. In accordance with the latest version of the Principles for Effective Insolvency and Creditor Rights Systems (2011), the developers suggested the use of advanced mechanisms as a means to maximum protection of the interests of the participants of bankruptcy proceedings, a new system of monitoring, diagnosing and protecting businesses from financial problems and crises and finding optimal ways to overcome insolvency. In particular, an attempt was made to improve bankruptcy proceedings; new ways of protecting the rights and legitimate interests of both debtors and creditors, as well as employees and the state were introduced; for the purpose of economy and efficiency a procedure for pre-trial rehabilitation of debtors was introduced, and the jurisdiction of all matters in dispute with the debtor was given to the commercial court which considered the bankruptcy case of the debtor.

As the Government of Ukraine is in constant need of external borrowing, a new phase of reform was started.

5. The state of approximation of Ukrainian Insolvency Law with EU legislation

During last five years some steps to approximate Ukrainian insolvency law with EU legislation have be done. On 18 January 2013 the Law of Ukraine on Introducing Changes to the Law on Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy came into effect. It makes a number of important changes to insolvency procedures in Ukraine.

The New Insolvency Law provides better protection for creditors whose claims are secured with a pledge. It also changes the framework for starting and carrying out an insolvency procedure in the Ukrainian commercial courts. There are also changes to the out-of-court debtors' rehabilitation procedure which may be followed before starting insolvency proceedings at a commercial court. The New Insolvency Law adds a new chapter of legislation on international cooperation in cross-border insolvency procedures (table 1).

A significant change concerns the restrictions on when unsecured creditors can join ongoing insolvency proceedings at a commercial court. Previously an unsecured creditor wishing to join proceedings had to file its claim within thirty days from the date of official publication of the start of proceedings. This period could not be extended, which meant that if an unsecured creditor missed the deadline, it could not join the proceedings regardless of the significance of its claims against the debtor. Now commercial courts handling insolvency cases will be obliged to accept the claim even if it was filed after the expiry

of the thirty-day period. Such claims, however, may only be satisfied after the claims filed by unsecured creditors on time have been considered.

Table 1: The structure of the Ukrainian Insolvency Law before and after reformation in 2013

Before18 January 2013	From 18 January 2013
SECTION I. GENERAL PROVISIONS SECTION II. BANKRUPTCY PROCEEDINGS SECTION III. LIQUIDATION SECTION IV. AMICABLE SETTLEMENT SECTION V. TERMINATION OF BANKRUPTCY PROCEEDINGS SECTION VI. SPECIFIC FEATURES OF BANKRUPTCY OF CERTAIN CATEGORIES OF BUSINESS ENTITIES SECTION VII. FINAL PROVISIONS	SECTION I. GENERAL PROVISIONS SECTION II. BANKRUPTCY PROCEEDINGS SECTION III. LIQUIDATION SECTION IV. SALE OF PROPERTY IN BANKRUPTCY PROCEEDINGS SECTION V. AMICABLE SETTLEMENT SECTION VI. TERMINATION OF BANKRUPTCY PROCEEDINGS SECTION VII. SPECIFIC FEATURES OF BANKRUPTCY OF CERTAIN CATEGORIES OF BUSINESS ENTITIES SECTION VIII. ARBITRATION MANAGER (ASSET MANAGER, LIQUIDATOR) SECTION IX. BANKRUPTCY PROCEEDINGS RELATING TO FOREIGN BANKRUPTCY PROCEDURE SECTION X. FINAL PROVISIONS

The New Insolvency Law requires that if a creditor files a claim expressed in foreign currency, the value of the claim must be specified in Ukrainian Hryvnias according to the National Bank of Ukraine's official exchange rate on the date the claim is filed with the court.

The New Insolvency Law requires that an out-of-court debtors' rehabilitation procedure be established and approved at a general creditors' meeting. It should then be filed with the relevant commercial court for final approval. The term of the rehabilitation procedure may not exceed twelve months from the day the plan is approved by the commercial court. During this term, it is not possible to start insolvency proceedings.

Another significant change is that secured creditors are now protected even if they are excluded from the creditors' committee. The debtor's secured assets are isolated from the main asset pool and reserved for settling secured creditors' claims. Secured creditors now also have the right to reject a reorganization plan approved by the creditors' committee and to withdraw from insolvency proceedings by having their claims settled by selling the pledged assets or by a direct purchase of the debt by other creditors.

Under the New Insolvency Law, official publication of the start of insolvency proceedings must be made on the official website of the High Commercial Court of Ukraine. Overall, the New Insolvency Law provides for more comprehensive and progressive regulation of the insolvency procedure and changes it in accordance with current economic and legal developments.

6. Outstanding issues of approximation

However, there are still some outstanding issues. Ukrainian Insolvency law contains provisions that can be regarded as discriminatory. Under certain provisions of the law, not all business organizations may be recognized bankrupt, which violates one of the fundamental principles in the field of competition. Insolvency law excludes state-owned enterprises from the range of subjects of bankruptcy law. This can be regarded as a violation of the basic principle of competition in the countries with developed market relations – all market participants should be equal and the law should apply to all legal subjects equally.

The other problem is that Insolvency law gives local governments the right to decide that bankruptcy proceedings against municipal enterprises can not be brought.

Thus, without a reform of Insolvency Laws, on the one hand, Ukraine will not be able to implement market reforms effectively, and on the other – some problems will arise outside the country if it will be necessary to protect their interests and property rights of Ukrainian businessmen. It is no coincidence that foreign investors do not yet see the advantages of investing in Ukraine (success stories) from the use of bankruptcy procedures to address the debt problems.

7. Restructuring: a new approach to business failure and insolvency

In March 2014, the European Commission published its “Recommendation on a new approach to business failure and insolvency”. The primary subject of the Recommendation is the legal treatment of distressed but viable businesses. Its main objective is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximize the total value to creditors, employees, owners and the economy as a whole.

The Commission defines restructuring as a process by which the "composition, conditions, or structure" of a debtor's assets and liabilities are changed, "with the objective of enabling the continuation, in whole or in part" of its business activities.

The Commission has expressed concern at reports that distressed but viable businesses are being channeled into liquidation proceedings in some Member States. The result may be the break-up of business assets to be sold on a piecemeal basis, even though the business is worth more to creditors (and to other classes of stakeholders, such as employees) when preserved on a going concern basis. A restructuring is one way to preserve the value of such a business. A restructuring of liabilities (for example, through the write-down of debt or, in the case of a company, the conversion of debt to equity) could be used to restore the debtor to solvency so that it can continue to trade. Achieving this will require negotiation with affected creditors to procure their consent to compromise or otherwise alter their rights against the debtor. A restructuring procedure provided by law can, however, offer tools to facilitate reaching agreement – for example, by providing that in certain circumstances the decision of a prescribed majority of creditors to accept a restructuring plan can also bind dissenting creditors to the plan. Such tools can be provided within an insolvency code (for example, as part of a corporate rescue or reorganization procedure), or outside it – as in the case of the English scheme of arrangement.

The Commission's Recommendation is primarily focused on this type of restructuring tool – that provided by law to facilitate the negotiation of a binding restructuring agreement. It should be emphasized at the outset that it is perfectly possible to achieve such an agreement without recourse to a restructuring or insolvency procedure provided by law. Creditors can negotiate informally with a debtor to achieve a restructuring by consensus. Creditors with sufficiently similar interests and incentives (such as banks) may also develop their own restructuring processes, for use where a debtor with exposure to multiple creditors of that class becomes distressed. More formally, creditors or classes of creditors (such as bondholders) may commit themselves, before distress, to a restructuring process in a contract. These solutions may be more desirable than recourse to a formal procedure provided by law, not least because they may be less costly to achieve – recourse to formal restructuring or insolvency procedures can involve significant direct and indirect costs. Achieving such a solution may, however, be easier in the presence of a legal procedure that parties can "bargain in the shadow of", knowing that if they fail to cooperate, formal (public and costly) proceedings may have to be commenced. In addition, there will be some circumstances in which informal, industry or contractual solutions to distress are inappropriate (for example, because creditor interests

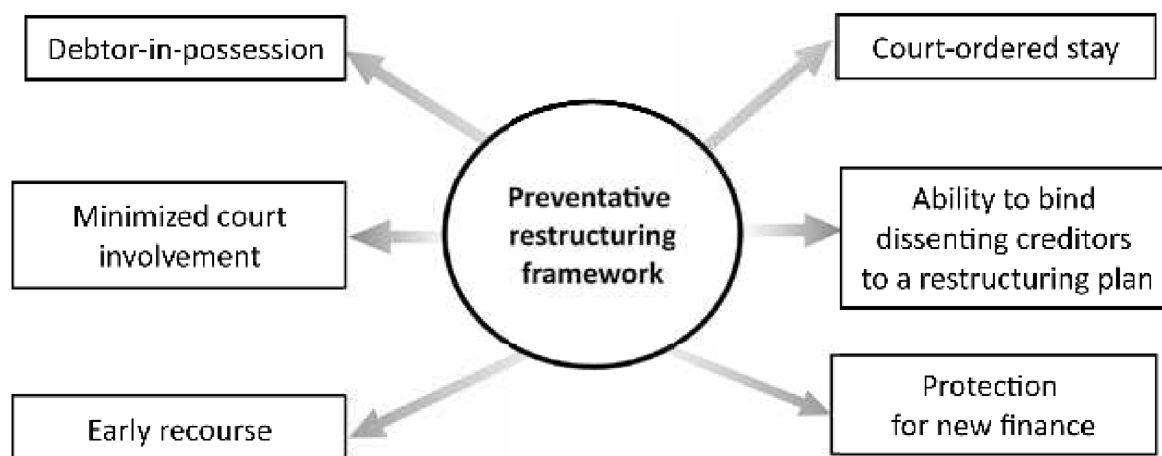
and incentives are too diverse to permit effective coordination), and then the presence of a restructuring procedure provided by law may be of direct utility to stakeholders.

In Ukrainian legislation the definition of restructuring is given in Insolvency: it is carrying out organizational, economic, legal, and technological measures to reorganize an enterprise, specifically through dividing the enterprise and transferring its debt obligations to the legal entity that is not subject to sanation, if this is stipulated by the sanation plan, and also change its management, forms of ownership, organizational and legal forms, which will facilitate the enterprises' financial rehabilitation, increase in the turnout of competitive goods, and efficiency in operating the enterprise and satisfying creditors' claims.

It is more broad. But in general this definition has the same context like EU's.

There are six core principles emphasized in the Commission's recommendations for a "preventative restructuring framework" in each Member State (Fig. 1).

Figure 1: Core principles of restructuring



These principles are complementary and as such should be analyzed together, rather than in isolation. The six principles are:

1. Early recourse: the Commission recommends that a debtor be able to have recourse to the restructuring framework at an early stage, before factual insolvency. In Member States where restructuring tools are presently contained within insolvency procedures that can only be commenced after a debtor is insolvent, adherence to this principle would require a change in the law to make such tools available earlier, without recourse to the full insolvency procedure. The Commission does not, however, recommend unrestricted access to its restructuring framework. To prevent misuse of the procedure by solvent companies (for example, as a device to coerce

a compromise where the debtor is fully capable of fulfilling its existing obligations), the Commission recommends restricting the availability of the framework to debtors already in "financial difficulties", such that there is a "likelihood of insolvency".

2. Minimized court involvement: the Commission recommends permitting a debtor to have recourse to the restructuring framework without the need to formally open court proceedings. More generally, it emphasizes the need for a swift and inexpensive procedure, and as such recommends restricting court involvement to circumstances where necessary and proportionate to safeguard the rights of creditors and others affected by a proposed restructuring plan (see principle 5 below). The Commission does contemplate the involvement of a court in some other limited circumstances (including where the debtor seeks a stay of creditor enforcement action; see principle 4 below), but its overall emphasis is on minimizing the need to have recourse to a court. Conformity with this principle could require significant change in jurisdictions that presently require courts to undertake a wider range of tasks in a restructuring process (for example, holding meetings for creditors to vote on a plan).
3. Debtor-in-possession: the Commission recommends that the debtor "keep control over the day-to-day operation of its business" while the restructuring framework is used. This principle is designed to ensure that the business can continue to be run while the possibility of restructuring is explored, with minimal disruption to ordinary operations. Leaving the debtor in control of the business may also help to incentivize early entry into the framework, consistent with principle 1. The principle of leaving managers in control might be regarded as controversial in jurisdictions that presently require the relinquishing of control in insolvency processes, but there is no necessary inconsistency. The Recommendation focuses on legal tools to enable restructuring, and not on the broader question of the design of insolvency procedures (which typically involve a much wider range of activities, such as investigations into managerial conduct, and the avoidance of pre-insolvency transactions).
4. Court-ordered stay: the Commission recommends that the debtor be empowered to seek a stay of individual creditor enforcement action (including by secured creditors), by application to a court. The stay is designed to enable the assets of the business to be kept together, preventing their piecemeal dismemberment by creditors. Since a stay impinges on the ordinary rights of creditors to enforce on default, its availability might in some circumstances be predicted to increase rather than decrease the cost of credit ex ante. For this reason, the Commission recommends a series of safeguards,

including time limits (initial stay of up to four months, subject to renewal up to a maximum duration of 12 months), and an obligation to lift the stay when no longer necessary to facilitate the adoption of a restructuring plan. The Commission also contemplates Member States imposing other conditions on the availability of the stay. States might, for example, require evidence of the viability of a debtor's business, so as to exclude use of the procedure by non-viable businesses (that is, those whose assets are not worth more kept together than broken up in a piecemeal sale). The Commission does however recommend that the stay be granted where creditors with a "significant" amount of claims support the negotiation of a restructuring plan, and the plan has a reasonable prospect of being implemented and of preventing the debtor's insolvency.

5. Ability to bind dissenting creditors to a restructuring plan: the Commission recommends that the restructuring framework provide for a plan to be negotiated between debtor and creditors (secured or unsecured), and – where approved by the requisite majority of creditors in affected classes – sanctioned by a court, with the effect that dissenting creditors are bound by it. The Commission also recommends power to sanction a plan approved by some classes but not others, with the result that it would be possible for a majority of classes to bind dissenting classes (that is, for those classes to be "crammed down"). Various safeguards are called for, including a requirement that the plan does not reduce the rights of dissenting creditors below that which they might reasonably be expected to have received if the debtor's business had instead been liquidated or sold on a going concern basis, as the case may be. Procedural requirements are also stipulated to ensure creditors are notified of the plan, can object to it, and can appeal against it. As others have noted, aspects of the Commission's proposals for restructuring plans appear to borrow from the English scheme of arrangement procedure, which enables a court to sanction a binding scheme that has the consent of the prescribed majority of creditors (or of creditors in an affected class), subject to a range of substantive and procedural safeguards. It is important to acknowledge that the administration of this scheme procedure with due safeguards has required significant judicial input and expertise (for example, to develop principles for the proper constitution of classes).
6. Protection for new finance: the Commission recommends that those who provide new finance to a debtor in accordance with the terms of a court-sanctioned restructuring plan be shielded from the operation of avoidance provisions in insolvency law, and from "civil and criminal liability relating to the restructuring process", except in the case of fraud.

8. Conclusions

Regulation of relations in the sphere of bankruptcy is aimed at ensuring equal protection of creditors and the debtor, the creation of open and clear rules for economic agents on the market – both domestic and foreign. Perspective Ukraine's membership in the EU requires the adaptation of bankruptcy legislation to the European standards. However, some provisions introduced in the new edition of the Law of Ukraine "Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy", not only do not meet the European requirements of the unified law on bankruptcy, but reject the accumulated achievements in restoring the solvency of business entities. Some positions and contradictions contained in the specific requirements complicate their prospective application and may lead in practice to a reduction of the expected effect.

One way to solve this problem in Ukraine is legislative regulation-making process of regulatory legal acts of subjects of the rule-making and accounting of provisions. The necessary condition and the main principle of a rule-making process is the legitimacy as an objective of property rights as a whole.

Thus, creating a national state legal system in accordance with EU regulations, it is necessary at the same time adapting existing laws to take new ones, agreed with the legal field of the EU legislation. It is important to consider that the process of approximation of Ukrainian legislation requires the harmonious cooperation of all branches of government.