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Appointment of Trustees: Common issues and international perspectives

Paweł Kuglarz and Mateusz Kaliński compare recent changes in Polish law to that of other key jurisdictions



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The Polish Government recently proposed far-reaching changes to the appointment of trustees



Trustees (insolvency office holders, administrators) are one of the most important players in bankruptcy proceedings. For sound and efficient insolvency procedures, it is particularly important that they are managed by qualified, trained and experienced professionals – the trustees.

Therefore, the appointment of trustees also raises public awareness and discussions.

Recent plans in Poland

In the publicly available draft bill implementing the EU Restructuring Directive, the

Polish Government recently proposed far-reaching changes to the appointment of trustees.

Firstly, appointments will be made from a list of insolvency practitioners established for each court, with insolvency practitioners able to choose 3 courts where they can be considered for appointments. This system is somehow close to a lottery, because one never knows what bankruptcy they will get. There are, however, some exceptions, albeit the general idea is to provide for automatic choice, by allocation in numerical order from the list, even though appropriately qualified insolvency practitioners will still be required for the biggest and

most important proceedings. These plans have led to some discussion in Poland. In the authors' view, the proposed methodology can be criticised, taking into consideration international perspectives.

Views from different jurisdictions

It is worth considering Germany, Austria, Italy, France, Great Britain, Spain, USA, Latvia, Lithuania and Czechia, just to name a few.




Germany

In Germany, the trustee is appointed by the bankruptcy


court and there is no unified practice. In some courts, the President of the Insolvency Division invites insolvency practitioners, who have declared an interest in being appointed, for an interview. On the basis of these meetings, the court prepares a list of insolvency practitioners. Currently, there is discussion in Germany over the possible introduction of a licensing system for the whole of Germany. The Ministry of Justice has declared it will present a draft of a new regulation this year. Interestingly enough, in Germany, legal persons cannot be appointed as trustee (such a possibility exists in Poland), because of a ruling by the German Constitutional Tribunal.


 **Austria**
In Austria, the trustee is also appointed by the court from a publicly available list published on the Internet, with legal persons able to take appointments as trustee in bankruptcy proceedings. The system works well and the insolvency procedure is among the most efficient in Europe.


 **Italy**
In Italy, the trustee is always appointed by the court with little involvement by the creditors. However, amendments to the law are pending, which will grant more rights to the creditors.


 **France**
In France, the trustee is also appointed by the court. However, creditors enjoy special rights to appoint their representative with similar competences to the trustee and with a possible impact on the rights of the trustee.


 **Great Britain**
In Great Britain, the trustee can be appointed by the Creditors' Meeting with approval coming from a majority of creditors voting by value.

 **Spain**
In Spain, the law provides for the possibility to indicate a candidate for appointment by the court, if the request comes from those representing a majority of the debt owed to creditors.

 **United States**
In the United States of America, the trustee is appointed by the court. However, the creditors' bodies are entitled to ask for a change of trustee, though specific regulations differ with regard to concrete proceedings and their legal basis.

 **Czech Republic**
In Czechia, there is a possibility to draw the trustee from a list. However, this procedure is heavily disputed and criticised. As such, the legislature is thinking about changing it.

 **Latvia**
In Latvia, there is also a drawing system for appointment of the trustee, but – like in Czechia – this solution is under critique and may well be amended.

 **Lithuania**
In Lithuania, there is a kind of random system, even if insolvency practitioners can be selected from both natural and legal persons. Nevertheless, the system is criticized, because some practitioners have abused it by creating many insolvency offices to increase the chance of being elected.

Conclusions

To sum up, we would like to point out that the Polish legislator should once again think about the rules for appointment of the trustee within insolvency proceedings. International perspectives and experience prove that, even in countries where legal landscape allow some kind of draw for the trustees, such regulations are under critique and, most of the time, do



not offer a satisfactory solution in the quest for transparency and efficiency.

In our view, the reform should focus on court system changes and not on limiting the business activity of insolvency practitioners, who may be significantly affected by the proposed regulations. Therefore, properly and efficiently working courts, honouring transparency requirements, should be allowed to pick a trustee from all insolvency practitioners in Poland, or as indicated by the majority of creditors, naturally respecting the need to appoint a practitioner with an appropriate qualification. ■



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