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Tort-Based Claims and Legal Divergence in EU Insolvency Systems: Towards a Framework for Trust and Stability in Cross-Border Contexts

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ABSTRACT

The increasing interconnection of European legal and economic systems has amplified the need for coherent and predictable cross-border insolvency regimes. While Regulation (EU) 2015/848 coordinates jurisdiction, recognition, and cooperation across Member States, it does not fully harmonize the substantive treatment of specific categories of claims. This paper examines one particularly sensitive area: the treatment of tort-based claims and liabilities arising from unlawful or harmful conduct in personal insolvency proceedings. The paper analyses how such claims may be classified, included, excluded, or discharged under different national insolvency regimes, with Ireland serving as an illustrative case. The Irish framework is especially relevant because it combines common-law influences, modern statutory debt-resolution procedures, regulated Personal Insolvency Practitioners, creditor participation, and multiple procedural routes, including bankruptcy, Debt Relief Notices, Debt Settlement Arrangements, and Personal Insolvency Arrangements. The paper argues that divergences in the treatment of tort-based claims create challenges for legal predictability, creditor protection, debtor rehabilitation, and systemic trust in cross-border insolvency systems. In response, it develops a conceptual framework based on the source of the claim, the nature of the harmful conduct, the degree of fault, procedural status, insolvency treatment, and discharge consequences. Rather than advocating full harmonization, the proposed framework aims to improve transparency, comparability, and practical decision-making in cross-border contexts.

Keywords: Tort-based claims in insolvency, EU insolvency regulation, Legal divergence, Dischargeability of claims, Non-dischargeable obligations, Systemic trust, Creditor protection, Debtor rehabilitation

INTRODUCTION

Cross-border insolvency has become an increasingly important feature of the European legal and economic landscape. Individuals and businesses operate across borders, hold assets in different jurisdictions, and may owe debts to creditors located in several Member States. In response, the European Union has established a procedural framework for the coordination of insolvency proceedings. Regulation (EU) 2015/848 provides rules on jurisdiction, recognition, cooperation, and the coordination of main and secondary insolvency proceedings. Its scope covers public collective proceedings based

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on insolvency law, including proceedings aimed at rescue, adjustment of debt, reorganisation, or liquidation (European Parliament and Council, 2015).

However, procedural coordination does not eliminate substantive legal divergence. The EU Insolvency Regulation does not fully harmonize how national systems classify claims, determine their ranking, or decide whether particular claims are released by a discharge. This distinction is particularly important in personal insolvency, where the practical meaning of a fresh start depends not only on the opening and recognition of proceedings, but also on the types of liabilities that survive or are extinguished.

Among the most complex categories are claims arising from tort-based liability, unlawful conduct, or harmful conduct. Such claims occupy a sensitive position between private compensation, creditor protection, moral responsibility, deterrence, and debtor rehabilitation. Unlike ordinary contractual debts, tort-based claims may arise from personal injury, wrongful death, fraud, professional misconduct, negligent harm, intentional wrongdoing, or civil liability connected to criminal behaviour. As a result, national legal systems often treat these claims differently from ordinary commercial or consumer debts.

This divergence creates practical uncertainty in cross-border contexts. A debtor may assume that a discharge in one Member State releases all pre-insolvency liabilities, while a creditor may argue that a specific claim survives because of its tort-based origin or public-policy character. Courts, insolvency practitioners, and advisors must therefore determine not only whether an insolvency proceeding is recognised, but also which claims are included, excluded, conditionally includable, or non-dischargeable.

This paper examines how divergences in the treatment of tort-based claims affect legal predictability, creditor protection, debtor rehabilitation, and systemic trust in cross-border insolvency systems within the European Union. It develops a conceptual framework for classifying and comparing such claims across national regimes. The aim is not to advocate full harmonization of substantive insolvency law, but to provide a structured analytical model that makes legal divergence visible, comparable, and manageable.

TORT-BASED CLAIMS IN INSOLVENCY: CONCEPTUAL FOUNDATIONS

Tort-based claims differ from ordinary contractual claims because they are not based primarily on voluntary credit relationships. A contractual creditor usually assumes a defined commercial or financial risk. A tort creditor, by contrast, may have become a creditor involuntarily as a result of harmful conduct. This distinction is one reason why many legal systems treat tort-based claims with particular caution in insolvency.

The category itself is broad. It may include claims for damages arising from negligence, gross negligence, intentional harm, fraud, breach of statutory duty, professional misconduct, personal injury, wrongful death, or damage to property. Some claims are purely civil in character. Others may be connected to criminal proceedings, regulatory sanctions, or public-law enforcement. The classification of the claim is therefore not only technical; it reflects policy choices about responsibility, compensation, deterrence, and rehabilitation.

In insolvency law, tort-based claims create a fundamental tension. On the one hand, the debtor's rehabilitation requires a meaningful discharge from unsustainable liabilities. A discharge that leaves too many obligations untouched may fail to provide a genuine fresh start. On the other hand, creditor protection and victim compensation may justify excluding some claims from discharge, especially where the liability arises from intentional wrongdoing, serious personal harm, or conduct that the legal system does not wish to neutralize through insolvency.

The problem becomes more difficult because the same factual event may be characterized differently across legal systems. A claim based on misrepresentation, for example, may be treated as a contractual claim in one jurisdiction, a tort-based claim in another, and a fraud-related claim in a third. Similarly, a director-liability claim may be treated as a corporate governance issue, a statutory liability, a tort-based obligation, or a quasi-penal claim, depending on the national legal framework.

For analytical purposes, tort-related liabilities in insolvency can be placed on a spectrum. At one end are ordinary contractual claims. Next are civil compensation claims that arise from negligent harm. More serious are claims based on gross negligence, intentional misconduct, fraud, or abuse of trust. At the far end are criminal fines, penalties, and public-law sanctions. This spectrum is important because the further a claim moves from ordinary commercial risk toward intentional or punitive liability, the stronger the policy arguments become for limiting or excluding discharge.

EU CROSS-BORDER INSOLVENCY FRAMEWORK AND LIMITS OF HARMONIZATION

Regulation (EU) 2015/848 provides the central EU framework for cross-border insolvency proceedings. Its core function is procedural coordination. It determines which Member State has jurisdiction to open main insolvency proceedings, provides for recognition of those proceedings across the Union, and regulates cooperation between courts and insolvency practitioners. Jurisdiction for main proceedings is primarily linked to the debtor's centre of main interests, or COMI. Article 3 defines COMI as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (European Parliament and Council, 2015).

The Regulation is therefore designed to create legal certainty in cross-border cases. It determines where proceedings can be opened and how they are recognised. However, it does not create a uniform European law of dischargeability. Member States continue to determine many substantive aspects of insolvency law, including the classification and treatment of specific categories of claims. This is precisely where tort-based claims become difficult.

Directive (EU) 2019/1023 reflects a broader European policy movement toward preventive restructuring, discharge of debt, and second chance. It seeks to increase the efficiency of restructuring, insolvency, and discharge procedures and to support honest entrepreneurs in obtaining a discharge after a reasonable period (European Parliament and Council, 2019). Nevertheless, the Directive does not resolve all questions concerning the dischargeability of tort-based claims, particularly in consumer or mixed personal-debt contexts.

The result is a layered European system. At one level, EU law coordinates jurisdiction and recognition. At another level, national law determines the substantive treatment of claims. This creates a predictable procedural architecture, but not necessarily predictable outcomes for specific claim categories. In the context of tort-based liabilities, that gap can generate uncertainty for debtors, creditors, and professionals advising in cross-border cases.

The key question is therefore not only whether an insolvency proceeding is recognised in another Member State. The more precise question is whether a particular claim, arising from a particular type of harmful conduct, with a particular procedural status, is included in the proceeding and released by the resulting discharge. This distinction is central to trust and stability in cross-border insolvency systems.

IRELAND AS AN ILLUSTRATIVE CASE: PROCEDURAL PATHWAYS AND CLAIM TREATMENT

Ireland provides a useful illustrative case because its personal insolvency framework combines common-law legal traditions with modern statutory mechanisms for debt resolution. Irish law includes several routes for individuals in financial distress, including bankruptcy, Debt Relief Notices, Debt Settlement Arrangements, and Personal Insolvency Arrangements. These procedures differ in purpose, eligibility criteria, debt categories, creditor involvement, institutional supervision, and consequences for discharge.

Bankruptcy remains the formal court-based insolvency route. Under the revised Bankruptcy Act 1988, bankruptcy generally stands discharged on the first anniversary of the adjudication order, subject to statutory exceptions and possible objections in cases of non-cooperation or non-disclosure (Bankruptcy Act 1988). This short discharge period is one reason why Ireland is frequently discussed in cross-border personal insolvency contexts. However, the duration of bankruptcy alone does not determine the treatment of all liabilities.

The Personal Insolvency Act 2012 introduced structured non-bankruptcy debt-resolution mechanisms. These include Debt Relief Notices, Debt Settlement Arrangements, and Personal Insolvency Arrangements. The Act also defines categories such as excluded debts and excludable debts. This distinction is significant. Excluded debts cannot be released or affected by certain arrangements. Excludable debts may be included only where the relevant creditor consents or is deemed to consent. The revised Personal Insolvency Act states that a Debt Settlement Arrangement or Personal Insolvency Arrangement must not contain terms releasing an excluded debt, while excludable debts require creditor consent before becoming permitted debts (Personal Insolvency Act 2012).

The Irish framework also shows the importance of professional intermediation. Debt Settlement Arrangements and Personal Insolvency Arrangements involve the Personal Insolvency Practitioner, who assists in preparing proposals, communicates with creditors, and interacts with the

Insolvency Service of Ireland. In this institutional model, the PIP is not merely a private advisor but part of a regulated debt-resolution architecture. The court and the Insolvency Service may also be involved at different procedural stages.

For tort-based claims, Ireland illustrates the need for precise classification. The Personal Insolvency Act defines excluded debts to include liabilities arising out of domestic support orders and damages awarded by a court or other competent authority in respect of personal injuries or wrongful death arising from the tort of the debtor (Personal Insolvency Act 2012). This does not mean that every civil liability connected to harmful conduct is treated identically. Rather, it shows that the legal consequence depends on the exact statutory category, the origin of the claim, and the procedure being used.

Ireland is therefore analytically useful not because it offers a simple model, but because it demonstrates how layered modern personal insolvency systems can be. A cross-border debtor, creditor, or advisor must distinguish between bankruptcy and statutory arrangements, between excluded and excludable debts, between civil damages and penalties, and between liabilities that are automatically affected and those requiring creditor consent or remaining outside the process.

ILLUSTRATIVE CASE EXAMPLE

The following case demonstrates the practical relevance of claim classification in a cross-border context.

A self-employed consultant originally based in Germany relocates to Ireland and later applies for an Irish personal insolvency procedure after establishing habitual residence and economic activity there. The debtor has three major liabilities. First, there is an unsecured bank loan. Second, there is a tax debt. Third, there is a civil damages claim brought by a former client who alleges that the debtor caused financial loss through misleading professional advice.

At first glance, the debtor may assume that all pre-insolvency liabilities can be dealt with in one procedure. However, a structured analysis shows that the three claims raise different questions. The bank loan is an ordinary contractual claim and may generally be treated as a standard unsecured debt. The tax debt may fall into a special statutory category, depending on the procedure and creditor consent requirements. The client's damages claim requires a more detailed analysis: Is it contractual, tort-based, based on negligence, based on intentional misrepresentation, already established by judgment, still disputed, or connected to fraud?

If the claim is merely alleged and not yet determined, the procedural status matters. If the claim has been reduced to judgment, the wording of that judgment becomes important. If the judgment expressly finds intentional fraud, some legal systems may treat the claim differently from a negligence-based compensation claim. If the claim concerns personal injury or wrongful death, it may fall into a specific excluded category under certain regimes. If it concerns purely economic loss, the answer may be different again.

The example shows why cross-border insolvency analysis cannot stop at the question of whether the debtor has obtained a discharge. The better question is: which claim, arising from which conduct, with which procedural status, is included in which procedure and released with which effect? Without this level of analysis, debtors may receive unrealistic expectations, creditors may misjudge enforceability, and professionals may underestimate litigation risk.

DIMENSIONS OF LEGAL DIVERGENCE IN TORT-BASED CLAIMS

Legal divergence in the treatment of tort-based claims can be analysed through several dimensions. The first is the legal origin of the claim. Some claims arise from contract, others from tort, statute, regulatory obligations, criminal sanctions, or mixed legal bases. A single factual situation may produce several legal claims. For example, fraudulent conduct may give rise to contractual rescission, tort damages, criminal penalties, and regulatory sanctions. Each may have a different insolvency treatment.

The second dimension is the nature of the harmful conduct. Legal systems may distinguish between negligence, gross negligence, intentional harm, fraud, breach of fiduciary duty, professional misconduct, and statutory breach. This matters because insolvency law may be more willing to release ordinary negligence-based liabilities than liabilities arising from intentional wrongdoing or fraud.

The third dimension is the degree of fault. Some systems use fault level as a gateway to non-dischargeability. Germany provides a clear example: Section 302 of the German Insolvency Code provides that discharge of residual debt does not affect certain claims, including liabilities based on the commission of an intentional tort, provided the claim has been filed with the relevant legal basis and underlying facts (Insolvency Code, 2024). This shows how national law may draw the line not at tort in general, but at intentional tort.

The fourth dimension is procedural status. A claim may be merely asserted, disputed, pending before a court, admitted in insolvency proceedings, or finally established by judgment. The procedural status can affect whether the claim is provable, whether it participates in distributions, whether it is released, and whether it can continue to be litigated after discharge.

The fifth dimension is insolvency treatment. A claim may be fully included, included but non-dischargeable, excluded from the proceeding, conditionally includable with creditor consent, subordinated, prioritized, or treated as a secured claim. These categories should not be conflated. A claim may be included for voting or distribution purposes but still survive discharge. Conversely, a claim may be outside a specific arrangement because the law classifies it as excluded.

The sixth dimension is the policy rationale. Exclusions from discharge may be justified by victim protection, deterrence, moral responsibility, public order, or creditor protection. Inclusion in discharge may be justified by debtor rehabilitation, economic reintegration, proportionality, and the avoidance of permanent financial exclusion. Legal systems differ because they assign different weight to these rationales.

A CONCEPTUAL FRAMEWORK FOR CLASSIFICATION AND COMPARISON

To manage this complexity, this paper proposes a six-dimensional framework for analysing tort-based claims in cross-border insolvency contexts. The purpose of the framework is not to eliminate national differences, but to make them explicit and comparable.

Dimension	Key Question	Example
Source of claim	Does the claim arise from contract, tort, statute, penalty, or mixed grounds?	Loan debt, civil damages, tax debt, fine
Conduct type	What conduct caused the liability?	Negligence, fraud, breach of duty
Fault level	What level of fault is legally relevant?	Negligence, gross negligence, intent
Procedural status	Has the claim been established?	Alleged, disputed, judgment-based
Insolvency treatment	How does the regime classify the claim?	Included, excluded, conditional
Discharge consequence	Does the liability survive discharge?	Released, partly released, survives

The first step is to identify the source of the claim. This prevents the analysis from treating all debts as ordinary unsecured liabilities. The second step is to identify the conduct that produced the claim. This distinguishes accidental harm from deliberate misconduct. The third step is to determine the legal fault level. This is essential where national law treats intentional torts or fraud differently from negligence.

The fourth step is to determine procedural status. A disputed allegation should not necessarily be treated in the same way as a final judgment. The fifth step is to classify the claim under the relevant insolvency regime. This requires attention to statutory categories such as excluded debt, excludable debt, secured debt, priority debt, or non-dischargeable debt. The sixth step is to assess the consequence of discharge.

The framework can be expressed in one guiding question:

Which claim, based on which conduct, with which degree of fault, in which procedural status, is treated how under the relevant insolvency regime, and does it survive discharge?

This question is more useful than asking simply whether a debtor is discharged. It creates a structured method for comparing national laws and for advising debtors and creditors in cross-border cases.

TRUST, STABILITY AND PRACTICAL IMPLICATIONS IN CROSS-BORDER CONTEXTS

Trust in cross-border insolvency systems depends on predictability. Creditors need to understand whether their claims will be included, affected, released, or preserved. Debtors need to understand whether insolvency will provide a meaningful fresh start. Courts and professionals need a common analytical structure for identifying legally sensitive claim categories.

Unmanaged divergence can undermine this trust. If a debtor believes that a discharge releases all liabilities, while a creditor believes that a tort-based claim survives, conflict is likely. If advisors fail to distinguish between negligence, intentional wrongdoing, fraud, personal injury, public-law penalties, and tax liabilities, the debtor may make decisions based on incomplete or inaccurate assumptions. If courts in different Member States conceptualize the same claim differently, recognition may not eliminate uncertainty.

The proposed framework does not remove national divergence, but it helps manage it. It requires decision-makers to identify the relevant claim category and the policy rationale behind its treatment. It also helps advisors explain risk more accurately. In cross-border cases, this is especially important because insolvency planning, COMI relocation, and discharge expectations often depend on the assumed effect of a foreign proceeding.

The framework also supports creditor protection. Creditors with claims arising from serious harmful conduct should be able to identify whether their claims are potentially preserved. At the same time, debtors should not be left in uncertainty about whether ordinary civil or commercial liabilities will be released. Transparency benefits both sides.

Full harmonization of tort-based claim treatment across the European Union is unlikely in the short term. Such claims are closely connected to national concepts of civil liability, public policy, victim compensation, moral responsibility, and debtor rehabilitation. However, full harmonization is not the only route to stability. Legal diversity does not necessarily undermine cross-border insolvency systems; unmanaged and opaque divergence does. A structured framework can therefore contribute to trust by making divergence visible, explainable, and institutionally manageable.

CONCLUSION

This paper has examined tort-based claims and legal divergence in EU insolvency systems. It has argued that the EU Insolvency Regulation provides an essential procedural framework for cross-border insolvency, but does not fully harmonize the substantive treatment of specific claim categories. Tort-based claims are particularly sensitive because they lie at the intersection of compensation, fault, deterrence, creditor protection, and debtor rehabilitation.

Ireland illustrates the complexity of modern personal insolvency systems. Its framework includes bankruptcy and statutory debt-resolution mechanisms, regulated intermediaries, creditor participation, and statutory distinctions between excluded and excludable debts. These features show why cross-border insolvency analysis must move beyond broad statements about discharge and examine the precise legal treatment of individual claims.

The paper has proposed a six-dimensional framework based on source of claim, conduct type, fault level, procedural status, insolvency treatment, and discharge consequence. This framework can support academic analysis, professional advice, creditor assessment, and institutional decision-making. It does not require full harmonization of national insolvency law. Instead, it provides a structured method for managing legal diversity.

A structured framework for analysing tort-based claims can strengthen trust in cross-border insolvency systems by making legal divergence visible, comparable, and manageable.

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