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Evaluating Legal Certainty under Insolvency Regulations of the European Union

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Abstract

This article examines the insolvency rules of the European Union, specifically, the Recast European Insolvency Regulation (EIR Recast 2015), in order to determine whether such rules help enhance legal certainty in cross-border insolvency cases involving corporate groups with the objective of reducing abusive forum shopping. The problem of cross-border insolvency with corporate groups is a very timely one, especially in light of the global growth of international trade, the movement towards the economic integration of various regions around the world, such as the European Union, the greater flow of capital, and the ease of global communications. Forum shopping refers to the practice of such a company seeking the most favourable jurisdiction for its insolvency proceedings. This practice is known as 'abusive' when it reaches the point when a particular interest group, in so doing, seeks to appropriate wealth that belongs to others. The outline of this article is as follows: Section 1 of this article starts by providing an overview of cross-border insolvency of corporate groups. Then Section 2 explores in depth the main provisions of the EIR Recast 2015 that are relevant to enhancing legal certainty in a way beneficial to reducing abusive forum shopping, Section 3 proposes some recommendations to improve the EIR Recast 2015 in regard to enhancing legal certainty with the objective of reducing abusive forum shopping, and Section 4 concludes.

Keywords: Insolvency; Corporate groups; Company law; Forum Shopping; Legal certainty

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تقييم الأمان القانوني في ضوء لائحة الإفلاس الأوروبية

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ملخص

يتناول البحث قواعد الإفلاس وفق قوانين الاتحاد الأوروبي وبالتحديد لائحة الإفلاس للاتحاد الأوروبي المعدلة لتحديد ما إذا كانت هذه القواعد تعزز الأمان القانوني في قضايا الإفلاس العابر للحدود المتضمن لمجموعات الشركات وذلك للحد من حالات التسوق القضائي الاستغلالي. وتعتبر مشكلة الإفلاس العابر للحدود من المشكلات المعاصرة في خضم التجارة الدولية والتكامل الاقتصادي بين مناطق العالم المختلفة كالاتحاد الأوروبي. ويقصد بالتسوق القضائي البحث من قبل الشركة عن المحكمة المفضلة لديها للقيام بإجراءات التفضيل. ويعد التسوق القضائي استغلالياً في حالة أنه حقق لأحد الأطراف مصلحة على محاسب الأطراف الأخرى.

يتضمن المقال الأقسام الآتية: القسم الأول يلقي نظرة عامة على لائحة الإفلاس الأوروبية المعدلة، وتناول القسم الثاني أهم بنود اللائحة الأوروبية المعدلة والتي تتعلق بتعزيز الأمان القانوني وتقليل التسوق القضائي الاستغلالي، كما يطرح القسم الثالث بعض المقترحات لتطوير اللائحة المعدلة بهدف تعزيز الأمان القانوني وذلك للحد من التسوق القضائي الاستغلالي، مع خاتمة في القسم الأخير.

الكلمات المفتاحية: الإفلاس، مجموعات الشركات، قانون الشركات، التسوق القضائي، الأمان القانوني

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Introduction

Many major companies now use complex structures that involve multiple levels of subsidiaries that are intended to achieve economic and administrative advantages.¹ As noted by Hannigan, it may also 'make geographic sense depending on the nature of the company's business' for a multinational company to divide its activities through subsidiaries.² The problem of cross-border insolvency with corporate groups is a very timely one, especially in light of the global growth of international trade, the movement towards the economic integration of various regions around the world, such as the European Union, the greater flow of capital, and the ease of global communications. Forum shopping refers to the practice of such a company seeking the most favourable jurisdiction for its insolvency proceedings.

1. Cross-Border Insolvency of Corporate Groups

Insolvency occurs when the liabilities of the company exceed its assets,³ which means that, by definition, the company will not be able to satisfy all its debts, and it is, therefore, likely that the shareholders will lose their investment, employees will lose their jobs, and most creditors will receive less than they are owed.⁴ This makes domestic insolvency cases difficult on their own, let alone cross-border ones, where the activities of the corporation, its assets, and its creditors are dispersed across different jurisdictions.

A great level of complexity arises when dealing with cross-border insolvency cases because assets and creditors are located in different jurisdictions.⁵ Cross-border insolvency is common in insolvency cases involving single companies as well as corporate groups.⁶ Such cross-border insolvency is complicated because courts in more than one country may claim jurisdiction over the insolvency proceedings, which makes the applicable insolvency law difficult to determine.⁷ Furthermore, the extent to which foreign creditors will have an equal footing with local creditors is not always certain in such proceedings.⁸ Due to the lack of an international scheme for dealing with such insolvency cases and the justified exercise by states of their sovereignty, a court might not have access to foreign assets of the corporation.⁹ This can consequently result in multiple courts in different jurisdictions commencing insolvency proceedings to deal with the same insolvency case, which accordingly makes the process extremely expensive, inefficient, and uncertain.¹⁰

1 Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009) 12-13.

2 Brenda Hannigan, *Company Law* (4th edition, Oxford University Press 2016) 18.

3 Ian Fletcher, *Insolvency Law in Private International Law* (2nd, Oxford University Press 2005) 1-4; Philip Wood, *Principle of International Insolvency* (Sweet & Maxwell 2007) 6.

4 Thomas Bachner, *Creditor Protection in Private Companies Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009) 5.

5 Lucian Bebchuk and Andrew Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *Journal of Law and Economics* 775.

6 Roman Tomasic, *Insolvency Law in East Asia* (Ashgate 2006) 536.

7 Jona Israel, *European Cross-Border Insolvency Regulation a Study of Regulation 1346/2000 on insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 30.

8 Cronin Matthew, 'UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to Substantive Problem' (1999) 24 *Journal of Corporation Law* 709.

9 Lynn Lopucki, 'Cooperation International Bankruptcy: A Post Universalist Approach' (1999) 94 *Cornell Law Review* 696.

10 Janis Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2009) 44 *Texas International Law Journal* 547.

Moreover, the elaborate structure of corporate groups makes the insolvency case of any member of the group even more complicated than the instance, when an individual company goes through cross-border insolvency proceedings. This is because the principle of separate legal personality can restrict the ability of creditors to seek to recover their debts from the assets of the parent company, even in cases where the parent company has total control over the subsidiary or in cases where the parent company has created the subsidiary as a vehicle to specifically limit its liability.¹ This complexity can be illustrated in the American case of *Global Telesystems v KPNQwest*.² In this case, all the infrastructure of the communications company, across several countries, was owned by a single member of the group, while the service was provided by separate subsidiaries in different countries. Consequently, the United States District Court was not able to treat the whole group as a single entity, and multiple insolvency proceedings were commenced and coordinated. This resulted in much lower proceeds than if the assets of the group had been sold as a whole.³ There are also other cases that demonstrate the complexities of cross-border insolvency, involving corporate groups, such as the aforementioned *KPNQwest*, *Re Stanford International Bank Limited*,⁴ *MG Rover*,⁵ *Daisytek*,⁶ and *Collins & Aikman*.⁷

The combination of (a) cross-border insolvency complexities and (b) complexities raised by corporate groups, when put together they greatly reduce the level of legal certainty in such insolvency cases to the detriment of creditors and other parties. Due to the fact, that the assets, creditors, and business operations of multiple subsidiaries are located in different jurisdictions, it becomes difficult to determine what court has jurisdiction over the insolvency proceedings of any given subsidiary, and this consequently makes it difficult to determine the applicable insolvency law.⁸ The courts have struggled in dealing with such insolvency proceedings as can be seen in the case of *KPNQwest*.⁹

Legal certainty is extremely significant in cross-border insolvency cases involving corporate groups. In its general application to the law, certainty is very crucial for the proper operation of any legal framework.¹⁰ If the law is not certain enough, members of the public will not be able to ascertain their rights and obligations, businesses will not know what rules they are subject to, and the courts will not know what rules to apply or how to interpret the rules.¹¹ For the law to be certain, the legislation must be definite, clear and precisely formulated.¹² As noted by Braithwaite, court decisions must also

1 Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform' (2010) 34 Cambridge Journal of Economics 915.

2 *Global Telesystems Inc v KPNQwest NV* 151 F.Supp.2d 478 (SDNY 2001).

3 *ibid*.

4 *Global Telesystems, INC v KPNQwest, NV*, 151 F Supp.2d (2001); *Re Stanford International Bank Limited* [2009] EWHC 1441 (Ch), [2009] BPIR 1157.

5 *MG Rover Espana and other Subsidiaries* [2005] BPIR 1162, [2006] BCC579.

6 *Re Daisytek-ISA Ltd and Others* [2003] All ER (D) 312 (Jul) 16 May 2003.

7 *In Re Collins & Aikman Europe SA Re* [2005] EWHC 1754 (Ch), [2006] BCC 861.

8 Israel (n 8) 30.

9 *Global Telesystems, INC v KPNQwest* (n 13).

10 Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap' (2015) 10 Brooklyn Journal of Corporate, Financial and Commercial Law 183.

11 James Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy' (2006-2007) 15 Tulane journal of International and Comparative Law 541, 549.

12 *ibid* 549.

be made in accordance with the framework of the existing legal system in which they operate and not arbitrarily.¹ This consequently should make the outcome of any dispute more predictable for all of the parties involved, such that they are able to foresee the consequences that a given action may entail.² In international insolvency proceedings legal certainty is a crucial because when legal certainty is not present, creditors, debtors and other parties cannot predict with sufficient certainty which court will have jurisdiction and which law will apply to insolvency proceedings, in order to avoid unexpected monetary expenses and liabilities.³

Due to the possibility of more than one court having jurisdiction over a certain dispute, some litigants may manipulate this to select the court that will be most favourable to their claim.⁴ This concept is referred to as 'forum shopping'. In the context of cross-border insolvency, the European Insolvency Regulation specifies that 'transfer of assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position' is to be considered a form of forum shopping.⁵ Forum shopping can be beneficial to all parties when they move to a jurisdiction that provides them with greater advantages. However, in some cases, forum shopping can be detrimental to some parties. For example, when debtors and directors transfer the assets of a company to a specific jurisdiction that is more beneficial to them while being adverse to the creditors.

Insolvency laws in different jurisdictions may differ and they may give the parties involved in the insolvency proceedings incentives to choose one legal regime in favour of another, which could ultimately lead to forum shopping.⁶ Different kinds of stakeholders (in particular, creditors, shareholders and employees) have an interest in selecting the insolvency law that serves their interests in the best possible way and provides them with high protection. For example, creditors might be interested in choosing an insolvency law that provides them with a high guarantee for their debts and ensures the quick realisation of their assets.

By one particular forum being more favourable to a certain party, it is possible for forum shopping to have an adverse effect on other parties. It is at this point that forum shopping is considered 'abusive'. Zywicki defines abusive forum shopping, as, which is 'not driven by consent and efficiency concerns, but rather by rent-seeking opportunities for some interest groups to redistribute wealth to themselves from others'.⁷

Forum shopping harms the insolvency proceedings in numerous ways, all of which reduce the legal certainty of the proceedings on account of the chance that the applicable law might be changed.⁸ The

1 John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 47, 48.

2 Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2007) 2 *Legisprudence* 47.

3 Judith Wade, 'The Centre of Main Interests Connecting Factor Affords Creditors no Certainty under the Model Law Regime' (2011) 22 *International Company and Commercial Law Review* 102.

4 Gerard McCormack, 'Bankruptcy Forum Shopping: the UK and US as Venues of Choice for Foreign Companies' (2014) 63 *International and Comparative Law Quarterly* 815.

5 Regulation (EU) 2000/1346 of the European Parliament and of the Council of 29 May 2000 on Insolvency Proceedings (EIR 2000), recital 4; Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisited' (2017) 3 *Hamburg Law Review* 38.

6 Marek Szydło, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 *European Business Law Review* 253, 256.

7 Todd Zywicki, 'Is Forum Shopping Corrupting America's Bankruptcy Courts?' (2006) 94 *Georgetown Law Journal* 1141.

8 John Pottow, 'The Myth (and Realities) of Forum Shopping in Transitional Insolvency' (2007) 32 *Brooklyn Journal of International Law* 785.

uncertain possibility of the change in applicable law not only affects the ability of creditors to predict the rules that will apply, the priority their claims will be given (which depends on the insolvency law applicable to the case),¹ and the extent to which claims in tort could be relevant to the insolvency, but this uncertainty also has direct financial consequences for creditors. This is because they do not know if they will have to hire foreign experts, travel to another location, or conduct the proceedings in another language.² Forum shopping could also be seen as abusive when debtors put the creditors at a great procedural disadvantage or when directors take advantage of it to select a jurisdiction that enables them to avoid personal liability or delay the proceedings.³ Abusive forum shopping could also result in a jurisdiction where the law provides creditors with less protection than other stakeholders.⁴ Finally, abusive forum shopping could place extra burdens on the courts of certain jurisdictions that appear to be more favourable to the debtors or directors of a company.⁵

Given the issues concerning abusive forum shopping and their implications on cross-border insolvency of corporate groups, the European Union has had through various attempts tried to create a legal framework for dealing with cross-border insolvency in general, and the insolvency of corporate groups in particular. The most recent of these attempts is the EIR Recast 2015, for which its key provisions with regard to enhancing legal certainty in cross-border insolvency will be explored next.

The New Recast EIR 2015 is the result of an ‘insolvency package’⁶, which was adopted by the European Commission in December 2012.⁷ The package is comprised of the proposal to revise Regulation 1346/2000 as well as the Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer European Insolvency Law Report on the application of that Regulation.⁸ It also includes an impact assessment,⁹ a Communication on a new European approach to business failure and insolvency,¹⁰ guidelines for the facilitation of negotiations about business restructuring, and a summary proposal from the European Commission to amend the insolvency rule.¹¹ The summary proposal to amend the Insolvency Regulation encompassed five broad areas, namely: (1) The extension of the scope of the EIR 2000 to proceedings aimed at

1 McCormack (n 27) 815.

2 Amy Cobum, ‘The Growth of Bankruptcy Tourism in the United Kingdom’ (2012) 25 *Insolvency Intelligence* 8.

3 Szydlo (n 29) 256.

4 Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003) 24, 25.

5 Cobum (n 33)11.

6 Geert van Calster, ‘COMIng, and here to Stay. The Review of the European Insolvency Regulation’ [Unpublished] (SSRN 2016) <<http://ssrn.com/abstract=2637003>> accessed 23 April 2019.

7 European Commission Press Release, ‘Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules’ IP/12/1354 (European Commission Press Release, 12 December 2012) <http://europa.eu/rapid/press-release_IP-12-1354_en.htm>accessed 23 April 2019.

8 Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer, *European Insolvency Regulation Heidelberg-Luxembourg-Vienna Report* (Hart Publishing 2014) 166.

9 European Commission, ‘Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings’ SWD (2012) 417 final Strasbourg 12 December 2012 <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf> accessed 23 April 2019.

10 European Commission, ‘Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency’ C (2014) 1500 final Brussels 12 March 2014 <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf> accessed 30 April 2016; Roisin Murphy, ‘Reformation of the European Insolvency Regulation to Act As a Legislative Tool to Assist in Europe’s Agenda’ (2015) 26 *European Business Law Review* 283.

11 *ibid.*

giving the debtor a ‘second chance’; (2) strengthening the current jurisdictional framework in terms of certainty and clarity; (3) improving coordination among insolvency proceedings opened in respect of the same debtor and striking a balance between efficient insolvency administration and the protection of local creditors; (4) reinforcement of the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; and (5) the management of multiple insolvency proceedings relating to groups of companies.¹

The New Recast EIR 2015 is made up of 7 chapters, 4 annexes, and 92 articles. In comparison, the EIR 2000 comprises 5 chapters, 3 annexes, and 47 articles.² The New Recast EIR 2015 also has 89 recitals, while the EIR 2000 has 33 recitals. This increase in the volume of the Regulation is an indication of the wider scope of its application and the serious intention of the EU to fill all of the gaps that were identified in the EIR 2000.

2. Enhancing Legal Certainty and the EIR Recast 2015

This section analyses the three main provisions of the EIR Recast 2015, that have an impact on enhancing legal certainty and aim at reducing the opportunity for abusive forum shopping, namely the provisions relating to the understanding of the notion of the Centre of Main Interests (COMI), the provisions relating to secondary proceedings, and Chapter V, which relates to the insolvency proceedings of members of a group of companies. The first of these are relevant to analysis because they determine the extent to which a creditor can predict with certainty that a main proceeding will not be interrupted by the commencement of a secondary proceeding. The notion of the COMI is relevant because it helps all parties involved in a case of insolvency to determine with certainty which court will have jurisdiction and the law applicable to the proceedings. Chapter V on groups is also relevant because it attempts to enhance legal certainty in insolvency cases involving corporate groups by utilising the mechanisms of cooperation and coordination.

(A) Clarification of the Notion of the COMI

The first main feature is the clarification of the notion of the Centre Of Main Interests (COMI) under the EIR Recast 2015. COMI is a legal mechanism that was invented in the European Insolvency Regulation (EIR 2000) for determining the jurisdiction and the applicable law in cross-border insolvency cases in the EU.³ The EIR 2000 stipulates that insolvency proceedings for individual companies must commence in the COMI of the debtor, which is defined as the place where the debtor conducts the administration of his interests on a regular basis, and which is therefore ascertainable by third parties.⁴ This notion appears to be designed with individual companies in mind and has been applied to numerous such cases.⁵ This chapter examines the notion of COMI and the extent to which it may be used to allocate jurisdiction in cases of the cross-border insolvency of corporate groups.⁶

1 Antonio Leandro, ‘The New European Insolvency Regulation’ (*Conflict of Laws net*, 28 May 2015) <<http://conflictoflaws.net/2015/the-new-european-insolvency-regulation/>> accessed 23 April 2019.

2 Francisco Garcimarin, ‘The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction’ [Unpublished] (SSRN 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 23 April 2019.

3 Regulation (EU) No 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1 (EIR 2000).

4 EIR 2000 recital 13.

5 Mirosława Mysze-Nowakowska, ‘Insolvency Forum Shopping - What Can be Learned from the ECJ and US Supreme Court Case Law on International Company Law and Insolvency Procedures?’ in Karolina Wierczynska and Lukasz Gruszczynski (eds), *Polish Yearbook of International Law XXXVII* (Polish Academy of Sciences 2017).

6 Michael Weiss, ‘Bridge over Troubled Water: The Revised Insolvency Regulation’ (2015) 24 *International Insolvency Review* 192.

The foreseeability of the COMI is highly relevant to the cross-border insolvency of corporate groups. Part of the insolvency risk calculation made by creditors intending to undertake business with a certain company requires them to anticipate the jurisdiction where claims would be filed in the event that the company becomes insolvent.¹ Under the EIR 2000, the notion of the COMI was vague. This was in the vague definition of the COMI under the EIR and by looking at the jurisprudence of domestic courts and the Court of Justice of the European Union in this regard.² The lack of certainty resulting from the ambiguity of the notion of the COMI is a great concern because it can lead to abusive forum shopping that is harmful to creditors. The EIR Recast 2015 attempts to resolve this problem by codifying the jurisprudence of the Court of Justice of the European Union.³ This section thus examines the extent to which the EIR Recast 2015 contributes to defining the COMI for the benefit of the parties involved in insolvency cases of corporate groups.

Article 3 of the EIR Recast provides concrete limitations on forum shopping by revoking the presumption of the COMI as being the place of the registered office if a legal entity changes its office to another Member State within three months prior to the request for the opening of insolvency proceedings.⁴ This is very useful for meeting creditor expectations, as companies that try to abuse the notion of the COMI by moving their registered office to another jurisdiction will not be able to benefit from this transfer unless a period of three months has passed.⁵

The EIR Recast 2015 does not attempt to resolve the uncertainties pertaining to insolvency cases of corporate groups by establishing a new method for identifying the COMI of a corporate group that differs from that of individual companies, but instead it did so by enhancing the clarity of the notion of the COMI in general. This should not be regarded as a *acuna*; rather it should be seen as a specific policy decision consistent with the approach of allowing each individual case to be determined on its merits, as stipulated by Article 3.⁶ As argued by Bork and Mangano, this implies that, as a general rule, there will be as many COMIs as there are companies.⁷ The main idea underlying the clarifications made to the notion of the COMI in the EIR Recast 2015 was to consolidate the existing jurisprudence of the Court of Justice of the European Union and some of the domestic decisions of various Member States in a clear and explicit manner, rather than introduce structural changes to the COMI. Therefore, the changes made to the COMI in the EIR Recast 2015 did not transform it drastically, but maintained the approach of the Court of Justice of the European Union in *Eurofood*.⁸ Instead, the EIR Recast 2015 adopted an elaborate chapter on cooperation and coordination, which will be discussed separately below, to help mitigate the problems associated with the insolvency of corporate groups.

1 Francisco Garcimarin, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' (SSRN, 21 March 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 27 May 2018.

2 Epp Aasaru, 'The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 *European Business Law Review* 349.

3 Gerald McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 69 *The Cambridge Law Journal* 169.

4 EIR Recast 2015 art 3(1) paras 2-4.

5 EIR Recast 2015, Recital 31 and art 3(1).

6 Reinhard Bork and Renato Managano, *European Cross-Border Insolvency Law* (Oxford University Press 2016) 230.

7 *ibid* 283.

8 Case C- 341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813. Para 26.

The notion of the COMI under the EIR Recast 2015 has been clarified in a number of ways. First of all, the definition of the COMI is now a substantive provision in the Regulation and not merely a concept in the preamble. The inclusion of the notion of the COMI in the preamble of the previous EIR 2000 meant that it was a non-binding explanatory notion, while the inclusion of a substantive provision in the EIR Recast 2015 makes it a binding legal concept that courts have no choice but to abide by. This is also highlighted by replacing the term ‘should’ with the term ‘shall’. However, the benefits of the relocation of the notion of the COMI from the preamble to the body of the Regulation should not be overstated, because the definition of the COMI has not dramatically changed.¹ Bork and Mangano argue that the removal of the term ‘therefore’ from the definition has added more clarity to its meaning, as this single word ‘had been responsible for a number of interpretative problems’.² However, there has been no case thus far where the term ‘therefore’ has caused a problem in the interpretation of the notion of the COMI.

Additionally, the notion of the COMI has been made clearer in the Regulation through a number of recitals that are useful in ensuring a consistent and predictable interpretation. Even though these recitals do not lay out any ground-breaking principles for interpreting and applying the notion of the COMI, as they merely codified Court of Justice of the European Union case law in relation to the COMI, the process of codifying such jurisprudence into the text of the Regulation adds a great level of certainty, as it makes them an indisputable part of the law.³ The first of these recitals is Recital 28, which incorporates the principles established in cases like *ISA Daisytek* relating to the understanding of the term ‘third parties’.⁴ Recital 28 provides that the term ‘third parties’ focuses on creditors by stating that a shift in the COMI may require ‘informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means’.⁵ As the EIR 2000 did not clarify who may be included in the term ‘third parties’, the addition of this recital enhances the position of creditors in regard to this concept.⁶

In an attempt to safeguard against abusive forum shopping, Recital 30 codifies the principle established in the *Interdil* case that the ‘registered office’ approach will be rebutted as the basis for allocating the COMI if the place of the central administration is not the same as the place of the registered office.⁷ According to Recital 30, the court may rebut the presumption that the COMI is located at the place of the registered office if ‘a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual center of management and supervision and of the management of its interests is located in another Member State’.⁸ This helps improve the clarity of the notion of the COMI from the perspective of creditors

1 EIR Recast 2015, art 3(1).

2 Bork and Mangano (n 54) 80.

3 Federico Mucciarelli, ‘Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo’ (SSRN, 25 August 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650414> accessed 4 April 2018.

4 *Re Daisytek ISA Ltd* [2003] BCC 562- [2003] EIRCR (A) 266.

5 EIR Recast 2015, Recital 28.

6 EIR Recast recital 5 and 11.

7 Case C-396/09 *Interdil Srl (In liquidation) v Fallimento Interdil Srl and another* [2011] WLR 334 Para 32.

8 EIR Recast 2015, Recital 30.

in insolvency cases of corporate groups by clearly stating that the registered office presumption may be rebutted and by setting the conditions for applying the ‘centre of administration’ approach in a manner that takes into consideration the expectations of creditors (by requiring the place to be ‘ascertainable by third parties’). For example, if a company operates and is managed from a certain Member State, but it is registered in another Member State merely to benefit from the legal aspects of registration in that location, the court can determine the COMI to be at the place of central administration and not the place of registration, especially if the place of central administration is ascertainable by creditors. While one can argue that the registered office approach is more predictable and certain than the place of central administration, the EIR Recast 2015 acknowledges that this position could be easily abused by companies and may be misleading to many creditors and other parties who identify a company by its place of operation and are not necessarily aware of where the company is registered. It is therefore justified that the registered office approach is rebutted in such cases.

The EIR Recast, therefore, does not prohibit the relocation of the COMI for insolvency purposes, and, in other words, does not prohibit forum shopping, as long as the relocation is real and ascertainable for the purposes of the insolvency proceedings.¹ However, Tidaro convincingly argues that:

The expression is confusing. It is unclear what “management” means or, at least, how it is different to the “centre of management and supervision”. The interpreter may choose to believe that the legislator, and previously the ECJ, is being redundant by using two different expressions for the same concept; but it is also arguable that the expression “management of its interests” may be referring to the direct, physical conduction of businesses (i.e., where the main productive or commercial center is located), something that would not normally be comprised in the “Central administration” concept.²

It is also worth noting that the EIR Recast 2015 is the first EU legal text that distinguishes between positive and negative forum shopping, as the EIR Recast 2015 clearly prohibits ‘fraudulent and abusive forum shopping’, which inversely means that forum shopping that is not fraudulent or abusive and positively contributes to insolvency proceedings is permitted.³ This is unlike the EIR 2000, which mentioned forum shopping in general without distinguishing between positive and negative forum shopping. However, even though this distinction is a great development, it is not easy for the courts to differentiate between positive and negative forum shopping, as the interests of the creditors, debtors, and directors are not necessarily the same. For example, a certain jurisdiction might appear favourable to a creditor because of the priority given to the creditor under the law of that jurisdiction, yet the same jurisdiction might appear unfavourable to a director because the law of that country might not permit reorganisation of the company and therefore it will limit the ability of the director to rescue the company. Therefore, what might appear to be efficient or useful forum shopping for one party might not be efficient or useful for another.

In conclusion, the EIR Recast 2015 makes a substantial contribution towards removing the ambiguity and uncertainty regarding the notion of the COMI. The codification of court decisions relating

1 Francisco Garcimarin, ‘The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction’ (SSRN, 21March 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 27 May 2018.

2 Ignacio Tirado, ‘An Evaluation of COMI in the European Insolvency Regulation: From ‘Insolvenzimperialismus’ to the Recast’ (2015) *Annal Review of Insolvency Law* 691.

3 EIR Recast recitals 5, 29 to 32.

to the notion of the COMI, such as those that clarify that creditors should be the main focus in the interpretation of the term ‘third parties’, as well as those that detail the conditions for rebutting the registered office approach, are all helpful in ensuring the consistent application of this notion across the EU. However, a number of these clarifications are made in recitals rather than in the body of the Regulation, which reduces the certainty that they will be strictly followed by the courts. Similarly, there are some concerns regarding the use of the center of administration approach when rebutting the registered office approach in cases where a company opens several operational establishments with no single main headquarters.¹ It is not clear in this case how the court will determine the COMI.

(B) Secondary Proceedings

The second main feature of the EIR Recast is the inclusion of provisions for secondary proceedings that have the potential to improve legal certainty for creditors in cross-border insolvency cases in general.² This section explains the secondary proceedings system as envisaged by the EIR Recast 2015, illustrating the reasons behind the use of secondary proceedings and the nature of the changes introduced by the EIR Recast 2015.

The notion of the COMI enables the creation a priority ranking for insolvency proceedings by which only one main proceeding is opened, and any subsequent proceedings are considered secondary.³ The primary function of the main proceedings is to take responsibility for undertaking the insolvency proceedings with regard to all of the assets of the company irrespective of where they are located. Another function of the main proceedings is to impose a duty to cooperate and communicate with other insolvency proceedings. Secondary proceedings are proceedings other than main proceedings, which are opened in a jurisdiction where the debtor has an establishment. According to Article 37(1), it is possible for the insolvency practitioner or ‘any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested’.⁴ The right to open such secondary proceedings may be limited in accordance with Article 37(2) as a result of an undertaking made in accordance with Article 36, which will be explained in more detail later.⁵ Prior to commencing any secondary proceedings, the insolvency practitioner of the main proceedings must be notified and given the opportunity to voice his opinion in accordance with Article 38(1).⁶ Secondary proceedings can only be opened in a jurisdiction where the debtor has an ‘establishment’. The EIR Recast 2015 defines ‘establishment’ to include ‘any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets’.⁷ Other significant aspects of this definition include replacing the term ‘goods’ with ‘assets’, which can add more certainty in regard to the inclusion of businesses in the services industry, as this

1 Irit Mevorach, ‘The Home Country’ of a Multinational Enterprise Group Facing Insolvency’ (2008) 57 *The International and Comparative Law Quarterly* 427, 441.

2 Dubravka Aksamovic, ‘Eu Insolvency Law- New Recast Regulation on Insolvency Proceedings’ in Dunja Duic and Tunijca Petrsevica (eds), *Procedural Aspects of EU Law* (Josip Juraj Strossmayer University of Osijek 2018) 69.

3 EIR 2000 art 3.

4 EIR Recast 2015 art 37(1).

5 Samantha Bewick, ‘The EU Insolvency Regulation Revisited’ (2015) 24 *International Insolvency Review* 172, 181.

6 Bob Wessels, *International Insolvency Law* (Kluwer 2012) 729.

7 EIR Recast 2015 art 2(10).

industry does not trade in ‘goods’ and should be covered by the Regulation, as well as introducing a 3-month period for limiting the recognition of relocating a registered office or place of business for the purpose of determining the COMI (which will be explored in the next section), and which may also increase certainty for parties involved in the insolvency and help in reducing abusive forum shopping.¹

The system envisaged by the EIR Recast 2015 is based on the assumption that in most cases there would only be one insolvency proceeding. Such insolvency proceedings are expected to cover all the assets and creditors of the debtor, irrespective of their location within the EU, and consequently, only one court should have jurisdiction over the insolvency proceedings. Such an approach for dealing with insolvency might reflect the intention to adopt the universality principle, where one court and one law apply to the insolvency proceedings.² However, the EIR Recast 2015 permits secondary proceedings to be commenced alongside main proceedings to deal with the insolvency of the same debtor, as a result of which the approach adopted by the Regulation is, in fact, a modified universality approach.³ The modified universalism approach strives to strike a balance between purely territorial bankruptcy systems and a universal bankruptcy system. It achieves this by reserving discretionary power to local courts to protect certain local interests,⁴ and by giving local courts the right to assess the fairness of the home country’s main proceedings and the right to protect the interests of local creditors as well as the interests of the State itself.⁵ This is demonstrated in the EIR Recast 2015 through the ability of the court in any EU Member State to commence secondary proceedings to protect its local creditors.

By permitting the commencement of secondary proceedings, the Regulation reduces legal certainty, since one cannot predict if and when they will be commenced and the extent to which they may interrupt the main proceedings. However, it must be admitted that secondary proceedings have some advantages that may justify their limited interference with main proceedings in rare circumstances. For instance, in certain jurisdictions, local preferential creditors, such as employees, may not have any preferential treatment in accordance with the applicable law of the jurisdiction where the main proceedings are taking place.⁶ Having secondary proceedings can ensure that preferential creditors do not lose their privileges. Likewise, secondary proceedings can avoid clashes between domestic laws and may help avoid the complexity of administering a single, very large insolvency proceeding.⁷ However, secondary proceedings should be avoided as much as possible to ensure the effective operation of the main proceedings.

Another significant aspect to the way secondary proceedings are handled under the EIR Recast 2015

1 Geert van Calster, ‘COMIng, and here to Stay. The Review of the European Insolvency Regulation’ (SSRN, 28 July 2015) <<http://ssrn.com/abstract=2637003>> accessed 30 April 2018.

2 Jay Westbrook, ‘Universalism and Choice of Law’ (2004-2005) 23 Penn State International Law Review 625.

3 Bork and Mangano (n 54) 230; Dominik Skauradszun, ‘Preparation of Virtual Secondary Insolvency Proceedings Under the Recast EIR’ (2017) [3] Eurofenix 20.

4 Ulrik Bang-Pedersen, ‘Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests’ (1999) 73 American Bankruptcy Law Journal 386.

5 *ibid.*

6 Michel Menjucq & Reinhard Dammann, ‘Regulation No.1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon’ (2008) 9 Business Law International 154.

7 Bork and Managano (n 54) 231-234; Gerard McCormack, ‘Reforming the European Insolvency Regulation: A Legal and Policy Perspective’ (2014) 10 Journal of Private International Law 41.

is that they are no longer limited to being winding-up proceedings. Prior to the entry into force of EIR Recast, cross-border insolvency in the EU was governed by the European Insolvency Regulation 2000 which allowed secondary proceedings only to be winding-up proceedings has been seen as an impediment to the development of a reorganisation culture in the EU,¹ as such winding-up proceedings made it extremely difficult, or at times impossible, to rescue a corporation or sell its assets as an ongoing concern.² Under the EIR Recast 2015, it is possible for secondary proceedings to be either reorganisation or winding-up proceedings.³ In the latter, the assets of the company are liquidated in order to pay off the company's debt to its creditors according to their priority,⁴ whereas in the former, the objective is not to sell the company, but to rescue it and give it a chance to pay its debts back to its creditors. Reorganisation can also ensure the employees of the company do not lose their jobs and that the company continues to operate while satisfying its debts.⁵

Another major aspect of the EIR Recast 2015 is the concept of 'synthetic secondary proceedings'. This has been described by Mucciarelli as the 'most significant innovation' in the EIR Recast 2015.⁶ In accordance with Article 46, the insolvency practitioner of the main insolvency proceedings may request from a court that has opened secondary proceedings 'to stay the process of realisation of assets in whole or in part'. The court may require the insolvency practitioner 'to take any suitable measures to guarantee the interests of the creditors in the secondary insolvency proceedings and of the individual classes of creditors'. The secondary proceedings court may reject the request of the insolvency practitioner 'if it is manifestly of no interest to the creditors in the main insolvency proceedings'. This is a great provision in the EIR Recast 2015, as it has the potential to reduce costs and consolidate the insolvency procedure with the objective of maximising the opportunity for creditors to receive their money back. By empowering the insolvency practitioner to stay secondary proceedings, the insolvency practitioner can make the main insolvency proceedings more predictable and certain to creditors because doing so reduces the potential for the main insolvency proceedings to be disrupted by secondary proceedings. However, a minor concern with this provision is that the term 'manifestly' is not defined and therefore undermines legal certainty in this context.

The involvement of the insolvency practitioner can help reduce the circumstances in which secondary proceedings may be opened and therefore minimises the risk that such secondary proceedings will obstruct the main proceedings as well as reduces the potential for increased costs and delays. For example, if main proceedings commence in one of the Member States, the potential for these main proceedings to be disrupted remains an uncertain risk for creditors throughout the proceedings. However, the provisions in the EIR Recast 2015 help reduce this risk by facilitating 'synthetic' secondary proceedings whereby an insolvency practitioner requests a court that opens secondary proceedings to stay their proceedings with a promise to respect the interests of local creditors [AAS3][BA4]. Therefore, the system of secondary proceedings in the EIR Recast 2015 is

1 Emilie Ghio, 'European Insolvency Law: Development, Harmonisation and Reform, A Case Study on the European Internal Market' (2015) 1 *Trinity College Law Review* 154,164

2 Manfred Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 *American Bankruptcy Law Journal* 485, 520.

3 Mucciarelli (n 59) 19.

4 Tomas Arons, 'Recognition of Debt Restructuring and Resolution Measures under the European Union Regulatory Framework' (2014) 23 *International Insolvency Review* 57.

5 Gordon Johnson, 'The European Union Convention on Insolvency Proceedings: A Critique of the Corporate Rescue Paradigm' (1995) 5 *International Insolvency Review* 80.

6 Mucciarelli (n 59) 18.

a positive contribution to the law and to enhancing legal certainty for creditors in cross-border insolvency cases, especially since (a) secondary proceedings are not limited to being winding-up proceedings, (b) they only acknowledge changes to the relocation of the establishment if such relocation has taken place more than three months prior to the commencement of insolvency proceeding, and (c) the insolvency practitioner may be able to reduce the potential of secondary proceedings to disrupt the main insolvency proceedings [AAS3][BA6]. However, Tollenaar stresses that secondary proceedings are meant to be the exception, and it would be more effective for an insolvency to be dealt through one main proceeding with minimum distractions from secondary proceedings.¹ As noted by Bewick, as ‘useful as these changes [to secondary proceedings] will be, a degree of caution is still required. If the rights of the local creditors are respected, opening secondary proceedings, in addition, may introduce an unhelpful degree of cost and complexity. Secondary proceedings should remain rare’.²

(C) Chapter V on Insolvency Proceedings of a Member of a Group of Companies

The third and final main feature relevant to the analysis is the new Chapter V on the insolvency proceedings of members of a group of companies. There is usually a domino effect within a group when one member goes into insolvency, as it usually means that the whole group is facing financial difficulties. However, the fact that each member of the group has a separate legal personality means that the assets of one member cannot be legally acquired in order to pay the debts of another member in the event of insolvency.³ The reality of multiple debtors and creditors being scattered across different jurisdictions makes it difficult to determine the most appropriate jurisdiction for commencing insolvency proceedings and makes the coordination between different insolvency proceedings very challenging.⁴ All this complexity contributes to increased costs in the insolvency proceedings for all parties involved and makes the process extremely lengthy in terms of time.⁵ The fact that the interests of both debtors and creditors involved in the insolvency proceedings are divergent, and at many times conflicting, can lead to abusive forum shopping, which could consequently have a negative impact on legal certainty for determining jurisdiction and the law applicable.⁶

The EIR Recast 2015 includes an entire chapter entitled “Insolvency Proceedings of Members of a Group of Companies” that aims to overcome some of the challenges associated with the cross-border insolvency of corporate groups in the EU. This chapter does not use a ‘one group-one COMI’ approach, even though Bork and Mangano believe that this chapter ‘seems to permit’ it, albeit ‘to a limited extent’.⁷ The EIR Recast 2015 instead adopts a ‘one group-many COMIs’ approach by respecting the separate legal personality of each member of the group and facilitating a more efficient group-wide insolvency process through cooperation among the insolvency practitioners and the courts involved in the insolvency proceedings of the various members of the group, and through non-mandatory coordination between the insolvency proceedings.⁸

1 Nicholaes Tollenaar, ‘Dealing with the Insolvency of Multi-National Groups Under the European Insolvency Regulation’ (2010) 23 *Insolvency Intelligence* 65.

2 Bewick (n 72) 183.

3 Damien Murphy, ‘Holding Company Liability for Debts of Its Subsidiaries: Corporate Governance Implications’ (1998) 10 *Bond Law Review* 241.

4 Israel (n 8) 11.

5 Eva M F de Vette, ‘Multinational Enterprise Groups in Insolvency: How Should the European Union act?’ (2011) 7 *Utrecht Law Review* 216.

6 Bob Wessels, ‘The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation’ (2009) 6 *European Company Law* 169.

7 Bork and Mangano (n 54) 282.

8 *ibid.*

(II) Cooperation and Communication

The EIR Recast 2015 attempts to create a legal framework to enable cooperation between insolvency proceedings relating to different members of a group of companies, either between liquidators or between courts by having a section in the Chapter V on cooperation and communication. In accordance with Chapter V, insolvency practitioners and courts may cooperate and communicate to ensure the effective administration of the insolvency proceedings of different members of a group of companies. Such cooperation may take any form, such as through the conclusion of an agreement or a protocol. The EIR Recast 2015 does not require a specific format for such agreements or protocols, as Recital 49 states that they can take any form, written or oral, and may cover any scope, whether generic or specific, and may be concluded between different parties, for example between insolvency proceedings or between courts.¹

The EIR Recast 2015 permits cooperation between insolvency practitioners with the objective of exchanging information, considering the possibility of coordinating the group insolvency in accordance with Section 2 of Chapter V, and considering the possibility of restructuring the group members involved in the insolvency proceedings.² The Regulation also permits cooperation between the courts involved with the objective of coordinating the appointment of the insolvency practitioner, communicating information, coordinating the administration of the assets, coordinating the conduct of the hearings, and coordinating the approval of any necessary protocols.³ Finally, the Regulation permits cooperation between insolvency practitioners and the court concerning requests for the opening of proceedings in respect of another member of the same group, requesting information concerning the proceedings regarding other members of the group, and requesting assistance concerning the proceedings.⁴ The cooperation section of Chapter V also grants insolvency practitioners a number of extra powers relating to the proceedings of other members of a group of companies with the objective of facilitating the effective administration of the proceedings. Such powers include the right to be heard in any of the proceedings opened in respect of any other member of the group, the right to request the stay of any measure relating to the realisation of the assets of any other member of the group, for a period of up to three months, and the right to apply for the opening of group coordination proceedings in accordance with Section 2 of Chapter V.⁵

The provisions in the EIR Recast 2015 on cooperation in the insolvency cases of corporate groups are a great addition towards enhancing legal certainty in such cases, as the law now clearly provides a framework for insolvency practitioners and the courts to cooperate. This is especially useful in situations where the integration between members of the group is very high and the relationship very strong, and such cooperation becomes the optimal way to maximise the return for creditors or to ascertain the best way to avoid multiple insolvency proceedings and facilitate the reorganisation of the entire group.⁶ The EIR Recast 2015 attempts to ensure that such cooperation is undertaken for the benefit of creditors and requires that the cooperation and communication be appropriate

1 EIR Recast recital 49.

2 EIR Recast 2015 art 56(2).

3 EIR Recast 2015 art 57(3).

4 EIR Recast 2015 art 58.

5 EIR Recast 2015 art 60(1); Martin Davies, 'Parallel Proceedings for Insolvency and Limitation of Liability' (2015) 1 Lloyd's Maritime and Commercial Law Quarterly 24.

6 Philipp Esser, 'Reform of the EU Regulation New Framework for Insolvent Company Groups: Part 1' (2015) 34 American Bankruptcy Institute Journal 38.

to facilitate effective administration, that they do not entail any conflict of interest, and that appropriate arrangements are made to protect confidential matters.¹

While acknowledging the benefits of having a mechanism for cooperation in the EIR Recast 2015 in terms of facilitating the efficient administration of cross-border insolvencies of corporate groups, there remains a considerable amount of uncertainty with regard to its actual, practical implementation. The EIR Recast 2015 does not make cooperation mandatory; rather, it is up to the insolvency practitioner and the courts to initiate a request for cooperation.² As this is a mechanism in the EU, only time will tell if such a culture of cooperation exists amongst insolvency practitioners and judges, especially as there might be non-legal barriers to cooperation, such as linguistic and logistical barriers.³ The text of the EIR Recast 2015 itself contains a number of terms and concepts that remain uncertain. For example, Article 56 permits cooperation ‘to the extent that such cooperation is appropriate’ but does not define what would be considered ‘appropriate’.⁴ Similarly, Article 60(1) (a) (i) uses the phrase ‘reasonable chance of success’, which again may be a cause of uncertainty.⁵

(II) Coordination

In addition to the cooperation and communication provisions, the EIR Recast provides a much more powerful and useful system for coordination between the insolvency proceedings of different members within a group. According to the system of coordination provided in the EIR Recast 2015, group coordination proceedings may be requested by an insolvency practitioner before any court involved in insolvency proceedings of any member of the group.⁶ The objective of such coordination is to ensure the efficient administration of the insolvency proceedings of all members of the group.⁷ Such coordination is to be administered by the insolvency practitioner, to be identified as the coordinator, and the court that first seizes the insolvency proceedings shall have exclusive jurisdiction over the coordinated insolvency proceedings.⁸

However, this system of coordination is not mandatory, as the insolvency practitioners responsible for insolvency proceedings of other members of the group may accept or decline to join the coordination plan.⁹ The insolvency practitioner may object to joining a coordination plan on two grounds: an objection may be raised against the coordination plan itself or an objection may be raised against the proposed coordinator.¹⁰ It is also possible for an insolvency practitioner to subsequently join group coordination proceedings even if an objection was made at an earlier stage. It is possible for the insolvency practitioners to agree that a specific court is the most appropriate for the group coordination proceedings if two-thirds of all appointed insolvency

1 EIR Recast 2015 art 56 (2) (a) and art 57(1); Bork and Mangano (n 54) 289.

2 Gerard McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (2016) 79 *The Modern Law Review* 121.

3 Bob Wessels and Miguel Virgos, ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (*INSOL Europe*, July 2007) 22.

4 Esser (n 101) 38. f

5 EIR Recast 2015 art 60.

6 EIR Recast 2015 art 61.

7 EIR Recast 2015 art 63.

8 EIR Recast 2015 art 66 (1).

9 EIR Recast 2015 art 66(3).

10 EIR Recast 2015 art 64.

practitioners agree in writing to such an allocation.¹ The group coordination proceedings shall be conducted in accordance with the coordination plan designed by the insolvency coordinator. The coordinator may also issue recommendations for all insolvency practitioners joining the group coordination proceedings. However, the insolvency practitioners are not obliged to follow, either in whole or in part, the recommendation or the plan of the coordinator.² The coordinator also has other rights, such as the right to be heard and participate in any proceedings relating to the insolvency proceedings of any member of the group.³

The approach taken by the EIR Recast 2015 was to respect the separate legal personality of the members of the group.⁴ The coordination approach taken by the EIR Recast 2015 promotes efficiency while acknowledging, first, that there might be areas of inconsistency in the substantive consolidation approach, and second, the inherent difficulty in bringing all of the assets of the members of the group together under one proceeding in light of the inevitable legal discrepancies arising from the application of foreign laws.⁵ This coordination approach attempts to achieve consistency across the insolvency proceedings of all of the members of the group through coordination between the group coordinator and the insolvency practitioners at the insolvency proceedings of the members. Also, as noted by Van Calster, the possibility of having two-thirds of the insolvency practitioners agree regarding which court has exclusive jurisdiction is a welcome step for avoiding the hijacking of the proceedings by a minority and ‘effectively amounts to cram-down of choice of court of group coordination proceedings’.⁶ An effective implementation of this coordination approach could have a positive impact on the cost and may help save time in the overall insolvency proceedings of the group, as the group coordinator can ensure the reduction of repetition, the mediation of disputes, and the provision of information to all insolvency practitioners involved in the proceedings.⁷

The coordination approach adopted by the EIR Recast 2015 can be extremely useful in cases of group insolvencies. However, there are a number of drawbacks in the way this approach has been implemented by the Regulation that negatively contributes by reducing legal certainty for creditors and other relevant parties. First of all, it is not entirely clear which court has jurisdiction to oversee the group coordination proceedings. In addition, the fact that two-thirds of the insolvency practitioners can agree to change the court that has jurisdiction may act as a guarantee that the most appropriate court will be in charge, but the Regulation does not provide guidelines on how this selection is to be made.⁸ Secondly, participation in the group coordination proceedings is voluntary, and insolvency practitioners are not required to join the coordination proceedings if they are not happy with them or with the insolvency practitioner making the request, and, as noted by Weiss, ‘unfortunately, the group coordination plan can turn into a lame duck as there is no obligation on the insolvency practitioner to follow any recommendation or the coordination plan’.⁹

The EIR Recast 2015 also provides a great deal of flexibility in the coordination proceedings and

1 EIR Recast 2015 art 66.

2 EIR Recast 2015 art 70 (2).

3 EIR Recast 2015 art 72 (2).

4 Christoph Thole and Manuel Duenas, ‘Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation’ (2015) 24 *International Insolvency Review* 214.

5 *ibid* 215.

6 Van Calster (n 37) 14.

7 Thole and Duenas (n 115) 216.

8 EIR Recast, art 66.

9 Weiss (n 48) 212.

allows insolvency practitioners to join them even if they object to doing so at the beginning. While this may seem useful, it makes the process very unpredictable and uncertain. Thirdly, the recommendations and the plan issued by the coordinator are not binding, and the Regulation makes it very clear that insolvency practitioners are not under obligation to follow the recommendations or the plan in whole or in part.¹ This creates further uncertainty. Finally, the Regulation is also not entirely clear as to how the coordination itself is meant to be carried out effectively. In particular, there are no guarantees that the coordination will not damage the interests of the creditors or that it will balance the interests of all stakeholders.²

However, even with these drawbacks, as Thole and Duenas note, the ‘rules for the new group coordination proceedings can be useful in isolated cases’.³ McCormack understandably worries that the ‘voluntary nature of the regime, however, may mean that they are unlikely to be much used in practice but they may have a use in the ‘big ticket’ cases where there is a high degree of coordination among [insolvency practitioners] at the outset.’⁴ The coordination is definitely a positive step towards creating a legal framework for dealing with the insolvency cases of corporate groups, but there is still room for improvement, especially in order to enhance legal certainty for creditors in such cases.

This section has explored the main provisions of the EIR Recast 2015 that may contribute to enhancing legal certainty in cross-border insolvency cases involving corporate groups, namely the provisions on secondary proceedings, the provisions clarifying the notion of the COMI, and Chapter V on the insolvency proceedings of members of a group of companies. The analysis above demonstrates that these provisions provide great opportunities for enhancing legal certainty and reducing the possibility of abusive forum shopping. However, this section also highlighted some of the shortcomings of these provisions. Therefore, the next section points out a number of opportunities for reforming the EIR Recast with the objective of further improving legal certainty.

3. Opportunities for Reform

It is acknowledged that the EIR Recast 2015 is a major step forward towards resolving many of the issues facing cross-border insolvency cases of corporate groups. However, in light of the examination of the EIR Recast 2015 and its shortcomings, there is still room to further enhance legal certainty in such insolvency cases. Therefore, this section makes a number of proposals that would render the EIR Recast 2015 more effective in this regard.

These proposals may be classified into two main categories: Proposals for substantive provisions and proposals for procedural provisions. In regard to the substantive provisions of the EIR Recast 2015, the discussion above demonstrated the need for greater clarity and precision in defining the terms and concepts used in the Regulation, which should consequently reduce the opportunity for abusive forum shopping. For example, the terms ‘ascertainable’, ‘regular basis’, ‘reasonable’, ‘manifestly’ and ‘appropriateness’ need to be defined in a much clearer manner to avoid divergent interpretations of these terms or concepts by courts in the EU. Such improvements in clarity will definitely enhance legal certainty, which is one of the primary aims of the EIR Recast 2015. Some commentators, such as Mucciarelli, are optimistic that the Court of Justice of the European Union will play a pivotal role in

1 EIR Recast 2015 art 70 (2).

2 Thole and Duenas (n 115) 216.

3 *ibid* 227.

4 McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (n 103) 144.

the development of a clearer interpretation of these concepts.¹ It is also possible that legislators of the next Regulation will clarify the meanings of these terms.

The EIR Recast 2015 does not change the notion of the COMI found in the previous regulation, but it helps clarify what this means through Recitals 30, 32, and 33, which explain that the court's decision in the *Interdil* case is the one to be followed, that creditors may present their views to the court if the applicable law permits it, and that the court may refuse to open main insolvency proceedings if it comes to the conclusion that the COMI is not located within its jurisdiction. Recital 53 provides additional useful guidance on the notion of the COMI and how it can be applied in the context of groups of companies. However, the fact that this guidance is found in a recital may limit its usefulness and fails to guarantee that it will be applied in the intended manner in all cases, which could adversely affect legal certainty in insolvency cases of corporate groups. Additionally, a major area of ambiguity is in the fact that the factors for which the presumption that the COMI is at the place of the registered office may be rebutted still remain ambiguous, as the EIR Recast 2015 has not made this matter any clearer. The courts have identified some of these factors in cases made in accordance with the current EIR, but the priority and the weight of each one of them are yet to be determined. It is proposed that the legislators of the next Regulation establish a clear and precise definition of these factors.

One of the developments in the EIR Recast 2015 is its distinction between abusive and beneficial forum shopping, which is embodied in the Regulation through provisions that enable creditors to present their views with regard to determining jurisdiction to the courts.² This solution is not perfect, however, because it is not compulsory for the court to take into consideration the views of the any of the parties. The EIR Recast 2015 also does not clearly distinguish between abusive and beneficial forum shopping, probably because, as discussed earlier, the divergent interests of the various stakeholders in insolvency proceedings could mean that what is considered abusive for one party may be beneficial to another. It is therefore proposed that the legislators of the next Regulation make it clear that the understanding of the term 'abusive' should be made with reference to the impact of forum shopping on creditors. Similarly, the Regulation does not specify how to deal with cases where there are conflicting views amongst creditors regarding the determination of jurisdiction, which can be problematic when some consider the forum shopping to be abusive while others consider it to be beneficial. Article 66 of the EIR Recast 2015 provides a mechanism for dealing with a multiplicity of views among creditors concerning group cooperation proceedings by requiring a minimum of two thirds of the creditors to share the same view for it to be considered valid. Therefore, it is proposed that this same principle be used where there are conflicting views among the creditors in relation to the determination of jurisdiction in cases of abusive forum shopping.

In addition to the proposals for improving the substantive provisions of the EIR Recast 2015, there are a number of proposals for improving the procedural provisions of this Regulation. First of all, the new provision in Article 3(1), which states that the COMI is presumed to be the place of the registered office, does not apply if the registered office has been moved to another Member State less than 3 months before the commencement of the insolvency proceedings. This is a positive move towards combating abusive forum shopping. However, the EIR Recast 2015 sets this period at 3 months for companies and 6 months for individuals. The rationale behind this distinction is not clear, and it appears to make more sense to set the longer period for businesses that are riskier to creditors, such

1 Mucciarelli (n 59) 20.

2 RJ de Weijts and MS Breeman, 'Comi-Migration: Use or Abuse of European Insolvency Law' (2015) 11. European Company and Financial Law Review 495.

as corporate groups. The longer the limitation period, the more protected creditors are from abusive businesses that would relocate their registered office for the sake of avoiding liability.

The cooperation and coordination mechanisms found in Chapter V are some of the great innovations of the EIR Recast 2015 that may be utilised by insolvency practitioners and courts alike to the benefit of creditors and the insolvency proceedings of the group as a whole. However, not all jurisdictions have the required legal framework to enable such cooperation and coordination, especially for their courts to cooperate with foreign courts. Even though Recital 61 states that the application of national laws should not ‘impair the efficiency of the rules’ on cooperation, communication, and coordination, there still needs to be a binding mechanism for ensuring that the domestic laws of Member States facilitate cooperation and coordination.¹

It is acknowledged that legislative solutions are extremely cumbersome to realise, and therefore, the duty lies on judges to give effect to the commercial realities of situations involving corporate groups in their interpretation of the COMI and by embracing the culture of cooperation and coordination.

The EIR Recast 2015 is definitely a positive development in terms of providing greater certainty and reducing abusive forum shopping in the cross-border insolvency cases of corporate groups, and the proposals made above can help improve this Regulation further.

4. Conclusion

This paper attempts to evaluate the extent to which legal certainty is enhanced in cross-border insolvency cases under the EIR Recast 2015. This was undertaken by firstly exploring the issue of cross-border insolvency of corporate groups, which shares some of the issues that face cases of cross-border insolvency of individual companies, but also have unique complications as a result of the separate legal personality of the individual members of the group. The article explores how the EIR Recast has attempted to address the uncertainties facing the cross-border insolvency of corporates through COMI clarifications, secondary proceedings, and by incorporating a whole chapter that deals exclusively with the cross-border insolvency of corporate groups. Upon analysing the EIR Recast 2015, the article proposes a number of procedural and substantive recommendations to help enhance legal certainty even further. The EIR Recast 2015 represents a major achievement for European insolvency law that should be acknowledged. However, as noted by Mucciarelli, the New Recast EIR 2015 ‘does not drastically alter the private insolvency law scenario for cross-border insolvencies’ in comparison to the previous regulation², and that, as noted by McCormack, ‘the reality on ground seems to be that European law is built incrementally by a series of small steps.’³

1 EIR Recast 2015, recital 61.

2 Mucciarelli (n 59) 20.

3 McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (n 103) 146.

Bibliography

American Cases

- Global Telesystems Inc v KPNQwest NV 151 F.Supp.2d 478 (SDNY 2001)

English Cases

- Collins & Aikman Europe SA, Re [2005] EWHC 1754 (Ch), [2006] BCC 861
- Daisytek-ISA Ltd and Others, Re [2003] All ER (D) 312
- MG Rover Espana and other Subsidiaries [2005] BPIR 1162, [2006] BCC579.
- Stanford International Bank Limited, Re [2009] EWHC 1441 (Ch), [2009] BPIR 1157

CJEU Cases

- Case C-341/04 Eurofood IFSC Ltd [2006] ECR I-3813
- Case C-396/09 Interedil Srl (In liquidation) v Fallimento Interedil Srl and another [2011] WLR 334

List of Legal Instruments

- Insolvency Proceedings [2000] OJ L160/1
- Insolvency Proceedings (recast) [2015] OJ L141/19

A

- Aasaru E, 'The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 European Business Law Review 349

B

- Bell A, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003)
- Bewick S, 'First do no Harm -Changes to the EU Insolvency Regulation' (2012) 5 Corporate Rescue and Insolvency 207
- — — 'The EU Insolvency Regulation Revisited' (2015) 24 International Insolvency Review 172
- Bork R and Managano R, *European Cross-Border Insolvency Law* (Oxford University Press 2016)
- Braithwaite J, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 47

C

- van Calster G, 'COMIng, and here to Stay. The Review of the European Insolvency Regulation' [Unpublished] (SSRN 2016) <<http://ssrn.com/abstract=2637003>>

E

- Esser P, 'Reform of the EU Regulation New Framework for Insolvent Company Groups: Part 1' (2015) 34 American Bankruptcy Institute Journal 38

F

- Fletcher I, *Insolvency Law in Private International Law* (2nd, Oxford University Press 2005)

H

- Hannigan B, *Company Law* (4th edn, Oxford University Press 2016)
- Hess B, Oberhammer P and Pfeiffer T, *European Insolvency Regulation Heidelberg-Luxembourg-Vienna Report* (Hart Publishing 2014)

M

- McCormack G, 'Jurisdiction Competition and Forum Shopping in Insolvency Proceedings' (2009) 68 The Cambridge Law Journal 169
- — — 'COMI and Comity in UK and US Insolvency Law' (2012) 128 Law Quarterly Review 140
- — — 'Reconciling European Conflict and Insolvency Law' (2014) 15 European Business Organization Law Review 309
- — — 'Bankruptcy Forum Shopping: the UK and US as Venues of Choice for Foreign Companies' (2014) 63 International and Comparative Law Quarterly 815;
- — — 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10 Journal of Private International Law 49
- — — 'Something Old, Something New: Recasting the European Insolvency Regulation' (2016) 79 The Modern Law Review 121
- Mevorach I, *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009)

- — ‘The Home Country’ of a Multinational Enterprise Group Facing Insolvency’ (2008) 57 *The International and Comparative Law Quarterly* 427
- — ‘Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap’ (2015) 10 *Brooklyn Journal of Corporate, Financial and Commercial Law* 183
- Mucciarelli F, ‘Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo’ [Unpublished] (SSRN, 25 August 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650414> accessed 26 April 2016

P

- Popelier P, ‘Legal Certainty and Principle of Proper Law Making’ (2000) 2 *European Journal of Law Reform* 321

S

- Sarra J, ‘Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings’ (2009) 44 *Texas International Law Journal* 547

T

- Thole C and Duenas M, ‘Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation’ (2015) 24 *International Insolvency Review* 214
- Tirado I, , ‘An Evaluation of COMI in the European Insolvency Regulation: From
- ‘Insolvenzimperialismus’ to the Recast’ (2015) *Annal Review of Insolvency Law* 691.
- Tollenaar N, ‘Dealing with the Insolvency of Multi-National Groups under the European Insolvency Regulation’ (2010) 23 *Insolvency Intelligence* 65

V

- Vette E, ‘Multinational Enterprise Groups in Insolvency: How Should the European Union Act?’ (2011) 7 *Utrecht Law Review* 216

W

- Wade J, ‘The Centre of Main Interests Connecting Factor Affords Creditors no Certainty under the Model Law Regime’ (2011) 22 *International Company and Commercial Law Review* 102
- Weijs R and Breeman M, ‘Comi-Migration: Use or Abuse of European Insolvency Law’ (2015) 11 *European Company and Financial Law Review* 495
- Weiss M, ‘Bridge over Troubled Water: The Revised Insolvency Regulation’ (2015) 24 *International Insolvency Review* 192
- Wessels B and Miguel Virgos, ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (*INSOL Europe*, July 2007) <<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>> accessed 30 April 2016
- — ‘The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation’ (2009) 4 *European Company Law* 169
- — *International Insolvency Law* (Kluwer 2012)
- Wood P, *Principle of International Insolvency* (Sweet & Maxwell 2007)