HARMONISATION IN TIMES OF CRISIS

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1. INTRODUCTION

Globalisation generally, and European integration more specifically, have led to the minimisation of legal diversity, which can result in transaction costs and the lack of level-playing field for cross-border actors. One of the prevailing methods to achieve such level-playing field is legal harmonisation.

In the European Union (EU) in particular, harmonisation serves as a key tool for the integration of the internal market. The rationale behind harmonisation is that disparities between national legal systems create obstacles to the proper functioning of the internal market by producing competitive advantages for some actors with cross-border activities and by deterring foreign investment. Further, the EU is more appealing to external economic actors and investors if they only need to tackle one unified regime, instead of twenty-eight (one supranational and twenty-seven national). It is thus not surprising that the harmonisation of several fields of law has been a priority of the European institutions since the creation of the EU.

A discussion of legal harmonisation is particularly relevant during a time when, in addition to the current health crisis brought about by the COVID-19 pandemic, European integration seems to have lost some of its shine and the EU is experiencing some integrational panic.[2] The last decade or so has unfolded in a rather dramatic way for the European Union, its market and citizens. In the words of Antonios Platsas:

> the word 'crisis' is not merely common; it is everywhere … Nationalisms and populisms are on the rise … The naivety of the late 1990s and the early 2000s has given its place to considerable scepticism … In 2015, the EU has been hit by the worst immigration crisis it has encountered in its history [whilst] in 2016, the United Kingdom's electorate voted … to withdraw from the EU, otherwise the leading example of harmonisation efforts in the world to date. And the question is: what has the legal harmonisation thesis done to thwart certain or all

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[2] Mai'a Davis Cross & Xinru Ma, *EU Crises and Integrational Panic: the Role of the Media,* 22 JOURNAL OF EUROPEAN PUBLIC POLICY 1053, 1056 (2015).

> of the above? Or, even more provocatively, is this the right time for one to engage oneself with another legal harmonisation discussion?[3]

To answer Platsas' question, it is exactly the right time to revisit the question of harmonisation. Underlying the various crises confronting the EU lies a problem very much intertwined with the matter of harmonisation, since European issues such as the legitimacy and validity of the EU, particularly salient in times of crises, 'can probably be best identified by analysing the objections against private law harmonisation.'[4]

2. HARMONISATION AND CRISES

Legal harmonisation has been confronted with several obstacles over the years, increasingly so in times of crisis where the protection of national sovereignty and legal cultures, as well as an overall rise in Euroscepticism, prioritising state-centric solutions to common issues have become more present than ever before. Eurosceptic tensions, which culminated with 'Brexit', provide clear evidence that the 'seductive appeal of harmonisation is today tarnished [and its] role is increasingly contested.'[51] Legal harmonisation, therefore, has inherent challenges, and EU institutions are under great pressure to adapt and overcome these challenges.

Firstly, even in an era of accelerated globalisation, legal systems remain deeply rooted within the structure of the nation-state. The laws and regulations that individuals and undertakings deal with, including those inspired or promoted by supranational institutions, are usually drafted by domestic legislatures. Distinctive national legal cultures are at the heart of law schools' curricula and popular culture, as well as domestic legislatures and government bodies. They are therefore entrenched within domestic legal systems and exhibited in domestic legal texts.

Secondly, harmonisation is increasingly contested in the EU. During peaceful times, legal harmonisation is easier to develop. During these periods, not only are European policies established under lesser time constraints, but domestic political timelines – such as electoral cycles – are known at European level too. This allows the European institutions to strategically plan the development of harmonisation policies in advance, through white or green papers or

[3] ANTONIOS PLATSAS, THE HARMONISATION OF NATIONAL LEGAL SYSTEMS. STRATEGIC MODELS AND FACTORS vii-viii (2017).
[4] Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective,* 3 EUROPEAN LAW JOURNAL 378, 385 (1997).
[5] Stephen Weatherill, *Why Harmonise, in* 2 EU LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 31 (Takis Tridimas & Paola Nebbia eds, 2004).

the Commission's work programmes. The implementation of these policies is also foreseeable and veto points can be anticipated. In times of crisis, these timelines change because domestic uncertainty increases and standard operating procedures can rarely be applied.

A publicly perceived threat – in the case of harmonisation, a threat to national sovereignty and legal culture for example – increases the salience of an issue and leads to an increased likelihood of domestic actors opposing the harmonisation measure. In other words, harmonisation policies and debates become more resistance-prone during times of high politicisation.

Over the years, crises facing the EU have revealed two opposite tendencies, which are not necessarily mutually exclusive. Firstly, a preference for state-centric solutions which prioritise domestic interests, a rejection of supranational standards and overall harmonisation efforts with a view to protecting domestic sovereignty (such as in the global economic crisis); and secondly, increased cooperation and a natural phenomenon of legal convergence as States find common solutions to common problems (such as in the COVID-19 crisis). These phenomena are particularly visible within the field of European insolvency law.

3. CASE STUDY: HARMONISATION AND CRISES IN EUROPEAN INSOLVENCY LAW

Insolvency systems in the EU have been closely linked to nation-building processes and have been perceived as a sensitive area of national diversity, with the responsibility at the European level being mainly focused on cross-border procedural 388coordination. However, since the global economic and financial crisis of the late 2000s, the harmonisation agenda in this field has intensified and in the last ten years alone, the EU has been particularly prolific. Harmonisation measures of note include:

(i) the European Commission Recommendation on a New Approach to Business Failure and insolvency 2014;[6]
(ii) the European Insolvency Regulation Recast 2015;[7]
(iii) the Directive on Preventive Restructuring Frameworks 2019.[8]

Most of these harmonisation instruments were passed as a reaction to a crisis.

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[6] Commission Recommendation on a new approach to business failure and insolvency, COM(2014) 1500 final.
[7] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[8] 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.

3.1 Example n. 1: the global economic and financial crisis of 2007-2008

In the midst of the global economic crisis of the late 2000s, the EU saw an average of 200,000 firms going insolvent per year in the EU.[9] As early as 2012, the Commission published a Communication stating the urgent need to harmonise insolvency laws across the Union in order to promote a more business-friendly environment for debtors in financial distress. Specifically, it introduced the idea of harmonising specific elements of insolvency law, including rules on second chance for honest entrepreneurs and rules on preventive restructuring.[10] The Communication was expanded on and in 2014, the Commission published its Recommendation on a New Approach to Business Failure and Insolvency (ECR 2014). The Recommendation's aim was to (i) promote a rescue and recovery culture across the EU[11] and (ii) create a level playing field of national insolvency laws, which would, in turn, lead to improved access to credit and foreign investment.[12]

The ECR 2014 is an interesting instrument to study and its nature is of particular relevance for the current discussion. Indeed, despite championing further harmonisation, not only did the Commission opt for a soft law instrument, it also opted for a minimum harmonisation approach.[13] As a result of the soft law nature of the instrument, Member States were merely *invited* to implement the ECR 2014 in their national regimes. Their inclination to do so, however, 'has not been strong (to put it mildly)'[14] and an evaluation conducted by the Commission regarding compliance with the Recommendation revealed that only two Member States – Slovenia and Hungary – introduced reforms that resulted in legislation complying with the Recommendation.[15] Interestingly however, during that same period, while this top-down harmonisation initiative was rejected, States such as Belgium, Denmark, France, Germany, Greece, Italy, Poland, Portugal and Spain, to name just a few, substantially modernised their business failure policies to tackle the rising number of insolvency cases due to the economic and financial crisis.

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[9] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A new European approach to business failure and insolvency, COM(2012) 742 final, p.2.
[10] *Id*. at pp. 2-4.
[11] Commission Recommendation on a new approach to business failure and insolvency, COM(2014) 1500 final, Recital 1.
[12] *Id*., at Recitals 4, 8 and 11.
[13] *Id*., at Article 1(3).
[14] Horst Eidenmuller & Kirstin Van Zwieten, *Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency* 35 (European Corporate Governance Institute, Law Working Paper No. 301/2015, 2015), https://ssrn.com/abstract=2662213 .
[15] Directorate-General of Justice and Consumers of the European Commission, *Evaluation of the implementation of the Recommendation of 12 March 2014 on a New Approach to Business Failure and Insolvency* (Sept. 30, 2015).

The result of these reforms is striking. Although national insolvency regimes in the EU continue to show differences in substance, the aforementioned revisions have introduced greater legal similarity among the Member States' legislation, with an increasing number of domestic systems exhibiting common features such as cram-down mechanisms, debtor-in-possession regimes, preventive restructuring options and protection for new financing.

3.2. Example n. 2: the health crisis due to COVID-19

The COVID-19 crisis, which hit the world with full force in 2020 paralysed the world economy, forcing many countries around the globe to take emergency measures. Differing emergency responses across countries to the crisis uncovered tensions between global economic interdependence and the tendency for nation-state governance during the crisis. National governments adopted strategies and laws to control or mitigate the economically and financially destructive effects of the pandemic at a national level, with no preliminary co-ordination at the European or international level. This was mostly due to the fact that existing instruments did not provide the European institutions with the adequate powers to issue delegated or implementing acts[16] in the context of a pandemic.[17] In fact, adoption of new legal acts by the EU legislator – treaties, regulations, directives and decisions – is. Recommendations and opinions may be adopted more quickly, but they are not be binding on the Member States. As a consequence, the EU legislator had to leave the immediate mitigation of the crisis effects to national governments.[18] In the case of insolvency law, the EU instruments which existed at the

[16] For instance, the Directive on Preventive Restructuring 2019 provides for implementing powers and adoption of implementing acts for the Commission only regarding a data communication form (Recital 97 and Articles 29(7) and 30).
[17] Criticisms about governments' responses to the COVID-19 crisis in the area of insolvency law are not limited to the EU. See for example in the US context: Anthony J. Casey, *Bankruptcy & Bailouts; Subsidies & Stimulus: The Government Toolset for Responding to Market Distress* (European Corporate Governance Institute, Law Working Paper No. 578/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783422. The choice of tools in the current crisis has been suboptimal. The government has yet to fully address the systemic economic challenges posed by COVID-19. The appropriate response requires further economic stimulus for small businesses rather than bankruptcy reform. The economic hardship is real and growing, and while the day of reckoning likely won't arrive as a wave of Chapter 11 bankruptcy filings, it will materialize in some form in the absence of appropriate systemic economic relief.' See also Diane Dick, *Bankruptcy, Bailout, or Bust: Early Corporate Responses to the Business and Financial Challenges of COVID-19,* 40 BANKRUPTCY LAW LETTER 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765553.
[18] While Article 107(1) TFEU prohibits aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, such aid is, however, compatible with the internal market if it helps to make good the damage caused by natural disasters or exceptional occurrences, or if it is to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

time COVID-19 hit were of little use for companies, and individual countries had to act swiftly and independently to support business and limit the damages caused by the economic crisis.

At the onset of the COVID-19 crisis, Member States' preferred national solutions over common multilateral ones to control the spread of the virus. Although not prompted by the EU institutions to do so, Member States ended up resorting to similar strategies when it came to their insolvency regimes. They either tweaked existing insolvency measures (e.g. Denmark, France, Germany, Italy, UK), introduced new instruments in their restructuring toolkit (e.g. Germany (StaRUG), the Netherlands (WHOA), UK (CIGA)) and/or adopted non-insolvency relief packages (e.g. Denmark, France, Germany, Italy, the Netherlands, UK).[19]

This so-called phenomenon of 'copycat coronavirus policies'[20] was the result of regulatory emulation, which occurred spontaneously, with limited direct impetus from the EU.

4. LESSONS FOR HARMONISATION

Crises provide useful impetuses to rethink old debates and concepts. The global economic and financial crisis of the late 2000s as well as the COVID-19 pandemic have called into question the foundational and theoretical basis on which the EU institution have built their harmonisation efforts. These crises are thus an opportunity to rethink the concept of legal harmonisation and the role of the EU institutions in this process.

Following several studies conducted on harmonisation in the EU, I argue that there is a need to rethink the EU's harmonisation language and process. I support Reinhard Bork's statement that:

> [h]armonisation is declared to be a necessary and meaningful instrument for improving the common market and this cannot be doubted. However, if harmonisation is part of the day-to-day work of the European Union, shouldn't there be an administrative department within the European Commission which supports harmonisation efforts on a more general level? None of this is apparent. The impression is that there is no theoretical framework for harmonisation at all […]. A comprehensive theory of legal harmonisation has not yet been developed and it is still something to strive for […] This is a lacuna which must be addressed before harmonisation of insolvency laws can be pursued in earnest.[21]

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[19] Emilie Ghio et al., *Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic, in* INTERNATIONAL INSOLVENCY REVIEW (forthcoming, Oct. 2021).
[20] Ivan Krastev, *Copycat Coronavirus Policies Will Soon Come To An End*, FINANCIAL TIMES, Apr. 7, 2020, https://www.ft.com/content/bd12b3ca-77e9-11ea-bd25-7fd923850377.
[21] Reinhard Bork, *Preventive Restructuring Frameworks: A 'Comedy of Errors' or 'All's Well That Ends Well'?* 14 INTERNATIONAL CORPORATE RESCUE 417, 425 (2017).

What the above discussion of harmonisation and crises has revealed is that crises create similar problems for EU Member States and that governmental reactions tend to share common patterns, strategies and legal solutions. Therefore, what the study of harmonisation during crises ultimately reveals is that harmonisation can occur even without the involvement of the EU. During the global financial and economic crisis of the late 2000s, while the ECR 2014 was poorly implemented by Member States, they nonetheless mirrored one another's rescue regime; during the COVID-19 pandemic, while the EU was absent from the regulatory governance of insolvency law, Member States have nonetheless adopted similar strategies.

What this shows is that legal harmonisation across the EU should not merely be understood as top-down measures initiated by the EU institutions. Importantly, the crises discussed above have revealed the inadequacy of top-down harmonisation mechanisms as the *only* way to promote integration between Member States.

The reality of the legal harmonisation process reflects a dual approach to increasing legal similarity across the EU. This increased legal similarity can happen via EU-driven initiatives, *i.e.* top-down harmonisation, but also, via Member States-driven initiatives, *i.e.* bottom-up harmonisation. In the latter case, the coming together of legal systems can occur through different mechanisms, specifically convergence, exhibited by the similarity in the state-centric solutions adopted by countries in the wake of the COVID-19 pandemic. Convergence of laws has been defined as an 'affiliated idea to harmonisation of laws [,] a process as well as a result to be achieved[;] the process of the coming together of different systems, albeit in certain areas of law.'[22] Convergence is ultimately a process akin to policy diffusion, where policies are adopted at State level due to processes of competition, cooperation or learning between different countries.

This is important as, uncovering the role of Member States as drivers of European harmonisation, contributes to the demystification that EU laws are not merely passed in Brussels, behind closed doors, but that rather, the EU is an arena of dialectic harmonisation.[23]

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[22] PLATSAS, *supra* note 3, at 7.
[23] For an in-depth discussion of these issues, see Ghio et al, *supra* note 19.