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## **Reforming the European Insolvency Regulation – a Legal and Policy Perspective**

This paper will critically evaluate the proposals for reform of the European Insolvency Regulation - regulation 1346/2000 - advanced by the European Commission.<sup>1</sup> While criticised by some commentators as unsatisfactory, the Regulation is widely understood to work in practice.<sup>2</sup> The Commission proposals have been described as ‘modest’<sup>3</sup> and it is fair to say that they amount to a ‘service’ rather than a complete overhaul of the Regulation.<sup>4</sup> The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors.

A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best

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<sup>1</sup> See *Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings* COM (2012)743 and Proposal for a new Regulation COM (2012) 744 final. See also the Hess/Oberhammer/Pfeiffer external evaluation of the Regulation. - JUST/2011/JCIV/PR/0049/A4. On the same day as its proposals for reform of the Insolvency Regulation the Commission also released a Communication *A new European approach to business failure and insolvency* COM (2012) 742 and a Commission Staff Working Document - SWD (2012) 416 final. See now the Opinion of the European Economic and Social Committee on the proposal for a new Regulation – 2013/C 271/10 and the report from the European Parliament’s Committee on Legal Affairs on the proposed new Regulation dated 11<sup>th</sup> September 2013 (the “Lehne 2 report”).

<sup>2</sup> See the statement in the Commission report that the “Regulation is generally regarded as a successful instrument for the coordination of cross-border insolvency proceedings in the Union” - COM (2012) 743 final at p 4.

<sup>3</sup> See H Eidenmuller, “A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond” (2013) 20 *Maastricht Journal* 133, 150.

<sup>4</sup> See M Arnold QC, “The Insolvency Regulation: a Service or an Overhaul” *South Square Digest* (May 2013, 28).

achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.<sup>5</sup>

### **A. General philosophy**

The professed objective of the Insolvency Regulation is achieve greater efficiencies and effectiveness in the administration of cross-border insolvency cases.<sup>6</sup> The preamble to the regulation also mentions the prevention of forum shopping i.e. the movement of assets or judicial proceedings from one Member State to another so as to try to take advantage of a more favourable legal position.<sup>7</sup>

The Regulation puts in place a detailed framework for the management of cross-border insolvency cases within Europe and attempts a partial harmonization of conflicts-of-law rules but it does not say much about substantive insolvency law. The State where the debtor has its centre of main interests or ‘COMI’ is given centre stage when it comes to collection and administration of the debtor’s assets. The COMI State is given the exclusive authority to open main insolvency proceedings in respect of the debtor<sup>8</sup> and the decision to open such proceedings must be given

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<sup>5</sup> For instance, in the private law field the proposal for a Common European Sales Law – see SEC( 2011) 1165 final and SEC (2011) 1166 final and for a critical evaluation see S Whittaker, “Identifying the Legal Costs of Operation of the Common European Sales Law”(2013) 50 *Common Market Law Review* 85.

<sup>6</sup> Recitals 2 and 3. See generally on the Regulation, G Moss, I Fletcher and S Isaacs, *The EC Regulation on Insolvency Proceedings* (Oxford, OUP, 2nd ed 2009); I Fletcher, *Insolvency in Private International Law* (Oxford, OUP, 2nd ed 2005). The background of many of the underlying principles and detailed rules in the Regulation are explained in the Virgos-Schmit Report on the draft EU Convention on Insolvency Proceedings, which preceded and foreshadowed the Regulation. While the Virgos-Schmit Report has no official status and was not agreed to by all the EU Member States, nevertheless it is of persuasive authority. The report is to be found in an appendix to the books mentioned above.

<sup>7</sup> Recital 4. For an implicit distinction between ‘good’ and ‘bad’ forum shopping see the opinion of Advocate General Colomber in *Staubitz-Schreiber* - Case -1/04 [2006] ECR I-701, [71]-[72].

<sup>8</sup> Article 3(1).

immediate, full and unqualified recognition throughout the EU.<sup>9</sup> While secondary insolvency proceedings may be opened in States where the debtor has an ‘establishment’<sup>10</sup> the effect of these proceedings is however limited to assets within the particular State. According to Article 4, the law of the State where insolvency proceedings are opened, governs the conduct and effect of the proceedings and the article 4 sets out a number of matters that are specifically subject to the law governing the opening of the proceedings. These matters include the assets which form part of the estate; the powers of the liquidator; rules governing the lodging, verification and admission of claims; and the priority ranking of creditors. Articles 5-15 however, set out a whole host of exceptions to the Article 4 general rule.

Looking at the European Insolvency Regulation from the perspective of international insolvency principle, its general approach appears to be ‘universalism’, albeit tempered or modified by pragmatic considerations. The universalist philosophy suggests that there should be a single insolvency proceeding in respect of a debtor which covers all the debtor’s assets wherever situated and that applies in respect of all the debtor’s legal relationships.<sup>11</sup> Article 4 of the Regulation reflects a universalist approach but the exceptions contained in Articles 5-15 cast a different light. Another modification to the universalist philosophy in the Regulation comes from the fact that secondary insolvency proceedings may be opened in respect of a debtor and these

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<sup>9</sup> Articles 16 and 25.

<sup>10</sup> Article 3(2).

<sup>11</sup> For a discussion of universalism versus territorialism see G McCormack, “Universalism in Insolvency Proceedings and the Common Law” (2012) 32 *Oxford Journal of Legal Studies* 325. See also JL Westbrook, “Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 *American Bankruptcy Law Journal* 457; L LoPucki, “Cooperation in International Bankruptcy: A Post-Universalist Approach” (1999) 84 *Cornell Law Review* 696; S Franken, “Three Principles of Transnational Corporate Bankruptcy Law: A Review” (2005) 11 *European Law Journal* 232.

proceedings do not serve simply as mechanisms for the more convenient collection of assets and their remission to the liquidator in the principal proceedings. The secondary proceedings are subject to the law of the State that opens the secondary proceedings which will apply, inter alia, to the distribution of the assets subject to the secondary proceedings.<sup>12</sup> The role of secondary proceedings in the context of Regulation acknowledges implicitly the alternative to ‘universalism’; namely ‘territorialism’ which suggests that separate insolvency proceedings may be opened in any State where a debtor has assets and that ‘local’ assets should be in principle be set aside for the benefit of ‘local’ creditors.<sup>13</sup>

Apart however, from a rather bald statement that the proper functioning of the internal market requires a cross-border insolvency initiative there is nothing much in the preamble about higher level objectives. The Commission has painted the background to the proposed amendments with a far broader and bolder brush. The amendments are stated to be with a view to ensuring a smooth functioning of the internal market; its resilience in economic crises and the survival of businesses. Reference is made to the Europe 2020 strategy and the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment.<sup>14</sup> Language in the proposed new preamble refers to the extension of the regulation to proceedings which “promote the rescue of an economically viable debtor in order to help sound companies to survive and give a second chance to entrepreneurs. It should

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<sup>12</sup> This was made clear in *Re Alitalia Ltd* [2011] EWHC 15; [2011] 1 WLR 2049.

<sup>13</sup> For a defence of provisions ring-fencing assets for the benefit of ‘local’ creditors see the paper by the Singapore Chief Justice Chan Sek Keong, “Cross-Border Insolvency issues affecting Singapore” (2011) 23 *Singapore Academy of Law Journal* 413, 419.

<sup>14</sup> See explanatory memorandum attached to the Commission proposals at para 1.2.

notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage or which leave the existing management in place.”<sup>15</sup> Underlying the Commission agenda is the assumption that in a business there is a surplus of going concern value over liquidation value and that this going concern surplus is best captured if the business is, in some way, restructured rather than the assets of the business being sold off to the highest bidder.<sup>16</sup> This assumption is questionable in that the best outcome may be the sale of the economically viable part of a company’s business with the ‘bad bits’ being left behind and liquidated.

Chapter 11 of the US Bankruptcy Code is often cited as the model to which European restructuring laws should aspire.<sup>17</sup> Chapter 11 has as a goal the preparation and confirmation of a restructuring plan.<sup>18</sup> Prominent US commentators suggest<sup>19</sup> that in ”the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world,

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<sup>15</sup> New recital 3.

<sup>16</sup> On different conceptions of corporate rescue see V Finch, “Corporate Rescue: A game of three halves” (2012) 32 *Legal Studies* 302; “Corporate rescue in a world of debt” [2008] *Journal of Business Law* 756.

<sup>17</sup> See M Brouwer, “Reorganization in US and European Bankruptcy Law” (2006) 22 *European Journal of Law and Economics* 5; A Tilley, “European Restructuring: Clarifying Trans-Atlantic Misconceptions” [2005] *Journal of Private Equity* 99; C Pochet, “Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules” (2002) 6 *Journal of Management and Governance* 343.

<sup>18</sup> *Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434. See also HR Rep No 595, 95<sup>th</sup> Congress, 1st Session 220 (1977) and *US v Whiting Pools Inc* (1983) 462 US 198 at 203: “In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future ...By permitting reorganisation, Congress anticipated that the business would continue to provide jobs, to satisfy creditors’ claims, and to produce a return for its owners... Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if ‘sold for scrap’”.

<sup>19</sup> See E Warren & JL Westbrook, "The Success of Chapter 11: A Challenge to the Critics" (2009) 107 *Michigan Law Review* 603 at 604. The American Bankruptcy Institute has established a commission to review Chapter 11 with a view to advancing proposals for legislative reform – see [www.commission.abi.org](http://www.commission.abi.org)

Chapter 11 ... deserves a prominent place. Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death.” Restructuring mechanisms, including Chapter 11, are designed to keep a business alive so as to preserve this additional going concern value. There is however, another view that if a company encounters economic difficulties the most effective solution may be to shut it down.<sup>20</sup> For instance, if a company is producing goods and services for which there is no ready market then there may be no point in leaving it in existence. There seems little merit in saving a dog food company if the company is producing food that the animals do not like.<sup>21</sup> Putting ailing companies on a life support machine may in fact harm the sector of the economy in which they operate. It makes competitors suffer by forcing them to compete in crowded markets with rivals that are restructured and have their debts reduced but which are ultimately inefficient. There is a move therefore, to a new ‘Chapter 11’ with a greater emphasis on sales of the debtor’s business as a going concern rather than on restructurings in the traditional sense.<sup>22</sup>

There is a bit of a gap however, between the rhetoric of the European Commission and the reality. Despite the rhetoric, the Commission proposals are essentially modest and procedural at

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<sup>20</sup> See C Adams, “An Economic Justification for Corporate Reorganizations” (1991) 20 *Hofstra Law Review* 117, 133 “[M]ost assets are probably not firm-specific, and so, most insolvent corporations will not have substantially greater going concern than liquidation values and, consequently, will not be good candidates for an effective reorganization.”

<sup>21</sup> See generally M White, “Does Chapter 11 Save Economically Inefficient Firms” (1994) 72 *Washington University Law Quarterly* 1319; “The Corporate Bankruptcy Decision” (1989) 3 *Journal of Economic Perspectives* 129.

<sup>22</sup> See, for example, K Ayotte and DA Skeel, “Bankruptcy or Bailouts” (2010) 35 *Journal of Corporate Law* 469, 477 “roughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan.”

least so far as revision of the Regulation is concerned though, in fairness to the Commission, it should be pointed out that they are part of a broader package of measures including a Communication on “ A new European approach to business failure and insolvency”.<sup>23</sup> Essentially, the Regulation reform proposals extend Europe-wide recognition under the Regulation to a greater range of restructuring proceedings. This extension will now be considered.

### **B. Extension of the Regulation to cover ‘pre-insolvency’ procedures**

Currently, Article 1(1) provides that the Regulation applies to collective insolvency proceedings involving the partial or total disinvestment of the debtor and the appointment of a liquidator (Art 1). Article 2 goes on to state that for the purposes of the Regulation ‘insolvency proceedings’ shall mean the collective proceedings referred to in Art 1(1), which proceedings are listed in Annex A. The European court said in *Bank Handlowy*<sup>24</sup> that once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. ‘Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation.’ Moreover, in *Ulf Kazimierz Radziejewski*<sup>25</sup> the European court suggested that the Regulation applied only to the proceedings listed in the annex.<sup>26</sup> Therefore a form of Swedish debt relief procedure considered in the case did not fall within the Regulation as it was not

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<sup>23</sup> COM (2012) 742. See also European Commission Press Release of 5<sup>th</sup> July 2013 - [http://europa.eu/rapid/press-release\\_IP-13-655\\_en.htm](http://europa.eu/rapid/press-release_IP-13-655_en.htm).

<sup>24</sup> *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11). paras 33–35. See also para 49 of the opinion of Advocate General Kokott.

<sup>25</sup> Case C-461/11 – judgment 8<sup>th</sup> November 2012. The court however also pointed out that the procedure did not entail the divestment of the debtor and therefore could not be classified as an insolvency procedure within the meaning of Article 1.

<sup>26</sup> Para 24.



included in the Annex.

The annex may be over-inclusive in that it covers procedures that, strictly speaking, are not collective insolvency proceedings entailing the partial or total divestment of a debtor and the appointment of a liquidator. It may also be under-inclusive in that certain procedures in some countries may satisfy the Art 1(1) definition but are not listed in the Annex. There is also a time lag in that a State may introduce a new insolvency procedure but some time elapses before it appears in the Annex.<sup>27</sup>

Under the proposed new regime the Regulation would apply to apply to ‘collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation, (a) the debtor is totally or partially divested of his assets and a liquidator is appointed, or (b) the assets and affairs of the debtor are subject to control or supervision by a court.’<sup>28</sup>

This proposal would certainly allow a wider range of procedures to be listed in Annex A but there is no intention to alter the decisive effect attributed to inclusion in the list nor the procedure whereby a Member State notifies the Commission of what procedures it wants included in the list. There is however a proposal whereby the Commission would examine whether a particular procedure notified to it satisfies the definition, and should be included in the Annex.<sup>29</sup> The Commission would make the decision on inclusion rather than the Member States, acting through

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<sup>27</sup>There is a procedure under Article 45 whereby the Council, acting by qualified majority, may amend the Annex.

<sup>28</sup> New Article 1(1).

<sup>29</sup> New Article 45. The Lehne 2 report, see fn 1, at p 48 suggests however that it is not for Member States to decide which proceedings fall under Annex A and if the Article 1 conditions are met, then “Member States need to notify”.

the Council, as under the present regime. This amounts to a transfer of power to the Commission at the expense of Member states and it is questionable whether it will lead to more efficient or accurate outcomes unless there is a corresponding increase in the resources available to the Commission.

As far as the UK is concerned, the main point of contention in respect of the expanded definition of ‘insolvency proceedings’ in the proposed new Regulation is in relation to schemes of arrangement. Schemes of arrangement under the UK Companies Act have proved a popular restructuring tool for large corporate debt and for large companies<sup>30</sup>, including foreign-registered companies.<sup>31</sup> They serve in effect as a form of ‘debtor-in-possession’ restructuring. The scheme procedure enables a company to enter into a compromise or arrangement with any class of creditors, or members. In this way, the capital structure of a company in financial difficulties may be rearranged. The arrangement may have various elements, either alone or in combination, such as extending the maturity of loans; partial debt write off or converting debt into other instruments including equity in the company. The statute requires that a majority in number representing 75% in value of the class of creditors or members affected must accept the scheme. The court must also sanction a scheme as being fair to the creditors as a whole.<sup>32</sup> Once the statutory conditions are fulfilled, the scheme becomes binding even in respect of those creditors who did not give their consent.<sup>33</sup> The statutory provisions enable unanimous lender consent provisions in loan

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<sup>30</sup> See generally on schemes G O’Dea, J Long and A Smyth *Schemes of Arrangement Law and Practice* (Oxford, OUP, 2012).

<sup>31</sup> See *Re Seat Pagine Gialle SpA* [2012] EWHC 3686; *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746, [2013] BCC 201; *Re Rodenstock GmbH* [2011] EWHC 1104, [2012] BCC 459 and see generally Look Chan Ho, “Making and enforcing international schemes of arrangement” (2011) 26 *Journal of International Banking Law and Regulation* 434.

<sup>32</sup> On “fairness” see *Re Telewest Communications* [2004] EWHC 924, [2004] BCC 342.

<sup>33</sup> For details see Part 26 of the UK Companies Act 2006. As well as being used for the restructuring of company debt, schemes are also used in takeover situations as a means for the compulsory acquisition of shares.

agreements and, more generally, objections to a restructuring by minority lenders to be overcome.

The fact however that schemes of arrangement are not listed under the Insolvency Regulation means that they are not entitled to the benefits of automatic EU wide recognition under Articles 16, 17 and 25 of the Regulation. On the other hand, the UK courts have a wider jurisdictional base in that they may sanction schemes where the relevant foreign company has a ‘sufficient connection’ with the UK, even though its COMI may not be in the UK. Under Part 26 of the Companies Act 2006 dealing with schemes, the court has jurisdiction to sanction a scheme if the company is liable to be wound up under the Insolvency Act. By virtue of s 221 of the Insolvency Act, a winding up order may be made in respect of a foreign registered company but established case law suggests that the jurisdiction to exercise winding up should only be exercised if the company is deemed to have a sufficient connection with the UK. In cases like *Re Drax Holdings Ltd*<sup>34</sup> the courts have applied the ‘sufficient connection’ test in respect of schemes. For instance, in *Re Rodenstock GmbH*<sup>35</sup> a sufficient connection with the UK was found to exist by virtue of the fact that the credit facilities extended to the company contained English choice of law clause and jurisdiction clauses and also by expert evidence to the effect that the German courts would recognise the English court order.

The reason that schemes of arrangement are not listed under the Insolvency Regulation is that they are not necessarily a collective procedure nor an insolvency procedure. Schemes, for instance, may be used as a takeover mechanism in respect of solvent companies and even in the restricting context they may only involve a few debtors rather than debtors or bondholders as a

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<sup>34</sup> [2003] EWHC 2743, [2004] 1 WLR 1049.

<sup>35</sup> [2011] EWHC 1104, [2012] BCC 459. See also *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746, [2013] BCC 201 and *Re Seat Pagine Gialle SpA* [2012] EWHC 3686.

whole. The expanded definition of ‘insolvency proceedings’ provides an opportunity to revisit the issue of whether or not schemes should be listed under the Regulation. In accordance with the revised definition, one might argue that schemes of arrangement are based on a law relating to the adjustment of debts in which, for the purpose of adjustment of debt, the assets and affairs of the debtor are subject to control or supervision by a court. They are also judicial proceedings. While they are not invariably ‘collective’ proceedings, it is not clear what is meant by collective proceedings for the purpose of the Regulation and it should be possible to limit the application of the Regulation to certain types of schemes.

It is unlikely however, that listing of schemes under the Regulation would be welcomed by UK restructuring professionals. On the one hand, there would be automatic EU wide recognition of schemes instead of the present piecemeal recognition but it would limit the jurisdiction of the English courts to sanction schemes to cases where a company had its centre of main interests in the UK. No longer could the courts apply a more flexible ‘sufficient connection’ test. This would surely detract from the attractiveness of the UK as the restructuring venue of choice for large companies. It might limit the financial and other opportunities of UK-based professionals. More seriously it might make large corporate restructuring more difficult to accomplish since not all jurisdictions may have the same advantageous laws as the UK that enable ‘hold-outs’ among minority creditors to be overcome.

### **C. Jurisdiction to open insolvency proceedings**

The Regulation gives jurisdiction to open main insolvency proceedings to the State where the debtor has its centre of main interests (COMI). In the case of companies, there is a presumption that COMI is the same as the place of the registered office but this is only a presumption and it may be rebutted. The only other guidance on COMI in the Regulation comes in recital 13 of the

preamble which states that the COMI “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”. There has been considerable criticism of the COMI concept and its place at the heart of the Regulation.<sup>36</sup> Certainly it is fact sensitive and capable of varying judicial interpretations particularly when, for example, the corporate headquarters, principal assets, place of main operations and place of incorporation are all in different countries.<sup>37</sup>

It would be possible to reduce uncertainty by replacing the COMI test for main insolvency proceedings with an incorporation, or seat of registration test, or, less radically, by making the COMI equals place of registered office presumption rebuttable only in wholly exceptional circumstances.<sup>38</sup> There are at least two drawbacks with this approach. Firstly, the COMI test is mirrored in other international instruments such as the UNCITRAL Model Law on Cross-Border Insolvency and a unilateral departure from the COMI yardstick by the EU would cause disharmony and friction in the process of international insolvency co-operation.<sup>39</sup> Secondly, while within the frontiers of the EU it may be somewhat pejorative to use the expression ‘letter box incorporation jurisdictions’, a company may have little or no economic connection with its place of incorporation or registration. The vast bulk of its activities may be carried out elsewhere. In these circumstances, it seems perverse to give the place of incorporation the

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<sup>36</sup> See generally M Szydlo, “Prevention of Forum Shopping in European Insolvency Law” (2010) 11 *European Business Organization Law Review* 253; W-G Ringe, “Forum Shopping under the EU Insolvency Regulation” (2008) 9 *European Business Organization Law Review* 579; G McCormack, “Jurisdictional competition and forum shopping in insolvency proceedings” (2009) 68 *Cambridge Law Journal* 213.

<sup>37</sup> L LoPucki in “The Case for Cooperative Territoriality in International Bankruptcy” (2000) 98 *Michigan Law Review* 2216, 2217 has gone so far as to say that the COMI concept is intentionally vague and practically meaningless.

<sup>38</sup> See generally J Armour, “Who Should Make Corporate Law? EC Legislation versus Regulatory Competition” (2005) 58 *Current Legal Problems* 369; H Eidenmüller, “Free Choice in International Company Insolvency Law in Europe” (2005) 6 *European Business Organization Law Review* 423.

<sup>39</sup> Article 16 and see *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] Ch 33.

jurisdiction to open main insolvency proceedings particularly when the courts of that State may be ill-equipped in terms of convenience and resources to carry out the task.

The Commission's proposals stick with the COMI concept but try to put some more flesh on the bones by introducing a statutory codification of the case law from the European Court particularly in the *Interedil* decision.<sup>40</sup> The proposals suggest a weakening, rather than a strengthening, of the COMI presumption. The new language states that the COMI/ registered office presumption may be rebutted where "a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests" is located in another State.<sup>41</sup>

Under the Regulation, for a party that is advantaged by the opening of insolvency proceedings in a particular country rather than others, there is an incentive to file proceedings first and then to ask questions later, if at all. The Regulation creates a figurative race to the court house door though the notion of a 'court' under the Insolvency Regulation is something of a misnomer since it extends to administrative bodies and even insolvency practitioners (IPs) competent to open insolvency proceedings under the provisions of a particular national law.<sup>42</sup> In marginal cases where the COMI of a company is debatable, the competent authorities of a Member State first seised of an insolvency matter may well be inclined to assert jurisdiction.<sup>43</sup> Under the Commission proposals, a new Article 3b will impose a duty on courts and other bodies competent to open insolvency proceedings to examine ex officio whether or not they have jurisdiction in the

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<sup>40</sup> Case C-396/09; [2011] BPIR 1639.

<sup>41</sup> New recital 13a.

<sup>42</sup> See the definition in Article 2(d) and see also *Re Salvage Association* [2003] EWHC 1028, [2004] 1 WLR 174, [20]-[21].

<sup>43</sup> *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594, [2007] BCC 127.

particular case. It is questionable however whether this requirement adds anything new and whether it amounts to anything more than an additional bureaucratic requirement – in other words, a “box-ticking” exercise.

The new article also gives any “creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings” the right to challenge the decision opening main proceedings. The court opening the main proceedings is required to inform known creditors “of the decision in due time in order to enable them to challenge it.” This provision opens up the possibility that foreign creditors might have greater rights than local creditors to appeal against decisions opening insolvency proceedings. This state of affairs appears to be anomalous.

#### 1. Insolvency-related actions

The Commission proposals also suggest measures of clarification in respect of insolvency-related actions acknowledging that the “delimitation between the Brussels I Regulation and the [Insolvency] Regulation is one of the most controversial issues relating to cross-border insolvencies.”<sup>44</sup> It proposes a codification of the decision in Seagon v Deko<sup>45</sup> so that in the revised Regulation there would be a clear statement that courts opening insolvency proceedings also have jurisdiction in respect of actions that derive directly from the insolvency proceedings

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<sup>44</sup> See *Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings* COM(2012) 743 final at p 10.

<sup>45</sup> Case C-339/07 [2009] ECR I-767. See on the decision L Carballo Pineiro, “Vis attractiva concursus in the European Union: its development by the European Court of Justice” *InDret* 3/2010 at pp 1-23 and more generally A Dutta “Jurisdiction for insolvency-related proceedings caught between European legislation” [2008] *Lloyds Maritime and Commercial Law Quarterly* 88.

and are closely linked with them.<sup>46</sup> This clarification is welcome but there is no guidance on what is a ‘directly and closely linked action’. Such guidance need not be exhaustive nor prejudice the generality of the term but it might follow the example of Article 4(2) which sets out conflict of law rules for determining the matters that are subject to the law of the State that opens the insolvency proceedings.

The Commission has also proposed that a liquidator should be allowed to bring insolvency related actions in the defendant’s country of domicile as well as in the insolvency forum.<sup>47</sup> This would allow a liquidator to couple an insolvency-related action with, for example, an action based on the duties of directors under company law.<sup>48</sup> There is much merit in this proposal for, at the moment, a liquidator is faced with the prospect and the costs of potentially having to bring proceedings against the same defendant in two different countries. Proceedings under insolvency law to set aside pre-insolvency transactions, on the basis that they are detrimental to the general body of creditors, are insolvency-related.<sup>49</sup> Therefore they should be brought in the State where the insolvency proceedings are opened whereas actions to recover company assets in a

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<sup>46</sup> On whether the Insolvency Regulation applies where the defendant in an insolvency-related action is resident outside the EU see the preliminary reference to the European court in *Schmidt v Hertel*- Case C-328/12 The Advocate General suggests that it does but the Virgos-Schmit report, see fn 6, at paras 11 and 44 suggests otherwise.

<sup>47</sup> See *Proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings* COM(2012) 744 final at p 7.

<sup>48</sup> The proposal adds that insolvency related actions may only be brought in a court of the defendant’s domicile if that court has jurisdiction under the Brussels 1 Regulation. But it could be argued that that court has no jurisdiction by virtue of the bankruptcy and analogous proceedings exception under the Brussels 1 Regulation, in which case the proposal means little in practice. The Hess/Oberhammer/Pfeiffer external evaluation of the Regulation is much clearer on this point. It states that the liquidator should be entitled to file the insolvency-related action optionally before the courts of the EU state in which the defendant is domiciled, if and to the extent that, the latter courts have jurisdiction over the connected claim under the Brussels 1 Regulation. - JUST/2011/JCIV/PR/0049/A4 - at pp 22 and 219-220.

<sup>49</sup> *Seagon v Deko* Case C-339/07 [2009] ECR I-767.



defendant's possession should be brought in the State where the defendant is domiciled.<sup>50</sup> This seems costly and inconvenient. It would minimize transaction costs if the actions could be combined and heard together in the same State.

#### **D. Improving the coordination of main and secondary proceedings**

The Insolvency Regulation departs from Universalist ideals by permitting the opening of secondary insolvency proceedings applying to assets in a State where the debtor has an "establishment". Local law applies to these secondary proceedings including local priority rules in respect of the distribution of assets.<sup>51</sup> Under a truly universal regime the primary job of a liquidator in secondary proceedings would be merely to collect assets and hand them over to the liquidator in the main proceeding who would then distribute them in accordance with the law governing the main proceedings. The opening of secondary proceedings protects the position of local preferential creditors whose claims would be regarded as non-preferential under the law of the main proceedings.

The Regulation contains a number of provisions to regulate the relationship between main and secondary proceedings. Firstly, any 'surplus' that remains after payment of all claims that have been lodged in the secondary proceedings must be passed to the Insolvency Practitioner (IP) in the main proceedings but, in practice, there may be nothing left after claims of local preferential creditors have been met. Secondly, there is a duty imposed on the IPs in the main and secondary proceedings to communicate promptly with one another.<sup>52</sup> Thirdly, secondary proceedings can be stayed for up to 3 months at the request of the IP in the main proceedings, although the court in the secondary proceedings granting the stay may require the IP in the main insolvency

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<sup>50</sup> *Byers v Yacht Bull Corp* [2010] EWHC 133, [2010] BCC 368.

<sup>51</sup> Articles 2(i) and 28.

<sup>52</sup> Article 31.

proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors.<sup>53</sup> A request by the liquidator for a stay may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. The stay may be extended for further three-month periods at a time but the stay may be lifted by the court where it no longer appears justified having regard to the interests of creditors. Fourthly, a composition in the secondary proceedings may not become final without the consent of the liquidator in the main proceeding. Such consent cannot be withheld however, if the financial interests of the creditors in the main proceeding are not affected by the composition.

The opening of secondary proceedings complicates the IP's task in the main proceedings. Apart from having to deal with another independent office holder, creditors in other countries are now in a stronger bargaining position. For example, an IP who is trying to formulate and implement plans for the sale of the business as a whole could find the plans frustrated by creditors in a particular State who take the view that a secondary liquidation in that State would better serve their interests. The English courts have tried to minimize the potential disruption caused by the opening of secondary insolvency proceedings through two mechanisms. The first is the notion of 'synthetic' secondary proceedings. In *Re Collins and Aikman*<sup>54</sup> it was held that the UK Insolvency Act was sufficiently flexible so that UK IPs should observe promises made to creditors in other EU States that local priorities would be respected in return for not opening secondary proceedings in the other States. In effect, the creditors got the benefits of having secondary proceedings without the trouble of going to open them. The secondary proceedings

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<sup>53</sup> Article 33.

<sup>54</sup> *Re Collins and Aikman Europe SA* [2006] EWHC 1343, [2006] BCC 861.

were ‘synthetic’ rather than actual. Secondly, in *Re Nortel Networks SA*<sup>55</sup> a procedure was put in place to try to ensure that the IP in the main proceeding had a ‘voice’ on any decision to open secondary proceedings. The administrators of various companies in the Nortel group were granted an order requesting other EU courts to give notice of applications to open secondary insolvency proceedings in respect of Nortel companies and to allow them to make submissions on such applications. The administrators were of the view that the best option to maximise value for Nortel’s creditors was through a coordinated restructuring of the entire group. Accordingly, they wished to avoid secondary insolvency proceedings on the basis this was likely to impede a global restructuring and reduce the value ultimately realised for the benefit of the creditors.

While IPs and courts, particularly in the UK, have devised imaginative solutions to particular issues thrown up the Regulation,<sup>56</sup> one insuperable roadblock is presented by the fact that while main insolvency proceedings may be either liquidation or restructuring proceedings, secondary proceedings opened after commencement of main insolvency proceedings can only be liquidation proceedings.<sup>57</sup> One of the drafters of the Regulation has explained that limiting secondary proceedings to liquidations was part of the overall compromise which led to the instrument gaining general acceptance. “By opening a local liquidation proceeding, Member States can pull an emergency brake if they feel that unlimited recognition of foreign rehabilitation proceedings is unfair to their (or to their local creditors’) interests.”<sup>58</sup> Nevertheless, the limitation may make an overall business sale or restructuring more difficult to accomplish.<sup>59</sup>

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<sup>55</sup> [2009] EWHC 206, [2009] BCC 343.

<sup>56</sup> See Commission Report COM (2012) 743 final at p 14.

<sup>57</sup> Article 3(3).

<sup>58</sup> See M Balz, “The European Union Convention on Insolvency Proceedings” (1996) *American Bankruptcy Law Journal* 485, 520.

<sup>59</sup> For criticism see I Fletcher *Insolvency in Private International Law* (Oxford, OUP, 2nd ed 2005), 371.

The Commission's proposals retain a role for secondary proceedings – there does not appear to have been serious consideration given to the idea of doing away with secondary proceedings and entrusting all power to the liquidator in the main proceedings. The proposals however, contain measures to improve the coordination of main and secondary proceedings and generalize and 'Europeanise' some of the practices developed by the English Courts in cases like *Re Collins and Aikman* and *Re Nortel Networks*. Firstly, the court seised of a request to open secondary proceedings may turn down the request if the IP in the main proceedings gives an undertaking that the distribution and priority rights enjoyed by local creditors if secondary proceedings had been opened will be respected in the main proceedings.<sup>60</sup> According to the Commission, such a practice is currently not possible under the law of many Member States and the proposal introduces a new rule of substantive law.<sup>61</sup> Secondly, the court seised with a request to open secondary proceedings is required to hear the liquidator of the main proceedings before making its decision.<sup>62</sup> Thirdly, the proposal abolishes the requirement that secondary proceedings have to be liquidation proceedings. Fourthly, the proposal extends the obligation to cooperate to the courts involved in the main and secondary proceedings.<sup>63</sup> "Consequently, courts will be obliged to cooperate and communicate with each other; moreover, liquidators will have to cooperate and communicate with the court in the other Member State involved in the proceedings."<sup>64</sup> Under the current Regulation, there is no express duty of co-operation between courts opening main and secondary insolvency proceedings but there have been suggestions that such a duty should be implied.<sup>65</sup>

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<sup>60</sup> New Articles 18(1) and 29a(2).

<sup>61</sup> See explanatory memorandum attached to the Commission proposal at para 3.1.3.

<sup>62</sup> New Article 29(1).

<sup>63</sup> New Article 31a.

<sup>64</sup> Explanatory memorandum at para 3.1.3.

<sup>65</sup> See Moss, Fletcher and Isaacs, *The EC Regulation on Insolvency Proceedings* (Oxford, OUP,

In the regime under the revised Regulation there will still be a role for secondary proceedings.<sup>66</sup> Therefore, it clearly makes sense to try to improve the coordination of main and secondary proceedings while acknowledging and paying respect to the dominant role of the main proceedings. The main and secondary proceedings should be coordinated rather than work in opposition and conflict. To this end, it is useful and beneficial to provide courts in other Member States with direct authorisation to implement the kind of beneficial practices that found favour with the English courts in *Collins & Aikman* and *Nortel*. It is also useful to spell out an express duty of cooperation between the courts opening main and secondary proceedings rather than leaving it to the realm of implication and inference. The courts in different countries may not necessarily draw the same inference. Moreover, given the importance now attached to business and corporate restructuring, confining secondary proceedings to liquidation proceedings seems regressive and the Commission proposals suggest a welcome change.<sup>67</sup>

### **E. Groups of Companies**

The Insolvency Regulation does not have any provisions on groups of companies, whether of a substantive or procedural kind.<sup>68</sup> In determining whether insolvency proceedings may be opened,

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2nd ed, 2009) at para 8.362.

<sup>66</sup> In one respect the revised Regulation would extend the possibilities for opening secondary proceedings through providing in a new Article 3(3) that the relevant time for assessing whether the debtor possesses an establishment within another Member State is the date of the opening of the main proceedings – see also the new recital 19b. This provision would reverse the decision of the Court of Appeal in *Trustees of the Olympic Airlines Pension Scheme v Olympic Airlines SA* [2013] EWCA Civ 643 which holds that the relevant date for determining the existence of an ‘establishment’ is the date of the application to open the secondary proceedings.

<sup>67</sup> According to the explanatory memorandum at para 3.1.3 this “ensures that the opening of secondary proceedings does not automatically thwart the rescue or restructuring of a debtor as a whole.”

<sup>68</sup> See generally I Mevorach, “The ‘Home Country’ of a Multinational Enterprise Group Facing

the focus of the inquiry is on a particular individual company and the COMI of that company, and not on its status as a member of a group of companies. The Regulation ignores the wider group perspective though some of the case law from Member States has adopted an “integrated economic unit” approach. This approach looks at the affairs of the group of companies as a whole and may lead to the conclusion that related companies have their COMI in the same State even though the companies may have been incorporated in different States. According to a French Court<sup>69</sup> the “analysis of the case law of the various Member States shows that courts adopt a pragmatic approach tending to allow streamlining of strongly integrated groups of companies.” The European court judgment in the *Eurofood* case<sup>70</sup> however firmly focuses the inquiry on the individual company holding that “where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.” In other words, the presumption that the COMI is the place of the registered office prevails.

More recently, in the *Mediasucre* case<sup>71</sup> the European court rejected the proposition that a single COMI could automatically be inferred from the fact that the property of two companies has been intermixed. The court said that such intermixing could be organised from two management and supervision centres in two different Member States.

In dealing with the insolvency of related companies four different approaches are possible. The most interventionist strategy is that of substantive consolidation and to pool the assets of related

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Insolvency” (2008) 57 *International and Comparative Law Quarterly* 427; “Centralising Insolvencies of Pan-European Corporate Groups: a Creditor’s Dream or Nightmare?” [2006] *Journal of Business Law* 468.

<sup>69</sup> *Re MPOTEC GmbH* [2006] BCC 681 at 687.

<sup>70</sup> Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-03813.

<sup>71</sup> Case C-191/10; [2012] All ER (EC) 239.

companies. As a general proposition this approach is unlikely to pass muster because it disregards the principle that a company is a legal entity separate and distinct from its controllers or constituent shareholders. This principle is at the heart of most European legal systems and was recently reaffirmed by the UK Supreme Court.<sup>72</sup> Some countries however, including Ireland, as an exception to the ‘separate corporate entity’ principle permit the pooling of assets of related companies in certain limited circumstances.<sup>73</sup> Even in the UK this principle is not unknown, for in a case arising out of the collapse of Bank of Credit and Commerce International in the early 1990s – *Re BCCI (No 2)*<sup>74</sup> – it was held that pursuant to s 167 of the Insolvency Act 1986 the court could approve a ‘pooling’ agreement where the assets of insolvent companies were so confused that it was impossible to define the assets of each company.

A second, milder, approach is that of procedural consolidation, whether done on a de facto or de jure basis. In the UK, this result can be achieved by the appointment of the same IP to two or more members of the same corporate group. In cases like in *Re Daisytek-ISA Ltd*<sup>75</sup> this approach was effectively adopted in respect of cases under the Insolvency Regulation with the court holding all the members of a group of companies had their COMI in the UK despite incorporation in different countries. A variant of the procedural consolidation approach is employed in the US and this allows a bankruptcy filing in a district other than where a company has its centre of main interests. Under the US code<sup>76</sup> a bankruptcy case may be filed where a company had its domicile, residence, or principal place of business in the US or where an affiliate company had already filed a bankruptcy case. This provision was used in the General Motors

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<sup>72</sup> *Prest v Petrodel Resources Ltd*, [2013] UKSC 34, [2012] 3 WLR 1; *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 WLR 398.

<sup>73</sup> See s 141 of the Irish Companies Act 1990. On the US position see D Baird, “Substantive Consolidation Today” (2005) 47 *Boston College Law Review* 5.

<sup>74</sup> [1992] BCC 715.

<sup>75</sup> [2003] BCC 562.

<sup>76</sup> 28 U.S.C. § 1408

case to facilitate a bankruptcy filing by General Motors in New York even though the company had its headquarters and main operations in the US State of Michigan. General Motors could ‘piggyback’ on an earlier bankruptcy filing by a small associated company in New York.<sup>77</sup> Effectively the US venue rules allow for the insolvencies of a large group of associated companies to be administered from the same location.<sup>78</sup>

A third, even milder, approach is that of procedural cooperation with the insolvencies of different members of a corporate group administered in different States but with the separate IPs being subject to a duty to cooperate and given a role in the different proceedings. The final approach, and least interventionist strategy, would be simply to disregard the fact that the companies are related and to proceed with separate insolvency proceedings in respect of each company. This approach is likely to be value destructive because the economic affairs of group members may be so entangled that meaningful returns can only be achieved through a coordinated group restructuring and/or sale of assets.

In its proposals the European Commission acknowledges the virtues of the second, procedural consolidation, approach. It states that its proposals are not intended to preclude the “existing practice in relation to highly integrated groups of companies to determine that the centre of main

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<sup>77</sup> See Financial Times, 2 June 2009, 27. See generally on the big ‘car’ cases in the US D Baird, “Lessons from the Automobile Reorganizations” (2012) 4 *Journal of Legal Analysis* 271; S Lubben, “No Big Deal: The GM and Chrysler Cases in Context” (2009) 82 *American Bankruptcy Law Journal* 531; M Roe and D Skeel, “Assessing the Chrysler Bankruptcy” (2010) 108 *Michigan Law Review* 727.

<sup>78</sup> For vociferous criticism of bankruptcy forum shopping in the US see L M LoPucki *Courting Failure: How Competition For Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor, University of Michigan Press, 2005) but for rebuttals of the LoPucki thesis see (2006) 54 *Buffalo Law Review* and also K Ayotte and D Skeel (2006) 73 *University of Chicago Law Review* 425. See now S Parikh, “Modern Forum Shopping in Bankruptcy” [2013] *Connecticut Law Review* 28.



interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction.”<sup>79</sup>

The main thrust of the Commission proposals is to extend the principles of cooperation applicable in the context of main and secondary proceedings to insolvency proceedings involving different members of the same group of companies. Both IPs and courts are obliged to cooperate but this cooperation may take different forms depending on the circumstances of the case. IPs should exchange relevant information and cooperate in the elaboration of a rescue or restructuring plan where this is appropriate. Cooperation by way of protocols is explicitly mentioned and the Commission suggests that this reference both acknowledges the practical importance of these instruments and further promotes their use.<sup>80</sup> Courts can cooperate, in particular, by the exchange of information and by coordinating the administration and supervision of the assets and affairs of the group companies as well as coordinating the conduct of hearings and the approval of protocols.

The proposal also gives an IP standing in relation to insolvency proceedings affecting another member of the same group. In particular, the liquidator has a right to be heard in these other proceedings; to request a stay of the other proceedings and to propose a rescue or restructuring plan in accordance with the law applicable to those proceedings. The IP also has the right to attend and participate in a meeting of creditors.<sup>81</sup> The Commission suggests that these procedural tools will enable the IP with the biggest interest in a successful group restructuring to submit a coordinated restructuring plan even if this plan does not meet with the approval of the IPs of

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<sup>79</sup> See explanatory memorandum attached to the Commission proposals COM (2012) 744 final, para 3.1.5.

<sup>80</sup> See new Article 42a and para 3.1.5 of the explanatory memorandum.

<sup>81</sup> New Article 42d.

other group members.<sup>82</sup> The proposals however, also open up the possibility of procedural chaos with different restructuring plans being put forward by different IPs. Practical arrangements will have to be worked out to ensure that this potentially valuable procedural tool does not become an arena for personal wrangling and conflict and an instrument for increased transaction costs.

Another point concerns the definition of members of a corporate group. It is defined as a number of companies consisting of parent and subsidiary companies. A parent company is defined in terms of control of a majority of voting rights in another company or membership of the other company plus the power to appoint or remove a majority of members of the administrative, management or supervisory board or the ability to exercise a dominant influence.<sup>83</sup> It has been argued that this definition is too limited because it fails to capture and reflect the myriad forms in which corporate groups are now structured.<sup>84</sup>

The cooperation approach set out in the Commission proposals have been taken a stage further in the Lehne 2 report prepared by the Committee of Legal Affairs of the European Parliament.<sup>85</sup> This report suggests the possibility of opening group coordination proceedings that would sit alongside the separate insolvency proceedings opened in respect of members of the group of companies. The coordination proceedings would allow for the appointment of a coordinator. Not only would the coordinator act as a sort of ‘super-mediator’ between the different IPs but he also has the task of “presenting a group coordination plan that identifies, describes and recommends a comprehensive set of measures”<sup>86</sup> that are appropriate to an integrated resolution of the group insolvency.

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<sup>82</sup> Explanatory memorandum, para 3.1.5.

<sup>83</sup> New Article 2(j).

<sup>84</sup> See H Eidenmuller, fn 3, 149.

<sup>85</sup> See Lehne 2 report, fn 1, at pp 39-43 and 47-48.

<sup>86</sup> *Ibid* at p 39.

While it can hardly be doubted that the amicable settlement of disputes between IPs is beneficial, the particular scheme envisaged by Lehne may not offer much of an improvement on the Commission proposals and it may in fact contribute to further costs and delay for at least three reasons. For a start, there is a question about where group coordination proceedings may be commenced. The proposal suggests that it should be in the State “where the most crucial functions within the group are performed”. But this may be no easy issue to resolve. Secondly, the group coordination plan has to be approved by the court and individual IPs have the opportunity of commenting upon the plan before it is approved. Thirdly, the group coordination plan is not binding on individual IPs though they have a duty to consider the recommendations in the plan and to explain deviations from the plan at creditors’ meetings.

#### **F. Applicable law - Missed opportunities**

Under the Regulation the law that applies to insolvency proceedings is, in general, the law of the State that opens the insolvency proceeding but Articles 5-15 contain several exceptions to this general principle. By and large, Articles 5 -15 have not been tested to the same extent in case law as the COMI principle and the jurisdiction to open insolvency proceedings. Nevertheless, the meaning of some of the Articles 5-15 provisions as well as the rules on “location” of assets in Art 2(g) seem shrouded in uncertainty and to detract from the security of transactions which these provisions are supposed to guarantee. Article 5, for example, states that the opening of insolvency proceedings shall not affect rights in rem of creditors over assets located in a State other than the State of the opening of proceedings.<sup>87</sup> The general view reflected in the Virgos

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<sup>87</sup> See generally on this P Smart, “Rights In Rem, Article 5 and the EC” (2006) 15 *International Insolvency Review* 18; M Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 *American Bankruptcy Law Journal* 485, 509-510.

Schmit Report<sup>88</sup> is that Article 5 embodies a ‘hard and fast’ rule<sup>89</sup> that the holder of the right in rem can exercise its rights without any exception or limitation stemming from collateral carve-outs for the benefit of unsecured creditors under the law of the COMI state. This interpretation implies that Article 5 constitutes an exception to Article 4(2)(i) which provides that the COMI State shall determine the rules “governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off”.<sup>90</sup> Arguably, Article 5 overprotects a secured creditor with foreign-located collateral because it gives a stronger level of protection against the debtor’s insolvency than that demanded by the national law of the situs.<sup>91</sup> There is an EU bonus – a bonus for secured creditors in European cross-border insolvencies that is not available in domestic insolvencies.<sup>92</sup> Unless secondary insolvency proceedings are opened in a particular State, a secured creditor is allowed to enforce against collateral in that State even though the country’s domestic law would not allow enforcement.

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<sup>88</sup> See paras 97-104.

<sup>89</sup> For use of this expression see AJ Berends, “The EU Insolvency Regulation: Some Capita Selecta” [2010] *Netherlands International Law Review* 423, 429 and for discussion of rival approaches see 430-434.

<sup>90</sup> The Financial Markets Law Committee Issue paper no 30 (September 2012) *European Insolvency Regulation*, at p 11 suggests however that there is some uncertainty on the point. See also Article 4(2)(1) on the role of the COMI State in determining who is to bear the costs and expenses incurred in the insolvency proceedings.

<sup>91</sup> See para 5.7 of the proposals prepared by Insol Europe, *Revision of the European Insolvency Regulation* (2012) - drafting committee chaired by Robert van Galen. More generally on the need for reform of Article 5 see the papers by Jennifer Marshall and Michael Veder on the [www.eir-reform.eu](http://www.eir-reform.eu) website.

<sup>92</sup> See M Virgos and F Garcimartin, *The European Insolvency Regulation: Law and Practice* (The Hague, Kluwer, 2004) 103-104: “Article 5 functions more as a rule of substantive law than as a simple conflict rule and when, compared with the national laws concerned, it may afford a stronger level of protection against the insolvency of the debtor than that which these national laws demand”.

Article 5 however, does not define what is meant by a “right of rem”. This is a source of some uncertainty but in general terms it covers security rights i.e. rights over property to ensure the payment of money or the performance of some other obligation.

It is also not clear what is meant by “shall not affect” in Article 5 and whether in particular it prohibits temporary restrictions on the enforcement of security; the writing down of secured debt; and the realization of security by an IP against the wishes of a secured creditor.

The Commission proposals leave Article 5 unchanged but make certain technical adjustments to the old Article 2(g) including new rules on the location of banks accounts.<sup>93</sup> These changes introduce a welcome measure of clarification but certain difficulties remain; not least whether the location rules establish a hierarchy and how to treat tangible property that may be recorded in an ownership register. The position of intellectual property rights is also unclear.<sup>94</sup>

The Commission also proposes a new provision – article 6a on netting agreements stating that such agreements shall be governed solely by the law of the contract governing such agreements. This proposal may suggest that netting agreements are currently outside Article 6 of the Regulation which is worded so as to preserve certain set-off rights. Article 4(2)(d) states that the law of the insolvency forum shall govern the conditions under which set-offs may be invoked, but, under Art 6, set-off rights can still be claimed if they are permitted by the law applicable to the insolvent debtor’s claim. The *BCCI*<sup>95</sup> litigation shows that set-off rights differ significantly

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<sup>93</sup> Under the Commission proposals, the ‘location’ rules would be contained in a new Article 2(f) and in the case of cash held in accounts with a credit institution, the asset would be deemed to be located in the State indicated in the account's IBAN.

<sup>94</sup> See Commission report - COM(2012) 743 - at p 12.

<sup>95</sup> *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213.

between States and the provision safeguards the position of creditors who have entered into certain transactions on the basis that set-off rights would be available. On the other hand, the expression ‘set-off’ may be used in different States to refer to different legal processes. It is not clear whether the expression should be given an autonomous interpretation for the purpose of the Regulation and whether this interpretation includes contractual netting. In *Eurofood*<sup>96</sup> the European court said that the COMI concept had to be given an autonomous interpretation but in the *Bank Handlowy* case<sup>97</sup> they declined to give such an interpretation to the concept of closure of insolvency proceedings.

The Commission also missed the opportunity of clearing up another ambiguity in the interpretation of Article 6 and, in fact, in the proposed new Article 6a compounds the area of ambiguity. Article 6, in allowing set-off rights that are permitted by the law applicable to the insolvent debtor’s claim does not say whether or not this has to be the law of an EU Member State. One might argue that this limitation is implicit in the Regulation but one could contrast the wording of Article 6, and the proposed new Article 6a, with Article 13. According to Article 4(2)(m), the law of the insolvency forum shall dictate the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors. Article 13 however, provides a defence where the person who benefited from an act detrimental to all the creditors provides proof that (i) the act is subject to the law of a different Member State and (ii) that law does not allow any means of challenging that act in the relevant case. This veto is designed to uphold legitimate expectations based upon the circumstances that exist at the time of acting but the veto is specifically stated to apply only where the relevant law is the law of an EU Member

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<sup>96</sup> Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-03813.

<sup>97</sup> *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11). paras 49-51.

State. In comparing the language of Articles 6 and 13 one could apply the maxim *expressio unius, exclusio alterius* or alternatively dismiss the difference in wording as simply due to imprecision and inconsistency on the part of the drafter.

Article 10a is another proposed new article from the Commission and it amends Articles 8 and 10 of the Regulation. Article 8 provides that the effects of insolvency proceedings on contracts conferring the right to acquire or make use of immovable property are governed solely by the law of the Member State within whose territory the immovable property is situated. Article 10 states that the effect of insolvency on employment contracts and relations shall be governed by the law applicable to the contract of employment. The preamble to the Regulation states that the purpose of this provision is to protect both employees and jobs.<sup>98</sup> The intention is that the law applicable to the employment contract would determine, for example, whether liquidation operates to terminate or to continue employment contracts. Other important employment law related matters are left to the law of the insolvency forum, including the preferential status of employee claims in liquidation.

The intended new Article 10a states that where the law of a Member State “governing the effects of insolvency proceedings on the contracts referred to in Articles 8 and 10 provides that a contract can only be terminated or modified with the approval of the court opening insolvency proceedings but no insolvency proceedings have been opened in that Member State, the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts.” It seems that behind the Commission proposal is the view that “different labour law standards may hinder an insolvency administrator to take the same

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<sup>98</sup> Recital 28.

actions with regard to employees located in several Member States and that this situation may complicate the restructuring of a company.”<sup>99</sup> On the other hand, the effect of the amendment would seem to deprive Article 10 of practically all force. Article 10 has made a policy choice and the new Article 10a makes a different policy choice. Certainly, the two do not sit neatly side by side. Take for example, the situation where the law governing an employment contract provides that the contract may only be terminated where insolvency proceedings have been opened in the State where that law is the municipal law. Article 10 would not allow the contract to be terminated if insolvency proceedings have proceedings in another State under a different law yet Article 10a would seem to permit this to be done. Another example is where the law of the employment contract specifies various conditions that have to be satisfied before the court can authorise the termination of the employment contract. The proposed new Article 10a does not spell out whether the courts in the state that opens the insolvency proceedings have to abide by the same conditions.

The clarification to Article 15 proposed by the Commission is more defensible and more readily comprehensible. Article 15 provides that the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending. The Commission proposes to make it clear that reference to ‘lawsuits pending’ includes arbitration proceedings.<sup>100</sup> This clarification makes explicit what was held to be implicit in Article 15 by the English courts

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<sup>99</sup> See Commission report - COM (2012) 743 - at p 12. The report goes on to say that “this situation is inherent in the policy choice underlying Article 10 which the evaluation study does not call into question. A harmonization of certain aspects of labour law could mitigate this problem but would be difficult to achieve since labour law is deeply rooted in national traditions and, at any rate, go beyond the scope of the revision of the Regulation.”

<sup>100</sup> See Commission report - COM (2012)743 - at p 13.



in *Syska v Vivendi Universal SA*.<sup>101</sup> The court suggested that it would border on the irrational to protect the legitimate expectations of those who had commenced an action against the insolvent but not those who had initiated a reference to arbitration.

### **G. Publicity and improving the position of creditors**

The Insolvency Regulation contains some provisions for publicizing the existence of insolvency proceedings but these are essentially voluntary. Article 21 states that a liquidator may request that notice of the opening of insolvency proceedings and the decision appointing him should be published in other Member States in accordance with the publication procedures in those States. Article 22 states that a liquidator may request that the opening of insolvency proceedings should be registered in the land registers, the trade register and any other public registers kept in other Member states. The publication of the opening of the insolvency proceedings triggers a presumption that a person honouring an obligation for the benefit of a debtor is aware of the opening of insolvency proceedings in respect of the debtor.<sup>102</sup>

There may be a considerable time lag between the opening of insolvency proceedings and the proceedings being publicized in another State. It is not therefore surprising that there have been a number of cases where main insolvency proceedings have been opened in an EU State even though main insolvency proceedings have already been opened in a different State. This was the case in *Re Eurodis PLC*<sup>103</sup> where it was held that the courts of the State where the first proceedings had been opened were not entitled to disregard the second set of proceedings. The

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<sup>101</sup> [2008] EWHC 2155, [2008] 2 Lloyd's Rep 636.

<sup>102</sup> Article 24 provides a good discharge to a person honouring an obligation for the benefit of the debtor if that person is unaware that insolvency proceedings in respect of the debtor have been opened in another Member State.

<sup>103</sup> [2011] EWHC 1025; [2012] BCC 57.

court held that while a winding up order by a Belgian court probably ought not to have been made, since the main insolvency proceedings were in the UK, it had to stand as a valid order of the Belgian court unless set aside in Belgium.

The Commission proposes an ambitious new regime to enhance the publicity of proceedings with Member States being required to publish relevant court decisions in insolvency cases in a ‘free’ and publicly accessible electronic register that is interconnected with the registers of other Member States.<sup>104</sup> The information to be published includes information concerning the court opening the insolvency proceedings, the date of opening and of closing proceedings, the type of proceedings, the debtor, the liquidator appointed, the decision opening proceedings as well as the decision appointing the liquidator, if different, and the deadline for lodging claims.

It is questionable whether the idea of a publicly accessible Community wide electronic register of insolvency proceedings is practically realisable. Moreover, given the considerable costs involved in the establishment and maintenance of such a system it is also questionable whether public funds should be committed to maintaining free access to the system.

#### 1. Improving the position of creditors

One of the reasons why ‘local’ creditors may press for the opening of secondary proceedings is that the main proceedings are being transacted in a faraway country and in a language with which they may not be familiar. Foreign creditors may not be familiar with the procedures in the State where main proceedings have been opened including the proofs that have to be submitted and the time limits for lodging claims. The creditor may be required to provide a translation of the claim into one of the official language of the State where the proceedings have been opened.

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<sup>104</sup> New Articles 20a, 20b, 20c and 20d and revised Articles 21 and 22.

Submitting a claim may require the services of a foreign lawyer or other professional. All these transaction costs may make it uneconomical to submit a claim. The European Commission has estimated that the average cost for a foreign creditor of lodging a claim is €2000 in a cross-border case. “Due to high costs, creditors may choose to forgo a debt, especially when it involves a small amount of money. This problem mainly affects small and medium-sized businesses as well as private individuals.”<sup>105</sup>

Articles 40–42 set out practical steps to try to alleviate the disadvantage that foreign-based creditors may suffer in practice. According to a French Commercial Court in *R Jung GmbH v SIFA SA*,<sup>106</sup> under these provisions, creditors, whose head offices were in an EU State than the State where the proceedings had been opened, were entitled to receive a notice of information with the title ‘Invitation to lodge a claim. Time limits to be observed’. The court said that this title must appear on a form at the top, in all official languages of the EU institutions. If it did not do so, then the creditor was not subject to any time limits in respect of the bringing of a claim.

The provisions in the Regulation however do not establish a comprehensive procedural framework. They only set out minimum rules enabling foreign creditors to lodge their claims and, under Article 42(2), the foreign creditor may be required to provide a translation of the claim into the language of the State that opens the proceedings. According to the Commission, “in some Member States requiring the translation has become the rule rather than the exception, thereby entailing additional costs and delays.”<sup>107</sup>

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<sup>105</sup> See Commission report - COM(2012)743 - at pp 16-17.

<sup>106</sup> [2006] BCC 678.

<sup>107</sup> See Commission report - COM(2012)743 - at p 16.

Recognising these issues, the Commission has fashioned a set of proposals that tries to facilitate the lodging of claims by foreign creditors.<sup>108</sup> Firstly, it provides for the introduction of two standard forms. One is for the notice to be sent to creditors and the other is for the lodging of claims. These standard forms will be made available in all EU official languages thereby reducing translation costs. Secondly, each Member State is required to indicate at least one EU official language other than its own which it accepts for the purpose of the lodging of claims. Thirdly, foreign creditors are given at least 45 days following publication of the notice of opening of proceedings in the insolvency register to lodge their claims and this period applies regardless of any shorter periods under national law. Foreign creditors will also have to be informed if their claim is contested and afforded the opportunity of providing supplementary evidence to verify their claim. Finally, it is provided that representation by a lawyer or another legal professional shall not be mandatory for the lodging of claims.<sup>109</sup>

## **Conclusion**

The general consensus reflected in the Commission proposals seems to be that the Regulation, on the whole, works well; that fundamental reform is not needed and could in fact be destabilising but that some reform would be beneficial to improve the practical operation of the Regulation.<sup>110</sup> Leading commentators, with varying degrees of enthusiasm, have described the proposals as a

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<sup>108</sup> Revised Articles 39-41.

<sup>109</sup> Revised Article 39.

<sup>110</sup> It should be noted that the UK has “opted-in” to the proposal – see written ministerial statement of 15<sup>th</sup> April 2013 “Government consider that it is in the UK’s interest to opt in to the proposal because it will be of general benefit to creditors and businesses in the UK and EU.” The statement is available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130415/wmstext/130415m0001.htm>.

“very decent”<sup>111</sup> and as a “modest attempt ..... to improve the status quo”.<sup>112</sup> The proposal will probably not do any harm except perhaps in relation to groups of companies where the revised Regulation opens up the possibility of multiple different plans for a group restructuring being put forward by IPs in different countries. Given however, the time and expense in trying to formulate a restructuring plan this nightmarish vista is unlikely to be seen much in practice.

In their proposals for a revised Regulation the Commission has stuck very much within the framework of the existing Regulation. The proposals do not set off on a new path or try to disturb the essential balance of interests at the heart of the political compromises that make up the Insolvency Regulation.<sup>113</sup> Recital 11 of the preamble to Insolvency Regulation<sup>114</sup> acknowledged that as a result of widely differing substantive laws it was not practical to introduce insolvency proceedings with universal scope throughout the entire EU and this calculus has not changed very fundamentally. Opinions still differ on the extent to which a company should be allowed to ignore or set aside existing contractual commitments during the insolvency process. The priority afforded secured credit<sup>115</sup> and whether secured creditors are subject to a bankruptcy or

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<sup>111</sup> See G Moss QC [2013] *Insolvency Intelligence* 55.

<sup>112</sup> See H Eidenmuller, fn 3, 150.

<sup>113</sup> See F Mucciarelli, “Not Just Efficiency: Insolvency Law in the EU and its Political Dimension” (2013) 14 *European Business Organization Law Review* 175.

<sup>114</sup> Regulation 1346/2000.

<sup>115</sup> See JM Garrido, “No Two Snowflakes are the Same: The Distributional Question in International Bankruptcies” (2011) 46 *Texas International Law Journal* 459 at 460-461 that “there are no two priority systems that are identical, and that harmonization or unification of the law in this area is extremely unlikely to happen. In fact, priority systems are but the expression of the hierarchy of values that permeate a given legal system. This means that graduation of creditors is primarily political, and that the influence of powerful groups of creditors, the inertia of legal tradition, or the conscious and deliberate choice to promote certain values, are the factors that explain the fundamental differences encountered in various jurisdictions around the world.”

restructuring moratorium and whether they can be subjected to a restructuring plan against their wishes are also areas where national differences remain pronounced.<sup>116</sup>

There are also differences on the extent to which there should be an investigation of the reasons that caused the company's financial difficulties and whether company management can be held personally responsible for these failings. There are different ideas about whether, and in what circumstances, pre-insolvency transactions may be set aside at the beckoning of an insolvency administrator and the importance ascribed to the security of transactions.<sup>117</sup> Another important area of difference concerns the treatment of employees in insolvency, whether in the context of continuation of employment or pensions.<sup>118</sup> National variation in the priority given to unpaid tax and environmental cleanup claims is also common.

Some countries may place a strong emphasis on liquidation whereas others put a greater emphasis on business restructuring. The last is however, is an area where the Commission have recognized, and tried to forge ahead with, a new consensus. In a Communication on a new European approach to business failure and insolvency they say:

“As Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment. It is a high political priority to take measures to create sustainable growth and prosperity.”<sup>119</sup>

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<sup>116</sup> See JL Westbrook, C Booth, C Paulus and H Rajak, *A Global View of Business Insolvency Systems* (Washington DC, The World Bank, 2010).

<sup>117</sup> See generally G McCormack, “Conflicts, avoidance and international insolvency 20 years on – a triple cocktail” [2013] *Journal of Business Law* 141.

<sup>118</sup> See generally S Deakin and A Koukiadaki, “Capability theory, employee voice, and corporate restructuring: evidence from UK case studies” (2012) 33 *Comparative Labor Law and Policy Journal* 427; J Armour and S Deakin, “Insolvency and employment protection: the mixed effects of the Acquired Rights Directive” (2003) 22 *International Review of Law and Economics* 443.

<sup>119</sup> Communication . *A new European approach to business failure and insolvency* COM (2012) 742 at p 2 citing ‘President’ Barroso's letter to EP President in the framework of the State of Union address on 12 September 2012.

The Commission highlights the importance of insolvency rules in supporting economic activity and, as a first step towards achieving its ambitious goals, it puts forward “the modernisation of the EU Regulation on insolvency proceedings”.<sup>120</sup> The rhetoric seems overblown and far divorced from the quite modest changes proposed in the revised Insolvency Regulation. While the modern tendency may be to hype everything and to herald eagerly rafts of new initiatives, this approach sows the seed of disillusionment and disappointed expectations. More prosaically, the Commission missed out on the opportunity for desirable clarifications of the Regulation, for example, in the context of Article 5 and security rights over property. It suggests that the existing provisions “apply sufficiently smoothly within the EU and the respective fields of the *lex fori* and the *lex situ* strike the right balance.”<sup>121</sup> It is difficult to concur with this conclusion when the provisions are unclear. Moreover, the Commission does not propose amendments to the provisions of the Regulation concerning the recognition of, and coordination with, insolvency proceedings opened outside the EU. “[T]he main reason is that such provisions would be binding only in the territory of Member States and not in non-EU countries.”<sup>122</sup> Nevertheless, in the context of set-off rights and netting agreements in Article 6, it would have been desirable to specify whether the Regulation applies if the relevant transaction is governed by a law of a non-EU State.

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<sup>120</sup> Communication, *A new European approach to business failure and insolvency* COM (2012) 742 at p 8. In addition, the Commission suggested the adoption of a European Entrepreneurship Action Plan which would include action to promote efficient bankruptcy procedures and offering second chance. The plan “Entrepreneurship 2020 Action Plan: Reigniting the entrepreneurial spirit in Europe” COM (2012) 795 was released on 9<sup>th</sup> January 2013.

<sup>121</sup> See Commission report - COM (2012)743 - at p 18.

<sup>122</sup> According to the Commission report at p 18 a possible elaboration of a draft international convention would better achieve these objectives, and also ensure the Union's interests in reciprocal negotiations with the third countries.