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# The Implementation of the New Insolvency Regulation

## Recommendations and Guidelines

JUST/2013/JCIV/AG/4679



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PART 1: SCOPE OF APPLICATION  
PRE-INSOLVENCY / HYBRID PROCEEDINGS\*

Milan

**A. The scope of the Regulation**

**Article 1(1) EIR-R**

**1. Legal framework**

**1.1 A new European approach to business failure and insolvency**

In *Eurofood*<sup>1</sup>, the CJEU stated that ‘*the wording of Article 1(1) of the Regulation shows that the insolvency proceedings to which it applies must have four characteristics. They must be collective proceedings, based on the debtor’s insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator*’.

These four requirements delineate the traditional concept of insolvency proceedings, that is, proceedings which are exclusively aimed at the distribution of an insolvent debtor’s assets among creditors, being the debtor perceived as incapable of overcoming its difficulties<sup>2</sup>. Since the EIR (Council Regulation [EC] No 1346/2000 of 29 May 2000 on insolvency proceedings) was based upon a convention signed in 1995<sup>3</sup>, it is no wonder that this concept sounded ‘old’ and outdated since the beginning<sup>4</sup>: at the moment the EIR was being adopted, some national legislations already provided proceedings which were not focused (or not only focused) on the liquidation of distressed businesses. It is not by chance that, even at the start, Annex A to the EIR included

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<sup>1</sup> CJEU, Case C-341/04, *Eurofood IFSC Ltd*, judgment of 2 May 2006, ECLI:EU:C:2006:281, para 46.

<sup>2</sup> *Wessels*, Themes of the future: rescue businesses and cross-border cooperation, *Insolv. Int.* 2014, 4, stated that ‘*this one-sided approach to corporate distress is clearly reflected in the EU Insolvency Regulation, which, for instance, allows the opening of secondary proceedings, which must be winding-up proceedings. The one-sidedness of the aforementioned approach is also indicated by the chosen name for the responsible insolvency office holder in either main or secondary insolvency proceedings: “liquidator”*’.

<sup>3</sup> Convention on Insolvency Proceedings of 23 November 1995, printed in <http://aei.pitt.edu/2840>.

<sup>4</sup> For this reason, since its enactment, there have been calls for reforms to the EIR. Among the earlier works dealing with suggestions as to the amendment, see *Moss and Paulus*, The European Insolvency Regulation – the case for urgent reform, *Insolv. Int.* 2006, 1; and *Omar*, Addressing the reform of the Insolvency Regulation: wishlist or fancies?, *Insolv. Int.*, 7.

proceedings which did not satisfy *all* the conditions set out in Article 1(1)<sup>5</sup>; or that proceedings which do not meet *all* those conditions were later added by amendment to Annex A<sup>6</sup>.

In the report on the application of the EIR<sup>7</sup> of 12 December 2012, the Commission maintained that ‘*due to new trends and approaches in the Member States, the current scope of the Regulation no longer covers a wide range of national proceedings aiming at resolving the indebtedness of companies and individuals*’, and suggested to extend the scope of the Regulation to pre-insolvency and hybrid proceedings, defined respectively as ‘*quasi-collective proceedings under the supervision of a court or an administrative authority which give a debtor in financial difficulties the opportunity to restructure at a pre-insolvency stage and to avoid the commencement of insolvency proceedings in the traditional sense*’, and as ‘*proceedings in which the debtor retains some control over its assets and affairs albeit subject to the control or supervision by a court or an insolvency practitioner*’<sup>8</sup>.

In 2014 the Commission adopted a recommendation<sup>9</sup>, with the objective to ‘*encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance*’. In pursuit of this objective, ‘*the Recommendation provides for minimum standards on: (a) preventive restructuring frameworks; and (b) discharge of debts of bankrupt entrepreneurs*’ (hereafter, ‘*Recommendation*’). It is noteworthy that among the core principles that Member States were urged to adhere to (by 12 months from the publication of the Recommendation) there were the ‘*pre-insolvency recourse*’ and the ‘*debtor-in-possession*’<sup>10</sup>. According to the former principle, the Commission recommended that debtors be able to have access to restructuring proceedings ‘*at an early stage, as soon as it is apparent that there is a likelihood of insolvency*’<sup>11</sup>; according to the latter, consistently with the goal of ensuring business continuity while the restruc-

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<sup>5</sup> As noted by *Moss, Fletcher and Isaacs*, *The EU Regulation on Insolvency Proceedings* (2016), 8.472, Annex A included UK administration proceedings, ‘*which do not require proof of actual insolvency but only that the corporate debtor was likely to become insolvent*’.

<sup>6</sup> See the French *sauvegarde* proceeding, which, pursuant to Article L620-1 of *Code de Commerce*, can be opened by a debtor that, without being unable to pay, is unable to overcome its difficulties and is aimed at easing the reorganization of its business.

<sup>7</sup> *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings* (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)).

<sup>8</sup> The Commission underlined that ‘*15 Member States have pre-insolvency or hybrid proceedings which are currently not listed in Annex A of the Regulation*’, thus implicitly confirming that some pre-insolvency and hybrid proceedings were already listed in Annex A.

<sup>9</sup> *Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency* (COM (2014) 1500). In the *Impact Assessment* accompanying the Recommendation (*Impact assessment accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency*), the Commission explained that the Recommendation was intended as complementary to the European Insolvency Regulation’s proposal: restructuring procedures of the kind proposed in its Recommendation would - if introduced by Member States - have been eligible for inclusion within Annex A of the EIR recast. It is not by chance that the expression used in the Recommendation, No. 1 (*‘the objective of this Recommendation is to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance’*) is almost identical to that used in the Recital 10, first sentence, of the EIR Recast (*‘the scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs’*).

<sup>10</sup> For the identification of the (six) core principles of the Recommendation, see *Eidenmüller and Van Zwieten*, *Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency*, papers.ssrn.com, 12.

<sup>11</sup> See Recommendation No. 6(a).

turing is negotiated, the Commission recommended that the debtor ‘*keep control over the day-to-day operation of its business*’ while the restructuring framework is used<sup>12</sup>.

However, ‘*the Recommendation has been [only] partially taken up by some Member States*’<sup>13</sup>; for this reason, the Commission has recently suggested adopting a directive with the purpose of harmonizing the topics covered by the Recommendation and some other areas where be equally worthwhile and achievable. Among the topics that this directive has intention to address, there will be preventive restructuring procedures and discharge of debts for entrepreneurs.

Several Member States have already amended their national laws introducing new proceedings for reorganization and rescue in order to allow entrepreneurs to survive and to encourage them to take a second chance. Further amendments and updatings are on the way to be introduced, or are expected to be introduced (or - if a directive is adopted - will be required to be introduced), in the national insolvency legislations in accordance with the abovementioned inputs. Therefore, pre-insolvency and hybrid proceedings are likely to early take on the leading role in the insolvency framework (unless they have taken it yet).

The EIR Recast (Regulation [EU] 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [recast] – hereafter **EIR-R**) encompasses ‘pre-insolvency’ and ‘hybrid’ proceedings, as proposed by the Commission.

## 1.2 Pre-insolvency and hybrid proceedings

Commonly, proceedings are defined ‘hybrid’ which combine the characteristics of out-of-court settlements and judicial insolvency proceedings. They are based on an agreement between the debtor and his creditors, which has binding effect *vis à vis* minority creditors (preventing the debtor from the need of seeking the consent of all creditors) and is subject to an examination of a judicial authority (which can be an in-depth one, but usually consists in a verification as to whether the formal requirements of the proceedings exist). In order to ease the agreement, a stay of enforcement actions is granted or can be granted. Often an insolvency practitioner is appointed, acting as a supervisor, and generally the debtor is not divested of its assets<sup>14</sup>.

Hybrid proceedings, as described, are pre-insolvency proceedings, since the court-approved arrangement is aimed at preventing the insolvency of the debtor. Not all pre-insolvency proceedings, however, are hybrid proceedings, since ‘out-of-court’ settlements and the so-called ‘confidential procedures’ are to be considered pre-insolvency proceedings as well. Out-of-court settlements consist in negotiations between the debtor and its creditors in order to modify the terms

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<sup>12</sup> See Recommendation No. 6(b) and *Eidenmüller and Van Zwieten*, Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency, papers.ssrn.com, 13.

<sup>13</sup> And ‘*even those Member States which have taken up the European Commission Insolvency Recommendation did so in a selective manner, meaning that differences remain*’: see *The Inception Impact Assessment (IIA)* adopted on 3 March 2016.

<sup>14</sup> For these remarks see *Garcimartín*, The review of the EU Insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements), NVRII Preadviezen/Reports 2011, 28 ff.; and *Hess in Hess/Oberhammer/Pfeiffer*, Heidelberg-Luxembourg-Vienna Report (2013), para. 3.3.2.



and the conditions of their contracts<sup>15</sup>. Being purely contractual transactions, they are based on the individual consent of all affected creditors: no creditor can judicially or legally be forced to change the content of his right against his will<sup>16</sup>. Similarly, confidential procedures are proceedings in which the debtor tries to reach agreement with the creditors and the debtor has no means to force any creditors to accept a reduction or modification of their claims or a standstill period, they being not publicised, advertised or other persons except those directly involved made aware of them; however, an expert or insolvency practitioner is usually appointed to assist the debtor and these proceedings generally involve protection against applications for the opening of insolvency proceedings. Sometimes, confidential procedures can provide a stay of enforcement of certain debts or can order modification of debts such as postponement of their due date<sup>17</sup>.

Nonetheless, the term ‘hybrid’ does not always indicate the proceedings having the set of features seen above. Indeed, ‘hybrid’ may also refer to the more general concept of ‘debtor in possession’, that is, proceedings in which the debtor is not divested of the assets but administers them under supervision by a court or a court appointed supervisor. This is the meaning attached to ‘hybrid’ in the Commission’s proposal to amend the EIR of 12 December 2012 (see above, para. 1.1). Thus understood, ‘hybrid proceedings’ cover the whole area of pre-insolvency proceedings, insofar as the debtor is always left in possession in out-of-court settlements and confidential proceedings. Furthermore, also (traditional) insolvency proceedings can be ‘hybrid proceedings’, given that in some Member States the debtor may remain in possession also after the opening of ‘full insolvency proceedings’, *i.e.* ‘insolvency proceedings which are not pre-insolvency proceedings’ (since they are opened ‘after the insolvency test has been carried out and the court has determined that the debtor is insolvent’)<sup>18</sup>.

Therefore, the relationship between ‘pre-insolvency proceedings’ and ‘hybrid proceedings’ varies depending on the meaning ascribed to the term ‘hybrid’.

Although there is no provision in the EIR-R clearly providing for a definition of these two concepts, their inclusion in the scope of the EIR-R is implied by Recital 10, according to which the EIR-R ‘should ... extend to [(i)] proceedings which provide for restructuring of a debtor at a stage where there is only likelihood of insolvency, and to [(ii)] proceedings which leave the debtor fully or partially in control of its assets and affairs’ - provided that ‘they take place under the control or supervision of a court’, ‘since such proceedings do not necessarily entail the appointment of an insolvency practitioner’. However, the EIR-R pro-

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<sup>15</sup> ‘These modifications may result, for example, in a rescheduling of payments, a reduction of their interest rates, a total or partial debt write-off or new loan facilities’: see Garcimartin, The review of the EU Insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements), NVR II Preadviezen/Reports 2011, 28.

<sup>16</sup> For this reason, they are governed - from a conflict-of-laws perspective - by the general conflict-of-laws rules on contractual obligations according to the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)). See Garcimartin, The review of the EU Insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements), NVR II Preadviezen/Reports 2011, 29.

<sup>17</sup> For a categorization of pre-insolvency proceedings in Member States, see INSOL Europe report ‘Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices’ of 12 May 2014 (TENDER NO. JUST/2012/JCIV/CT/0194/A4).

<sup>18</sup> See INSOL Europe report ‘Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practice’ of 12 May 2014 (TENDER NO. JUST/2012/JCIV/CT/0194/A4), 25.

vides a definition of ‘debtor in possession’: pursuant to Article 2(3), debtor in possession proceedings are those which ‘do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor’s assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs’. For this definition is very similar to the phrasing of the second part of the abovementioned Recital 10, it is likely that ‘debtor in possession’ corresponds, in the language of the EIR-R, to the ‘hybrid proceedings’ of the Commission’s proposal: As a consequence, the EIR-R would enlarge its scope to (i) pre-insolvency proceedings, and (ii) debtor in possession proceedings (which indeed fall outside the scope of the EIR<sup>19</sup>).

The essential elements of ‘pre-insolvency’ and ‘hybrid’ proceedings under the EIR-R are to be found in the definition laid down in Article 1(1).

### 1.2.1 Article 1(1) EIR-R<sup>20</sup>

Article 1(1) of the EIR-R is a provision far more detailed and complex than Article 1(1) of the EIR. According to Article 1(1), proceedings fall within the scope of the EIR-R which:

- (i) are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganization or liquidation
- (ii) are public (including interim proceedings)
- (iii) are collective
- (iv) entail certain limitations on the individual rights of the debtor and/or his creditors, that can be represented by: a) the total or partial divestment of debtor’s assets and the appointment of an insolvency practitioner; b) a control or supervision over the assets and affairs of the debtor exercised by a court; c) a temporary stay of individual enforcement proceedings granted by a court or by operation of law in order to allow for negotiations between the debtor and his creditors.

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<sup>19</sup> See Moss, *Fletcher and Isaacs*, The EU Regulation on Insolvency Proceedings (2016), 8.514.

<sup>20</sup> With regard to this Article, a preliminary remark is to be made: Article 1(1) of the EIR-R only deals with the so-called ‘**material scope**’ of the Regulation, whereas provides no guidance as to the ‘personal scope’ and ‘territorial scope’. As for the **personal scope**, Recital 9 is to be taken into consideration, which provides that ‘*this Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural or a legal person, a trader or an individual*’. This Recital almost literally mirrors Recital 9 to the EIR, which maintains that ‘*this Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual*’. Thus, in theory the personal scopes of the two Regulations correspond. What in practice makes the personal scope of the EIR-R wider is the enlargement of the material scope: as expressed in Recital 9, EIR-R ‘*should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor*’. For this reason, the relevance of personal scope issues may be limited.

### 1.2.2 Proceedings ‘based on laws relating to insolvency ... for the purpose of rescue, adjustment of debt, reorganisation or liquidation’

Proceedings which meet the conditions set out in the EIR-R are defined ‘insolvency proceedings’<sup>21</sup>, pursuant to Article 2(4). However, debtor’s insolvency is no longer a requirement for a proceeding to fall under the scope of the EIR-R. According to Article 1(1), proceedings are covered by the EIR-R which also ‘*may be commenced in situations where there is only a likelihood of insolvency*’.

The EIR-R provides no definition of insolvency nor of likelihood of insolvency. As a consequence, it must be held that there is no test as to the existence of insolvency or likelihood of insolvency other than that demanded by the national legislation of the State in which proceedings are opened<sup>22</sup>. The insolvency test differs in the Member States: the most common criteria for initiating proceedings based on insolvency are the cessation of payments test, and the balance sheet test (which depends on it being established that the debtor’s liabilities exceed the value of its assets). The judgment on the existence of a likelihood of insolvency differs too; and even the term expressing the concept of likelihood of insolvency varies from State to State (*e.g.* ‘crisis’, ‘distress’, ‘imminent insolvency’). In general terms, proceedings based on a condition of likelihood of insolvency (or pre-insolvency) are those whose opening is conditional upon a certain level of difficulties but without any prior insolvency test<sup>23</sup>. For the EIR-R to apply, there is no need that such difficulties have a financial nature: according to Recital 17, ‘*proceedings which are triggered by situations in which the debtor faces non-financial difficulties*’ are covered by the EIR-R, ‘*provided that such difficulties give rise to a real and serious threat to the debtor’s actual or future ability to pay*’. Recital 17 further explains that the time horizon for the determination of such a threat ‘*may extend to a period of several months or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity*’; and that ‘*this may be the case ... where the debtor has lost a contract of key importance to him*’.

In order to encompass most proceedings based on the mere likelihood of insolvency (as well as proceedings which leave the debtor in possession), the EIR-R simply requires that the proceedings be ‘*based on laws relating to insolvency*’. Proceedings are ‘based on laws relating to insolvency’ when:

- have ‘*the purpose of rescue, adjustment of debt, reorganisation or liquidation*’. Under the EIR, proceedings based on the debtor’s insolvency and on its divestment may always entail the liquidation of the debtor’s assets, but may also entail the reorganization of the business,

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<sup>21</sup> Actually, Article 2(4) defines ‘insolvency proceedings’ ‘*the proceedings listed in Annex A*’; and according to Recital 10, proceedings are listed exhaustively in Annex A ‘*which meet the conditions set out in it*’. Thus, it is possible to say that the term ‘insolvency proceedings’ refers to the proceedings which satisfy the conditions set out in Article 1(1).

<sup>22</sup> This is the solution proposed under the EIR by the *Virgós-Schmit report*, para. 49(b).

<sup>23</sup> See INSOL Europe report ‘*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices*’ of 12 May 2014 (TENDER NO. JUST/2012/JCIV/CT/0194/A4).

when are main proceedings<sup>24</sup>. Under the EIR-R, proceedings are no longer aimed necessarily at the distribution of the debtor's assets or at the reorganization. In particular, proceedings cannot be aimed at the liquidation (nor at the reorganization, if meant as possible only in respect of an insolvent debtor) which may be commenced in situations where there is only a likelihood of insolvency (see Article 1(1), second sentence);

- are based on insolvency law or on '*general company law ... designed exclusively for insolvency situations*' (see Recital 16: with regard to this aspect, see below, Section III, para. 2.2.1).

### 1.2.3 'Public'

Proceedings based on laws relating to insolvency aimed at the rescue, the adjustment of debt, the reorganization or the liquidation should be 'public'. According to Recital 12, proceedings are 'public' the opening of which is subject to publicity, '*in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings*'. Provisions as to the practical application of this condition are to be found in Article 24 et seq., which accommodate a detailed regime on insolvency registers<sup>25</sup>. According to these Articles, Member States are called to establish national insolvency registers, in which certain information concerning insolvency proceedings should be published ('*as soon as possible after the opening of such proceedings*') and made publicly available, including the date of the opening and the court having jurisdiction, the type of insolvency, whether it is a main, secondary or territorial proceeding, and the court and time limit within which a challenge as to jurisdiction may be brought<sup>26</sup>.

Pursuant to Recital 13, '*insolvency proceedings which are confidential should be excluded from the scope of this Regulation*'. As seen above (see para 1.2), confidential proceedings are those in which the debtor tries to reach agreement with its creditors and which are not made public in order to prevent the adverse effect of the insolvency stigma on the negotiations. Recital 13 justifies the exclusion with the difficulties to provide for their recognition abroad, given that the confidential nature makes it impossible for creditors or courts in other Member States to know that such proceedings have been opened. It has been remarked that confidential proceedings should be covered by the scope of the EIR-R as from the moment they become public<sup>27</sup>.

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<sup>24</sup> *Virgós-Schmit report* (para. 51) states that: '*... Limiting the application of the Convention to winding-up proceedings would have had the advantage of simplifying the resulting rules. The disadvantage would have been that it would have excluded from European cooperation very important proceedings in bankruptcy practice in certain Contracting States.... For some Contracting States the exclusion of reorganization proceedings would therefore be unjustified. The outcome of the negotiations was a compromise to extend the Convention system to insolvency proceedings the main aim of which was not winding-up but reorganization. As part of this compromise, however, local territorial proceedings opened after the main proceedings may only be winding-up proceedings (see points 83 and 86). If opened before, local territorial proceedings are subject to conversion into winding-up proceedings if the liquidator of the main proceedings so requests. The complications of compatibility and coordination between secondary reorganization proceedings (of which there could be several, if the debtor was based in several different Contracting States) and the main proceedings have led to restriction.*'

<sup>25</sup> See *Garcimartín*, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, papers.ssrn.com 2016, 5.

<sup>26</sup> For the information to be included in the registers, see Article 24(2).

<sup>27</sup> See *Garcimartín*, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, papers.ssrn.com 2016, 5.

Article 1(1) and Recital 15 specify that proceedings which are ‘conducted ... on an interim or provisional basis’ fall under the scope of the EIR-R as well. This elucidation clearly codifies the decision rendered in the *Eurofood* case, where the CJEU held that the judgment appointing a provisional liquidator constituted a decision opening insolvency proceedings recognizable in other Member States, since it met all the requirements set out in Article 1<sup>28</sup>. Accordingly, Recital 15 to the EIR-R states that ‘such proceedings should meet all other requirements of this Regulation’ in order to be included in the scope of the EIR-R. ‘Interim’ proceedings are those which usually are opened upon mere request of the debtor and entail the appointment of a provisional insolvency administrator for a limited period of time, until ‘a court issues an order confirming the continuation of the proceedings on a non-interim basis’<sup>29</sup>.

#### 1.2.4 ‘Collective’

Public proceedings based on laws relating to insolvency aimed at the rescue, the adjustment of debt, the reorganization or the liquidation should also be ‘collective’. According to Article 2(1), collective proceedings are ‘proceedings which include all or a significant part of a debtor’s creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them’. Recital 14 explains that (i) the creditors involved in the proceedings must represent all or a substantial proportion of the debtor’s outstanding debts; that ii) proceedings which involve only the financial creditors of a debtor should also be covered; and, most importantly, that (iii) proceedings involving only part of the creditors should be aimed at rescuing the debtor; conversely, liquidation proceedings should include all the debtor’s creditors. It has been noted that this last clarification is intended to prevent abuse of the process by excluding some creditors who would otherwise be left with extant claims against the debtor but no assets against which to enforce them, sidestepping the statutory order of priorities and *pari passu* distribution rules in the relevant Member State<sup>30</sup>.

#### 1.2.5 which entail some kind of ‘interference’ or upon the individual rights of the debtor and/or its creditors<sup>31</sup>

Public collective proceedings based on laws relating to insolvency aimed at the rescue, the adjustment of debt, the reorganization or the liquidation should then entail some kind of interference upon the individual rights of the debtor and/or his creditors.

The first kind of interference consists in the total or partial divestment of the debtor and the appointment of an insolvency practitioner (see Article 1(1)(a)).

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<sup>28</sup> CJEU, Case C-341/04, *Eurofood IFSC Ltd*, judgment of 2 May 2006, ECLI:EU:C:2006:281, para 45 ff.

<sup>29</sup> See Recital 15.

<sup>30</sup> These are the words used by *Bewick*, *The EU Insolvency Regulation, Revisited*, Int. Insolv. Rev. 2015, 6.

<sup>31</sup> These are the exact words used by *Garcimartin*, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, papers.ssrn.com 2016, 8, to summarize the content of litt. a), b) and c) of Article 1(1).

The second kind of impairment consists in the control or supervision exerted by a court over the assets and affairs of a debtor (see Article 1(1)(b)). According to Article 2(6)(i), the term ‘court’ means, in Article 1(1)(b), ‘*the judicial body of a Member State*’. Pursuant to Recital 10, ‘control’ include situations ‘*where the court only intervenes on appeal by a creditor or other interested parties*’. The term ‘appeal’ seems to be a reference to cases where the courts intervenes on application by a party<sup>32</sup>.

The third kind of interference consists in a temporary stay of individual enforcement actions granted by a court or by operation of law in order to allow for negotiations between the debtor and its creditors to reach an agreement on a restructuring plan (see Article 1(1)(c) and Recital 11). In fact, pursuant to Recital 10, in the absence of such ‘moratoria’ negotiations may be adversely affected and the prospects of restructuring hampered. Yet, ‘moratoria’ ‘*should not be detrimental to the general body of creditors*’: for this reason, proceedings in which such measure is granted should provide for suitable measures to protect creditors. Furthermore, ‘moratoria’ should be preliminary to one of the proceedings referred to in Article 1(1), point (a) or (b), if no agreement on a restructuring plan is reached. Being treated as autonomous proceedings, the jurisdiction to open such ‘moratoria’ is governed by Article 3, and their recognition by Articles 19 and 20. In accordance with these provisions, ‘moratoria’ may constitute main proceedings, and thus cover assets abroad (at least until a secondary proceeding is opened) and result in a stay on individual enforcement proceedings in other Member States.

### 1.2.6 and which may leave the debtor in possession

Although is not stated in Article 1(1), proceedings which fulfil all the said requirements may leave the debtor in possession.

According to the report ‘*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices*’ of 12 May 2014<sup>33</sup>, proceedings are defined in possession in which the debtor is not divested of the assets but administers his assets under supervision by a court or a court appointed supervisor. They being designed to avoid bankruptcy and facilitate restructuring, two main models can be followed, which may be alternative to one another: (a) a reorganization plan voted on by the creditors and confirmed by the court, sometimes accompanied by a short moratorium; (b) a moratorium ending with an agreement, that may be carried out under the supervision of the court and implies a stay of enforcement for claims covered by the agreement, which provides effects if the company complies with the collective agreement. If these scenarios fail, the proceedings may end up in a reorganization through sales ordered by the court under a judicial administrator. The outcomes of the said study show that in some Member States proceedings do provide that the debtor may remain in

<sup>32</sup> Moss, *Fletcher and Isaacs*, *The EU Regulation on Insolvency Proceedings* (2016), 8.492.

<sup>33</sup> INSOL Europe report ‘*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices*’ of 12 May 2014 (TENDER NO. JUST/2012/JCIV/CT/0194/A4), commissioned by the Directorate-General Justice in the European Commission to INSOL Europe ‘*to provide information on restructuring mechanisms already available in all Member States, their main features, effective use, rate of success, cost to the debtor and length*’.

possession also after the opening of full insolvency proceedings, and thus, also after the debtor having been declared insolvent.

Article 2(3) of the EIR-R provides for a definition of debtor in possession proceedings (see above, para. 1.2). This definition seems to suggest that also proceedings under Article 1(1)(a) may be in possession: in fact, debtor in possession proceedings do not require, but may provide for the appointment of, an insolvency practitioner, and are compatible with a partial divestment of the debtor. These proceedings may leave the debtor in possession when are not aimed at liquidating the debtor's assets among the creditors, but promote the reorganization of its business (in spite of the debtor's insolvency). The question arises whether proceedings that fall under Article 1(1)(c) are in possession, or rather -since the debtor is never divested in 'moratoria' - whether those proceedings are in possession in the meaning of Article 2(3). Recital 10 provides that '*since such proceedings [i.e. proceedings which leave the debtor fully or partially in control of its assets and affairs] do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court*'. Given that the expression used in this Recital is the same used to describe proceedings under Article 1(1)(b), it is better to hold that proceedings under Article 1(1)(c) may not be considered debtor-in-possession pursuant to Article 2(3). Obviously, proceedings under Article 1(1)(b) are debtor-in-possession proceedings par excellence.

### 1.3 Territorial scope

According to Article 3 and Recital 25 and 33, the EIR-R applies only to proceedings in respect of a debtor whose centre of main interests is located in the European Union. However, it is not expressed in the text of the EIR-R whether that requirement suffice or other territorial requirements are to be met for the instrument to apply. In particular, it is not clear whether the EIR-R (i) apply to purely domestic matters and (ii) apply where the cross-border connection is between one Member State and a non-EU State<sup>34</sup>. The same questions arise with regard to the EIR, and the CJEU answered to both in the negative<sup>35</sup>: it must be assessed whether these answers are still up-to-date (see below, para. 2.2.3).

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<sup>34</sup> *Bork and Mangano*, European cross-border insolvency law (2016), 2.71.

<sup>35</sup> CJEU, Case C-328/12, *Schmid*, judgment of 16 January 2014, ECLI:EU:C:2014:6.

## 2. Evaluation

### 2.1 Legal issues

#### 2.1.1 The title of the EIR-R: is it still up-to-date?

Notwithstanding proceedings fall in the scope of the EIR-R also which may be opened in case of a mere likelihood of insolvency, the title of the EIR-R is still to be considered up-to-date. In fact, the term ‘insolvency’ refers no longer to the financial or economic condition of a debtor unable to redress its business, but to the place (national insolvency law or national general company law - provided, in this last case, that proceedings ruled by such law are designed exclusively for ‘*insolvency situations*’: but see below, Section III, para. 2.2.1) in which the rules concerning the proceedings covered by the EIR-R are to be found. Thus, ‘*on insolvency proceedings*’ must now be read as ‘*on proceedings based on laws relating to insolvency*’.

#### 2.1.2 The notion of insolvency. Recital 17

The questions arise whether: (i) a uniform definition of insolvency is needed; (ii) in case of affirmative answer, (whether) a liquidity test should be preferred. It is to be preliminarily underlined that these questions are relevant only in a *de iure condendo* perspective: as seen above (para. 1.2.2), the EIR-R provides no definition of insolvency.

The first question has received a slight majority of affirmative answers from the stakeholders to whom the questionnaire prepared within this research project has been submitted. Respondents who have answered in the affirmative highlighted that a uniform definition should be desirable especially to avoid that the opening of territorial proceedings prior to the opening of main proceedings could be obtained only in some Member States<sup>36</sup>. According to the opposite view, the notion of insolvency should be continued to be determined according to the law of main or secondary proceedings. Indeed, this second interpretation seems to be endorsed by Article 34, second sentence (newly introduced in the EIR-R), that is (also) aimed at preventing the risks implied by the different national definitions of insolvency: according to this provision, in fact, ‘*where the main insolvency proceedings required that the debtor be insolvent, the debtor’s insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened*’<sup>37</sup>.

It is worth stressing that some respondents have held that a uniform definition of insolvency would be practical only within the framework of a harmonized substantive insolvency law;

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<sup>36</sup> According to Article 3(4)(a), territorial proceedings may be opened prior to the opening of main proceedings where ‘*insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor’s main interests is situated*’. On the other hand, it must be underlined that, if the EIR-R provided a definition of insolvency, there would be less possibilities to open territorial proceedings, since insolvency could no longer be a reason which may prevent the opening of main proceedings.

<sup>37</sup> On this point, see CJEU, Case C-116/11, *Bank Handlony*, judgment of 22 November 2012, ECLI:EU:C:2012:739, para. 68 ff.



and that other respondents, symmetrically, have held that the conflict-of-law approach is the most appropriate until there are divergent national insolvency definitions. This opinion must be emphasized as the most persuasive: the notion of insolvency seems to be a topic that can better be addressed within an instrument designed to further harmonization of national insolvency laws than within an instrument based on a conflict-of-law approach. In fact, (i) if a definition of insolvency were included in the EIR-R with the aim to promote harmonization of the national definitions, such objective would hardly be achieved, since the EIR-R is not conceived to encourage harmonization, and in any case harmonization would be encouraged in a worse manner than a directive (and maybe also a recommendation) would; (ii) if a definition of insolvency were included in the EIR-R to be read as a material provision of private international law, then it should be clarified the relationship between that definition and the potential different definitions provided in each national legislation: which one will apply?; in particular, which one will apply in cases in which proceedings involve only purely domestic matters (see below, para. 2.2.3)?

Yet, two reasons that are more convincing have been raised against the necessity to amend the EIR-R providing a definition of insolvency. The first reason consists in the fact that, due to the enlargement of its scope to pre-insolvency proceedings, ‘insolvency’ is no longer the burden of inclusion/exclusion of proceedings within the EIR-R. The second (and main) reason consists in the fact that the adoption of a common definition would not prevent each Member State from interpreting that definition in its own manner, making use of different national criteria<sup>38</sup>.

In conclusion, it is not advisable to introduce a definition of insolvency in the EIR-R; if need be, a uniform definition of insolvency will have to be adopted in the national legislations, should the establishment of a framework of harmonized insolvency law be promoted also as to the definition of insolvency.

In the light of this, the second question takes second place. Nonetheless, it is to be underlined that a large majority of the stakeholders to whom the questionnaire has been submitted who maintained that an insolvency definition is needed held that a liquidity test should be preferred over a balance-sheet test. This answer seems rational: proceedings based on insolvency are generally opened upon request of both the debtor and creditors<sup>39</sup>; and creditors who are not institutional (banks, insurance companies, etc.) usually rely on a liquidity test, since only the inability to pay debts as they fall due is perceptible by them. The EIR-R itself seems to show a preference for the liquidity test: according to Recital 17 (see above, para. 1.2.2), non-financial difficulties are only relevant when they give rise to a real and serious threat to ‘*the debtor’s actual or future ability to pay its debts as they fall due*’.

As far as this Recital is concerned, the question has been asked in the questionnaire submitted among stakeholders whether the possibility to open insolvency proceedings where the debtor faces non-financial difficulties raise any concerns (e.g. where ‘*the debtor has lost a contract which is of key importance to him*’). A slight majority of the respondents has answered in the affirmative, high-

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<sup>38</sup> But see below, para. 2.2.2.

<sup>39</sup> See INSOL Europe report ‘*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices*’ of 12 May 2014 (TENDER NO. JUST/2012/JCIV/CT/0194/A4), 29.

lighting two main issues raised by such a possibility. The first one consists in that the opening of insolvency proceedings in case of non-financial difficulties may prejudice the creditors' rights, which is unjustified at a very early stage of crisis (such a prejudice could only be accepted to the extent that enforcement proceedings by creditors are not precluded or interrupted). The second one - strictly connected with the former - is the risk of abuse: being 'non-financial difficulties' a broad and ultimately subjective concept, debtors could always rely on it in order to apply for insolvency proceeding; with the consequence that debtors could also file for the opening of insolvency proceedings with the aim either of preventing individual enforcement action or of handling more easily with lay-offs and shareholder conflicts. Conversely, respondents who have held that Recital 17 does not raise any particular concerns have underlined, on the one hand, that the opening of proceedings at a stage in which there are only non-financial difficulties correspond to the current approach to distress and to the promotion of the 'rescue culture' endorsed, *inter alia*, in the Recommendation; on the other hand, that non-financial difficulties are only relevant to the extent that they give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due: as a consequence, they should be deemed to fall under the general category of pre-insolvency.

The second position seems consistent with the letter of Recital 17: while pre-insolvency (likelihood of insolvency) should be read as a real and serious threat to the debtor's actual or future ability to pay, *i.e.* serious *financial* difficulties or imminent insolvency; non-financial difficulties should be read as difficulties that, in the short term, threaten the status of the debtor's business as a going concern, but that are only relevant for the purposes of the EIR-R when are susceptible to evolve, in the medium term, in a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due (that is, in serious financial difficulties or imminent insolvency). Since non-financial difficulties are relevant insofar as they are able to give rise to difficulty or inability to pay, it is clear that also proceedings triggered by a non-financial distress should fall under the category of pre-insolvency proceedings, and be subject to a test not far from the test to which other pre-insolvency proceedings are subject. Obviously, the effectiveness of such a test depends on the party having power to commence proceedings under national legislation.

### 2.1.3 Scope of secondary proceedings

Since under the EIR, secondary proceedings '*must be winding-up proceedings*' (see Article 3(3)) '*listed in Annex B*' (see Article 27), to implement restructuring may be difficult, as the decision rendered in the *Bank Handlony* case made evident. In this case, a French court held that the centre of main interests of a subsidiary company incorporated in Poland was located in France, and opened a proceeding aimed at rescuing the whole group of companies (whose parent company was incorporated in France) according to French law. Nevertheless, creditors of the Polish subsidiary filed for a secondary proceeding in Poland, where the whole assets were situated. The CJEU was asked to establish whether Article 27 of the EIR must be interpreted as meaning that

it allows for the opening of secondary insolvency proceedings in the Member State in which all of the debtor's assets are situated, where the main proceedings have a protective (rescue) purpose. The CJEU acknowledged that the opening of territorial proceedings '*risks running counter to the purpose served by main proceedings*'; the only solution, however, was found in the principle of sincere cooperation laid down in Article 4(3) of the TFEU, which '*requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings*'<sup>40</sup>. It was established, on the contrary, that no provision of the EIR prevents from opening secondary proceedings when main proceedings have rescue purposes: in fact, neither Article 3(3) nor Article 27 distinguish according to the purposes of main proceedings<sup>41</sup>. Thus, the EIR do not effectively coordinate secondary and main proceedings<sup>42</sup>.

The provision that secondary proceedings should have winding-up purposes has not been recast in the EIR-R, and the list containing proceedings only aimed at the winding-up has been deleted: therefore, secondary proceedings can now aim at helping the main proceeding in restructuring a distressed business. For present purposes, it has to be underlined that now the scope of main proceedings and secondary proceedings is **coextended**, unlike in the EIR.

#### 2.1.4 The COMI presumption for pre-insolvency proceedings

The EIR-R has improved the way to ascertain where a debtor's centre of main interests is located. According to Article 3, the place of the registered office (for companies and legal persons), the principal place of business (for individuals exercising an independent business or a professional activity) and the habitual residence (for other individuals) shall be presumed to be the centre of main interests, unless they have not been moved within the 3-month period (6-month for non-professional debtors) prior to the request for the opening of proceedings<sup>43</sup>. When the reform process was still on the way, a proposal had been made<sup>44</sup> to apply the presumptions laid down in Article 3 applicable only to insolvent debtors, and not to merely financially distressed debtors, on the assumption that the purposes pursued by the former and the latter by means of the centre of main interests shift would be deeply different. In fact, while an insolvent debtor would be more likely to relocate the COMI in the *suspect period* in order to benefit from '*a more favourable legal position to the detriment of the general body of creditors*' (as stated in Recital 5 to the EIR-R), a debtor who suffers from a simple financial distress would be more likely to do the same '*in ... search for a more favourable legislation ... into the general freedom of movement (see Articles 49 and 54, TFEU), rather than necessarily into a suspicious scenario*'.

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<sup>40</sup> Mucciarelli, Private international law rules in the Insolvency Regulation Recast: a reform or a restatement of the *status quo?*, ECFR 2016, 25.

<sup>41</sup> CJEU, Case C-116/11, *Bank Handlony*, judgment of 22 November 2012, ECLI:EU:C:2012:739, para. 55-57.

<sup>42</sup> On this topic see *Leandro*, Amending the European Insolvency Regulation to strengthen main proceedings, Riv. dir. intern. priv. e proc. 2014, 323 ff.

<sup>43</sup> On this topic, see *Bariatti and Corno*, Centro degli interessi principali, ilfallimentarista.it 2016.

<sup>44</sup> It is the proposal made by *Latella*, The "COMI" Concept in the Revision of the European Insolvency Regulation, ECFR 2015, 479 ff.

Article 3 does not distinguish at all between insolvency and pre-insolvency proceedings as to the application of the COMI presumption. There seems not to be the possibility to offer an interpretation of this Article in the sense of that proposal, since it would be contrary to the clear letter of the EIR-R; nor it seems to be possible to assess on a case by case basis what the purposes for the COMI shift are, and to apply the presumptions only to relocations made with abusive purposes. In any case, debtors which relocate the COMI with the aim to a better ‘restructuring environment’ will have the possibility to rebut those presumptions.

## 2.2 Practical problems

### 2.2.1 Pre-insolvency and hybrid proceedings before a ‘judgment opening insolvency proceedings’ is rendered

Article 19 of the EIR-R provides that ‘*any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings*’. The CJEU, however, has established that the EIR applies even before a judgment opening insolvency proceedings has been delivered but the request has been lodged; furthermore, the EIR contains provisions concerning the conduct of the proceedings for the period between the request for their opening and the opening judgment (see Article 38 of the EIR). Now, the EIR-R also considers the case of proceedings that have already commenced but have not been ‘formally’ opened: pursuant to Article 2(7), ‘*judgment opening insolvency proceedings*’ is not only the decision of any court to open insolvency proceedings or the decision of a court to appoint an insolvency practitioner, but also the decision of any court to confirm the opening of insolvency proceedings. This introduction was needed in view of the inclusion in the EIR-R of hybrid and pre-insolvency proceedings, that, as seen above, may be started by a debtor and by creditors, and may also entail the intervention of a court on appeal by creditors or other interested parties. In many cases, according to the national legislations, such proceedings are ‘substantially’ already opened at the moment a judgment pursuant to Article 2(7)(i) is rendered, but the opening under national legislation, however, do not fit the (autonomous) definition of Article 2(7)(i).

The reference in Article 2(7)(i) to the decision confirming the opening of proceedings may also hint at ‘interim’ proceedings, which, pursuant to Recital 15, are opened and conducted for a certain period on an interim or provisional basis before a court issues an order ‘*confirming*’ the continuation of the proceedings on a non-interim basis. ‘Interim’ proceedings currently provided in national laws see the appointment of a provisional insolvency practitioner<sup>45</sup> included in Annex B: for this reason, they seem to be recognizable abroad since the decision to appoint the insolvency practitioner is taken (see Article 2(7)(ii)). Should there be ‘interim’ proceedings not ap-

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<sup>45</sup> This is the case when a German *vorläufiger Insolvenzverwalter* or an Irish *provisional liquidator* are appointed.

pointing an insolvency practitioner listed in Annex B (or should they be introduced), they should be recognizable abroad since the final decision confirming the opening is issued.

Difficulties may arise concerning the early phase in which a judgment confirming the opening of insolvency proceedings (pursuant to the definition given at Article 2(7)(i)) has not been rendered yet: in particular, there might be cases where the debtor is not protected against individual enforcement actions from the outset, but only after a court or authority intervenes confirming the opening of proceedings. Two instruments (both already available in the EIR) are of some help to deal with this issue. The first one is the power for the court competent for the main insolvency proceedings to order in the application stage of such proceedings provisional and protective measures covering assets situated in other Member States (see Recital 36, fourth sentence). Judgments relating to these measures are automatically recognized abroad, pursuant to Article 32(1)(3). The second one is the power for the temporary insolvency practitioner appointed in the main proceedings to request, in the application stage, any measure to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that Member State (see Article 52).

Both the tools suffer from shortcomings. The first one may prevent foreign creditors from enforcing payment claims, but not from applying for the opening of secondary proceedings. In fact, there is no rule for 'moratoria' imposed during the application stage similar to Article 38(3), which provides that the court may stay the opening of secondary proceedings at the request of the insolvency practitioner or the debtor where a temporary stay of individual enforcement has been granted in another Member State to allow for negotiations between the debtors and its creditors<sup>46</sup>. The consequence is that creditors may always resort to local insolvency proceedings in order to prevent foreign main proceedings from grabbing local assets. The second tool is available only in main proceedings in which a temporary insolvency practitioner has been appointed, not where the debtor remains in possession: a broad interpretation seems not to be allowed, since the EIR-R usually mentions the debtor in possession where it wants to treat the same to the insolvency practitioner.

### 2.2.2 Article 34, second sentence

According to Article 34, second sentence, of the EIR-R (former Article 27 of the EIR), *'where main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened'*. Annex A does not distinguish among proceedings based on insolvency, proceedings based on a mere likelihood of insolvency and proceedings that can be based both on insolvency and likelihood of insolvency: thus, it may be difficult for courts requested to open a secondary proceeding to know whether

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<sup>46</sup> The reason is why only the 'moratorium' under Article 1(1)(c) (and not that provided in the application stage) is considered to constitute a main insolvency proceeding within the scope of the EIR, with the power to preclude secondary proceedings: see *Bork*, Moratoria (or "stays") under the new European Insolvency Regulation, *Insolv. Int.* 2016, 4.

foreign main proceedings are based on insolvency or not. For the provision contained in Article 34 to be effective, it is essential that Member States provide, pursuant to Article 86, a short description of their national legislation and procedures relating to insolvency, with a particular reference to the level of distress upon which the opening of each procedure<sup>47</sup> may be triggered.

However, this may not be sufficient, since there are procedures listed in Annex A which can be based on both insolvency and likelihood of insolvency. In these cases, there would not be other way to know whether main proceedings required debtor's insolvency but to analyze the circumstances which brought to their opening. It is obvious that such a check would barely be consistent with the principle of the mutual recognition and would hinder the efficiency of the EIR-R. Two possible ways can be devised to face this shortcoming. The first one is to interpret Article 34, second sentence, as it states that the debtor's insolvency should not be re-examined by the court opening a secondary proceeding not only '*where main insolvency proceedings required that the debtor be insolvent*' but also where main insolvency proceedings *could* be based on debtor's insolvency. This first method, however, may be contrary to the intention underlying the EIR-R to limit the opening of secondary proceedings and to promote rescue: if foreign courts were relieved to check insolvency also in cases in which main proceedings can be based on both likelihood of insolvency and insolvency, in fact, there would be more possibilities that several secondary proceedings aimed at liquidation be opened in respect of a debtor subject to a main proceeding aimed at its rescue<sup>48</sup>. The second method consists in encouraging the courts opening main proceedings to always specify in the judgment opening such proceedings whether the debtor is insolvent<sup>49</sup>. This second method seems not to raise concerns, and thus must be recommended.

### 2.2.3 The territorial scope

As seen above (para. 1.3), doubts arise as to whether the EIR-R applies: (i) to purely domestic matters; (ii) to proceedings whose sole cross-border connection is with a Third State. The two issues must be separately examined.

(i) In the *Schmid* case, the CJEU, asked to determine '*whether, in order for the Regulation to apply, there must in any event be cross-border elements in the sense that only situations involving connecting factors with two or several Member States fall within the Regulation's scope*', observed that '*a general and absolute condition of this kind does not result from the wording of the Regulation's provisions*'<sup>50</sup>, and that '*the objectives pursued*

<sup>47</sup> With regard to this problem, see *Csöke*, EIR Recast: Some tiny interesting details..., <https://www.insol-europe.org/download/documents/763>.

<sup>48</sup> This solution does not, then, seem consistent with the decision rendered in the *Bank Handlowy* case (CJEU, Case C-116/11, *Bank Handlowy*, judgment of 22 November 2012, ECLI:EU:C:2012:739), where the CJEU noted that '*when a court before which an application for secondary proceedings has been made draws conclusions from the finding of insolvency in the main proceedings, it must have regard to the objectives of the main proceedings and take account of the scheme of the Regulation as well as the principles on which it is based*' (para. 73).

<sup>49</sup> In *Virgós-Schmit* Report, the authors observed that '*States which list proceedings which can be used for purposes other than insolvency, must provide sufficient means of identification of the proceedings to facilitate the application of the Convention. For instance, requiring their courts or competent bodies to specify clearly **the grounds on which the decision to open proceedings is based**, so that these can then be used as an identification "label"*' (para. 49) (bold added for emphasis).

<sup>50</sup> CJEU, Case C-328/12, *Schmid*, judgment of 16 January 2014, ECLI:EU:C:2014:6, para. 20.

by the Regulation, as resulting in particular from the recitals in its preamble, likewise do not support a narrow interpretation of the Regulation's scope, requiring the presence of such an element<sup>51</sup>. The Court also noted that the centre of the debtor's main interests is to be determined at the time when the request to open insolvency proceedings has been lodged (as it had been decided in the *Staubitz-Schreiber* case<sup>52</sup>): 'at that early stage, the existence of any cross-border element may be unknown', and yet to postpone the determination of the court having jurisdiction until such time as the locations of various aspects of the proceedings (such as the residence of a potential defendant to an ancillary action) are known, 'would frustrate the objectives of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects'<sup>53</sup>.

No provision or recital contained in the EIR-R expressly requires for the existence of a cross-border connection. Furthermore, the provisions and recitals on the grounds of which the CJEU founded its decision have been recast, without amendments or with trivial amendments. These elements may be sufficient to consider the *Schmid* judgment still up-to-date. However, further elements to support the view that a cross-border connection is not needed can be indirectly found in two provisions newly introduced in the EIR-R. The first (and main) provision is Article 4, second sentence, according to which 'the judgment opening insolvency proceedings shall specify ... whether jurisdiction is based on Article 3(1) or (2)'. As the CJEU pointed out in the *Schmid* judgment, at the moment the proceedings are opened the cross-border connection may be still unknown: this rule clarifies that courts, whenever open a procedure included in the Annex, must declare whether it is a main or a secondary proceeding, irrespective of there being such cross-border element, or it having been apparent yet. The second rule is Article 24, pursuant to which 'Member States shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published ('insolvency registers'). That information shall be published as soon as possible after the opening of such proceedings'. For this provision to be effective, it has to be held that all national procedures listed in Annex A must be published.

In the light of this, the EIR-R should be deemed applicable also to purely domestic matters. It has been highlighted that, though the principle of effectiveness cited in the *Schmid* judgment (and now underpinned by Article 4) is reasonable, it would seem 'disproportionate to completely displace national rules on jurisdiction due to an unspecified risk of the insolvency at hand having cross-border effects,

<sup>51</sup> CJEU, Case C-328/12, *Schmid*, judgment of 16 January 2014, ECLI:EU:C:2014:6, para. 24.

<sup>52</sup> CJEU, Case C-1/04, *Staubitz-Schreiber*, judgment of 17 January 2006, ECLI:EU:C:2006:39.

<sup>53</sup> Articles 6, 14 and 44(3)(a) of the EIR have been recast in Article 9, 17 and 85(3)(a); Recitals 4, 8 and 12 of the EIR are now Recitals 5, 8 and 23. *Laukemann*, Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – *Schmid/Hertel*, IILR 2014, 101, summarizes the principles on which the decision is based as follows: 'neither Article 1(1) ... non Annex A thereto nor recital 14 appeared to limit the application of the Regulation to proceedings that involve any cross-border element ... The same held true, apart from Articles 6 and 14 EIR, for the wording of Article 3(1) EIR confining the determination of the competent court to the centre of a debtor's main interests, adding no further condition such as an element involving two or more Member States.... Instead, implementing such intra-EU element would lead to a significant legal uncertainty and delay at the outset of cross-border proceedings and therefore diminish their effectiveness and efficiency. This is because the determination of the competent court had to be made at the earliest possible stage, so that action may be taken to preserve the debtor's estate for the sake of the general body of creditors. This legislative approach reflected the principles of unity and universality of insolvency proceedings ..., militating in favour of a general applicability of the Regulation in case of a simple connection to third States'.

and this is certainly contrary to the pluralistic approach generally taken by the Regulation<sup>54</sup>. The fewer issues will arise, the more similar the interpretation of the centre of main interests criterion and the national jurisdiction criteria will be.

(ii) Once admitted that a Member State's jurisdiction should not depend on the existence of a cross-border link, the solution to the question whether the EIR-R applies also to proceedings whose sole cross-border connection is with a non-EU State (or with Denmark) is easier. On the one hand, if the EIR-R applies to proceedings which at the moment of their opening do not show any cross-border elements, it goes without saying that proceedings whose cross-border connection with a Third State becomes apparent at a later stage should fall within the scope of the EIR-R. On the other hand, proceedings which at the moment of their opening show as sole cross-border connection an element involving a non-EU State should also be covered by the EIR-R, since further elements involving a Member State may become apparent at a later stage<sup>55</sup>.

Some major doubts may arise as to whether judgments directly deriving and closely linked to insolvency proceedings in which a defendant domiciled in a Third State is sued fall in the scope of the EIR-R as well. Firstly, in 'insolvency-related' actions it is possible to know in advance whether the sole cross-border element involved is with a non-EU State, unlike in collective proceedings. Secondly, and most importantly, '*compared to collective proceedings, the defendant's protection guaranteed in civil procedure on the basis of the actor sequitur forum rei-principle enunciated in Article 2 of Brussels I Regulation [Article 4 of Brussels Ibis – editor's note] is of paramount importance and can thus only be ousted by overarching jurisdictional, i.e. insolvency-specific interests in this context*', especially for 'third-state defendants devoid of any sufficient connection to the state of the opening of insolvency proceedings within the European Union'<sup>56</sup>. Nevertheless, the *Schmid* judgment decided precisely this issue, establishing that the courts of the Member State '*within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State*'<sup>57</sup>. In accordance with this judgment, a large majority of the stakeholders to whom the questionnaire prepared within this research project has been submitted has argued that insolvency-related actions should fall within the scope of the EIR-R because they fulfil the only requirement provided, *i.e.* the debtor's centre of main interests being in a Member State; and that this conclusion is consistent with new Article 6 (dealing with the jurisdiction to open actions directly deriving and closely connected to the insolvency proceedings - see below, Section IV, para. 1), which does not require that the defendant is resident within the European Union for the EIR-R to apply.

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<sup>54</sup> *Bork and Mangano*, European cross-border insolvency law (2016), 2.75.

<sup>55</sup> In the English case of *Re BRAC Rent-A-Car (Re BRAC Rent-A-Car International Inc.* [2003] EWHC 128 (Ch)) the EIR had already been deemed applicable to a proceedings involving a Third State, *i.e.* the insolvency of a company incorporated in the United States. The English court said that the only limitation on territorial scope is the centre of main interests concept, and that if only debtors incorporated in a Member State were to be affected, the EIR would have explicitly stated this. The *Schmid* goes beyond, since it establishes that the EIR applies regardless of any cross-border implication.

<sup>56</sup> *Laukemann*, Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel, IILR 2014, 101.

<sup>57</sup> See also CJEU, Case C-295/13, *H.*, judgment of 4 December 2014, ECLI:EU:C:2014:2410, para. 33.



In light of this (in particular considering that the reform does not deal with this topic), it seems logic to confirm the solution given in *Schmid*, both for collective and individual actions. To deem the EIR-R applicable to proceedings (both collective and individual) whose sole cross-border link is with a Third State raises some concerns, both theoretical and practical. As for the theoretical issues<sup>58</sup>, it has been highlighted that such a solution, firstly, would violate the mutual trust requirement, since the EIR-R would apply to Third States' assets, creditors, defendants etc., without those States having decided to adhere to any bilateral or multilateral agreement; secondly, would disregard the *rationale* underlying the EIR-R, as emerging from Article 3, para. 2 through 4, which deals with territorial proceedings limited to the territory of a Member State. To the second consideration, it has been incisively replied that there is a fundamental difference between the universal scope of main proceedings and the strictly territorial scope of secondary or territorial proceedings, and that assets or others matters outside the EU are the concern solely of the main proceedings<sup>59</sup>. To the first point, it has been replied that it is recognition that is based on mutual trust, not jurisdiction: thus, '*the fact that non-EU countries may or may not recognise EU avoidance judgments should not of itself prevent the EU courts from taking jurisdiction over defendants resident outside the EU*'<sup>60</sup>.

Albeit correct, this last remark confirms that including in the scope of the EIR-R proceedings involving only Third States' implications may entail recognition and enforcement issues in those States<sup>61</sup> (and now we turn to the practical issues). On this point, the CJEU in the *Schmid* judgment noted that, if in a given case it is not possible to rely on the EIR itself for the recognition and enforcement of judgments, it is sometime possible to obtain the recognition and enforcement of the judgment delivered by the court with jurisdiction under a bilateral convention, or - in case of insolvency-related actions - under Article 25 of the EIR, in particular insofar as part of the defendant's assets are in the territory of other Member States<sup>62</sup>. Therefore, where a bilateral convention between the Member State taking jurisdiction and the Third State lacks, and where Article 25 (now 32) cannot apply, it is likely that proceedings will not be recognized and enforced in the Third State. In this case, the risk exists that the proceeding remains useless, especially when most part of the assets (in collective proceedings) or the whole assets whose restitution is claimed (in insolvency-related actions) are located in the Third State. For this reason, it has been proposed by some of the respondents to the questionnaire submitted within this research project that Member States should open proceedings involving a non-EU State connection only when these proceedings can find recognition and enforcement in that State; it has also

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<sup>58</sup> For the following considerations, see *Paulus*, The ECJ's understanding of the universality principle, *Insol. Int.* 2014, 70 ff. They have been expressed with regard to the EIR, but they seem valid also with regard to the EIR-R.

<sup>59</sup> *Moss*, ECJ takes worldwide jurisdiction, *Insol. Int.* 2015, 6 ff.

<sup>60</sup> *Moss*, ECJ takes worldwide jurisdiction, *Insol. Int.* 2015, 6 ff.

<sup>61</sup> Also part of those who deem that such an extension of the scope of the EIR-R is not excessive admits that it could raise recognition concerns.

<sup>62</sup> 'However, it is arguable that if the defendant did have assets in other Member States, the Regulation would apply anyway, since there is a cross-border situation as between two Member States': see *Bork and Mangano*, European cross-border insolvency law (2016), 2.80.

been proposed to adopt an international convention on recognition, in order to avoid such proceedings remain ineffectual.

In conclusion, it can be observed that the application of the EIR-R both to purely domestic proceedings and to proceedings involving a connection with non-EU States raises some issues<sup>63</sup>; nonetheless, such application is congruous with the text of the EIR-R, whose only test for jurisdiction refers to the centre of main interests being located within a Member State<sup>64</sup>.

### 3. Theses and recommendations

In light of the above, the following recommendations should be issued.

**3.1** The definition of ‘debtor-in-possession’ proceedings, provided in Article 2(3), should be considered equivalent to the concept of ‘hybrid proceedings’ laid in down in the Commission’s proposal of 12 December 2012.

**3.2** It is recommended not to introduce a uniform definition of ‘insolvency’ in Regulation (EU) No 2015/848. ‘Insolvency’ is no longer the burden of inclusion/exclusion within the scope of the Regulation. Furthermore, a definition to be included in the Regulation would require a specific amendment, would not prevent divergent interpretations and would only have the effect to (try to) further harmonize the substantive insolvency law of the different Member States.

If need be, it is advisable that a uniform definition be introduced directly in the national insolvency laws.

**3.3** Pursuant to Recital 17, the Regulation’s scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties (*e.g.* the loss of a contract of key importance to it).

The Regulation does not provide for specific rules for these proceedings. Since non-financial difficulties are significant insofar as ‘*give rise to a real and serious threat to the debtor’s actual or future ability to pay its debts as they fall due*’, proceedings opened in these situations should fall under the general category of pre-insolvency proceedings.

Therefore, proceedings triggered by non-financial difficulties should be considered to raise the same issues as proceedings triggered by financial difficulties.

**3.4** For the purposes of the Regulation, proceedings based on the insolvency of the debtor are equated to proceedings which are based on a mere likelihood of insolvency (both

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<sup>63</sup> In the contrary sense, see *Linna*, Cross-Border Debt Adjustment - Open Questions in European Insolvency Proceedings, Int. Insolv. Rev. 2013, 32, who observed (with concern to the Commission’s proposal of 12 December 2012) that proceedings mentioned in Annex A should fall within the scope of the new Regulation only if ‘*the concrete case ... [has] cross-border implications*’. She added that ‘*there is no need for a specific definition in this respect in the EIR or in the amendment draft*’.

<sup>64</sup> For this reason, proceedings opened in respect of a debtor which has an establishment in a Member State and whose centre of main interests is outside the European Union do not fall within the scope of the EIR-R. See *Lanckemann*, Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel, IILR 2014, 101.

fall under the general definition of ‘insolvency proceedings’). As a matter of fact, the Regulation does not provide specific rules on jurisdiction, recognition and applicable law concerning proceedings based on a mere likelihood of insolvency.

Consequently, the COMI presumption and the *suspect period* established in Article 3(1) should also be applicable to proceedings based on a mere likelihood of insolvency.

- 3.5** The provision requiring that secondary proceedings have to be aimed at the winding-up has not been recast in Regulation (EU) No 2015/848. As a consequence, secondary proceedings may now also be aimed at the debtor’s rescue or adjustment of debt, and may be coordinated with main insolvency proceedings in order to promote a debtor’s restructuring.

Therefore, main insolvency proceedings and secondary insolvency proceedings have now coextended scopes.

- 3.6** Protection against actions from the outset might not be guaranteed in the early phase of proceedings which are formally opened only when a judgment confirming the opening is rendered, pursuant to Article 2(7)(i).

In these cases, debtors may resort to instruments provided in Recital 36, fourth sentence (*‘provisional and protective measures covering assets situated in the territory of other Member States’* ordered by the court competent for the main insolvency proceedings), and in Article 52 (*‘any measures to secure and preserve any of the debtor’s assets situated in another Member State, provided for under the law of that Member State’*, upon request of a temporary administrator).

However, the first tool does not prevent from the opening of secondary proceedings abroad: such opening may only be stayed when *moratoria* provided in Article 1(1)(c) have been granted. The second tool is not available in proceedings in which the debtor is left in possession.

- 3.7** The provision has been recast according to which *‘where the main insolvency proceedings required that the debtor be insolvent, the debtor’s insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened’* (Article 34, second sentence).

For this provision being effective, it is recommended that Member States, in the short description of their national legislation and procedures relating to insolvency to be provided pursuant to Article 86, specify what proceedings can be opened in a situation of insolvency, what in a situation of likelihood of insolvency and what in both situations.

With the same purpose, it is advisable that Member States’ courts, in opening main proceedings that can be based both on insolvency and on a likelihood of insolvency, specify in the judgment whether the debtor is insolvent.

- 3.8** Pursuant to Article 3(1), Regulation (EU) No 2015/848 applies to proceedings in respect of a debtor whose centre of main interests is situated in a Member State. This is the only condition laid down as to the territorial scope of application of the Regulation.

Accordingly, the Regulation applies also to:  
proceedings devoid of cross-border implications. This is suggested by Article 4, according to which every judgment opening insolvency proceedings listed in Annex A shall specify whether such proceedings are main or secondary ones (provided that the debtor's COMI is in the European Union);  
proceedings whose sole cross-border implications involves a Third State (*i.e.* a non-EU State or Denmark), irrespective of whether the judgment opening such proceedings and judgments concerning their course and closure shall be recognized in the Third State.

## B. The relationship between Article 1(1) of the Regulation (EU) No 2015/848 and Annex A

Articles 1(1), (3), 2(4), Recital 9, Annex A EIR-R

### 1. Legal framework

#### 1.1 The framework under the EIR

The EIR has three provisions concerning the relationship between the scope of the instrument - as laid down in Article 1(1) - and Annex A: Article 1(1) itself, Article 2(a) and Recital 9. Article 1(1) defines the framework of the EIR, requiring for a set of cumulative conditions which national proceedings needed to meet. Article 2(a) stated that ‘insolvency proceedings’, *i.e.* the collective proceedings referred to in Article 1(1), ‘*are listed in Annex A*’; similarly, Recital 9 provided that ‘... *the insolvency proceedings to which this Regulation applies are listed in the Annexes ...*’.

According to the Virgós-Schmit Report<sup>65</sup>, Article 1(1) and Article 2(a) had to be interpreted in the sense that only those proceedings expressly entered in the list of the Annex should have been considered ‘insolvency proceedings’ as covered by the Regulation and should have been able to benefit from its provisions. As the Virgós-Schmit Report seems to suggest, in the mind of the drafters of the EIR Article 1(1) and Annex A should not have shown any discrepancies. The relationship between Article 1(1) and Annex A had been envisaged as a very simple one: on one hand, *only* the national procedures fulfilling the conditions of Article 1(1) should have been included in the Annex; on the other hand, *all* the national procedures fulfilling the conditions of Article 1(1) should have been included in the Annex.

However, in practice, discrepancies have become a widespread phenomenon. In particular, cases have arisen in which: (i) national procedures which did not satisfy all the requirements laid down in Article 1(1) were listed in Annex A, and (ii) national procedures which satisfied the requirements laid down in Article 1(1) were not listed in Annex A. This situation also depended on the procedure to amend Annex A, set forth in Article 45. Pursuant to this provision, the power of amending Annexes was vested in the Council, which acts by qualified majority on initiative of a Member State or the Commission. Since the Commission did not verify whether the proceedings notified by Member States fulfilled the requirements of Article 1(1), Member States, on one hand, had the power to promote at their discretion the inclusion in the Annex of whatever proceeding. This is what happened in practice: in fact, some Member States have listed in Annex A pre-insolvency proceedings, which were not ‘insolvency proceedings’ in the sense provided for

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<sup>65</sup> *Virgós-Schmit report*, para. 48.

by Article 1(1)<sup>66</sup>. On the other hand, Member States were not under any obligation to notify new domestic proceedings.

Two CJEU's judgments dealt with such discrepancies. The *Bank Handlony* case<sup>67</sup> addressed the issue of the recognition in other Member States of a French procedure (the *sauvegarde* established by the French Commercial Code) which had been included in Annex A although it did not comply with the scope of the Regulation (since it did not require the debtor's insolvency and aimed at its rescue). The CJEU decided that 'once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation'; and that 'inclusion in the list has the direct, binding effect attaching to the provisions of a regulation'<sup>68</sup>. The *Radziejewski* case<sup>69</sup> was perfectly in line with *Bank Handlony*. Since the debt relief procedure at issue - the Swedish *skuldsanering* - was not listed in Annex A, the CJEU stated that it fell outside the scope of the EIR. This procedure did not comply with all the requirements of Article 1(1) and thus probably it could not be included in Annex A. However, corollary of this decision is that the Regulation is not applicable to proceedings not included in Annex A even though they fit in its scope.

These judgments were not without consequences on the relationship between Article 1(1) and Annex A and their respective role. And indeed, (i) if the courts in other Member States were not to second-guess whether proceedings listed in Annex are 'true' insolvency proceedings, but should apply the Regulation for the simple reason of their listing; and (ii) if nothing prevented from the Annex being 'over-inclusive', *i.e.* covering procedures that are not collective and did not entail the partial or total divestment of a debtor and the appointment of a liquidator; or 'under-inclusive', in that certain procedures in some Member States may satisfy the Article 1(1) conditions without being listed in the Annex<sup>70</sup>; then the application of the Regulation should have been entirely up to the discretion of the Member States and parties should have not been able to rely on the cross-border effect of insolvency proceedings not included in Annex A.

## 1.2 The proposals to amend the EIR

In view of the described outcomes, proposals were put forward to amend the EIR and set up a different relationship between Article 1(1) and Annex A<sup>71</sup>. In particular, within the Heidelberg-Luxembourg-Vienna Report, it was suggested to regard the Annexes not as an integral part of the Regulation (having the same status), but as delegated acts (as provided for in Article 290 TFEU) or implementing provisions (as provided for in Article 291 TFEU), having nature of an

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<sup>66</sup> See, *e.g.*, French *procédure de sauvegarde* (as it will be seen below) and Italian *concordato preventivo*, which were included in Annex A to the EIR even if they do not fit the requirements set out in its Article 1(1).

<sup>67</sup> CJEU, Case C-116/11, *Bank Handlony*, judgment of 22 November 2012, ECLI:EU:C:2012:739.

<sup>68</sup> CJEU, Case C-116/11, *Bank Handlony*, judgment of 22 November 2012, ECLI:EU:C:2012:739, para 33.

<sup>69</sup> CJEU, Case C-461/11, *Ulf Kazimierz Radziejewski*, judgment of 8 November 2012, ECLI:EU:C:2012:704.

<sup>70</sup> McCormack, Reforming The European Insolvency Regulation: A Legal And Policy Perspective, *JprivInt'lL* 2014, 45 ff.

<sup>71</sup> See on this topic Eidenmüller, A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond, *MJ* 2013, 139 ff.

exemplifying list. According to this option, (i) when proceedings were listed in the Annex, courts should have been bound to apply the Regulation; (ii) when proceedings were not listed in the Annex, parties could have in any case relied on the Regulation where those proceedings had to correspond to the definition of Article 1(1)<sup>72</sup>.

Following this suggestion, the Commission proposed a new procedure for amending Annex A, as follows: *'in order to trigger an amendment of Annex A, Member States shall notify the Commission of their national rules on insolvency proceedings which they want to have included in Annex A, accompanied by a short description. The Commission shall examine whether the notified rules comply with the condition set out in Article 1 and, where this is the case, shall amend Annex A by way of delegated act'*<sup>73</sup>. However, this proposal tackled the problem only partially, *i.e.* with regard to the inclusion in the Annex of proceedings not fitting in the scope of the Regulation; it left unresolved the issue of whether the Member States were obliged to notify all the proceedings which meet the conditions laid down by the new Regulation. Indeed, since the amending power was vested in the Commission at the Member States' request, Member States would have retained a 'negative' filter power and might have refrained from notifying a proceeding if they did not want so<sup>74</sup>.

### 1.3 The framework under the EIR-R

#### 1.3.1 As to the nature of Annex A ...

The choice made in the EIR-R is very clear-cut. Like the EIR, Article 1(1)(3) and Article 2(4) prescribe that the proceedings fulfilling the requirements of the new Article 1(1)(1) - *i.e.* the 'insolvency proceedings' in the meaning of the Regulation - are listed in Annex A. What makes the choice unambiguous are the statements contained in the new recital 9. On the one hand, insolvency proceedings which fulfil the conditions set out in the Regulation *'are listed **exhaustively** in Annex A'* (bold added for emphasis) and the Regulation *'should apply [to them] without any further examination by the courts of another Member State'*. On the other hand, *'national insolvency procedures not listed in Annex A should **not** be covered by this Regulation'* (bold added for emphasis). As it has been pointed out, the EIR-R has codified CJEU'S decisions rendered in the cases *Bank Handlowy* and *Radziejewski* on the binding force of Annex A<sup>75</sup>. Therefore, now it seems to be beyond dispute that the inclusion or exclusion of proceedings from Annex A acts as a definitive

<sup>72</sup> Hess in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 3.4.2.

<sup>73</sup> See Art. 47(2) of the *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*, COM/2012/0744 final - 2012/0360 (COD).

<sup>74</sup> Mucciarelli, Private international law rules in the Insolvency Regulation Recast: a reform or a restatement of the *status quo?*, ECFR 2016, 12.

<sup>75</sup> Mucciarelli, Private international law rules in the Insolvency Regulation Recast: a reform or a restatement of the *status quo?*, ECFR 2016, 11.

proof of whether it benefits from the provisions of the EIR-R: what is in the Annex, benefits from the Regulation; what is outside the Annex, does not<sup>76</sup>.

### 1.3.2 ... and as to the amendment of Annex A

The provision for periodically revising the Annexes contained in Article 45 of the EIR has not been recast; nor the original Commission's proposal of a revised Article 45 has been retained in the EIR-R. Therefore, **no provision** in the EIR-R deals with the amendments of Annex A. Article 90(1), dealing with the periodical reports which the Commission is required to produce on the application of the Regulation, does not mention the revision of the Annexes.

## 2. Evaluation

### 2.1 Legal issues

#### 2.1.1 The underlying policy

The relation established in the EIR-R between Article 1 and Annex A reflects a twofold policy. The apparent policy is to have privileged legal certainty and predictability over a continuous check of Article 1(1) requirements, which would have entailed an inevitable degree of uncertainty<sup>77</sup>. Indeed:

- (i) the EIR-R should not apply to proceedings not listed in Annex A: even if a national procedure (either brand-new or omitted on purpose from the Annex) were to fulfil all the requirements set out in Article 1(1), the EIR-R would not be applicable. The inclusion in the Annex is a **necessary condition** to apply the EIR-R;
- (ii) the application of the EIR-R to proceedings included in Annex A which do not fulfil the conditions set out in Article 1(1) should not be disregarded: the EIR-R should be applied without any further examination as to whether the conditions set

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<sup>76</sup> See *Bariatti and Corno*, Il Regolamento (UE) 2015/848 del Parlamento Europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione). Una prima lettura, *ilfallimentarista.it* 2015, 4 ff.; *Moss, Fletcher and Isaacs*, The EU Regulation on Insolvency Proceedings (2016), 8.475; *Bork and Mangano*, European cross-border insolvency law (2016), 2.50-2.51; *Wessels*, The EU Regulation on insolvency proceedings (recast); the first commentaries, *European Company Law* 2016, 129 ff.; *Garcimartin*, The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction, *papers.ssrn.com* 2016, 10; *Fletcher*, The European Insolvency Regulation recast: the main features of the new law, *Insolv. Int.* 2015, 2; *McCormack*, Something Old, Something New: Recasting the European Insolvency Regulation, *MLR* 2016, 126 ff.; *Van Calster*, COMIng, and here to stay. The Review of the European Insolvency Regulation, *papers.ssrn.com*, 2016, 6; *Benwick*, The EU Insolvency Regulation, Revisited, *Int. Insolv. Rev.* 2015, 5 ff.; and *Weiss*, Bridge over Troubled Water: The Revised Insolvency Regulation, *Int. Insolv. Rev.* 2015, 5 ff.

<sup>77</sup> See *Garcimartin*, The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction, *papers.ssrn.com* 2016, 10; and *Weiss*, Bridge over Troubled Water: The Revised Insolvency Regulation, *Int. Insolv. Rev.* 2015, 6.



out in Article 1(1) are met. The inclusion in the Annex is a **sufficient condition** to apply the EIR-R<sup>78</sup>.

The undercurrent policy is the Member States' reluctance to deprive themselves of their power to determine which proceedings have to be included in the scope of the Regulation<sup>79</sup>. In the light of the foregoing, it is no wonder that the original Commission's proposal of a revised Article 45 has been deleted. As it has been highlighted, according to that proposal the Commission would have acted 'as gatekeeper in relation to the addition of proceedings to Annex A': for this reason, it was not accepted by the Member States<sup>80</sup>. Under the EIR-R, Member States, on the one hand, (still) retain the exclusive power the inclusion of national procedures in the Annex; on the other hand, cannot be forced to stimulate an amendment of the Regulation in order to include new national procedures in Annex A.

### 2.1.2 The role of Article 1(1) of the EIR-R

In view of the established 'Annex approach', it is undisputable that Article 1(1) has become partially redundant; nevertheless, it may still play a role, acting as a blueprint that should be taken into account when new proceedings are in the process of being included in Annex A<sup>81</sup>. It has been underlined that the EIR-R ensures better congruence between Annex A and Article 1(1)<sup>82</sup>. Thus, ideally, Annex A and Article 1(1) are still intended not to show any discrepancies, as it was envisaged under the EIR according to the Virgós-Schmit report: all the national procedures meeting the conditions under Article 1(1) should - at least theoretically - be included in Annex A. Accordingly, Article 1(1) should be regarded as a substantive provision.

### 2.1.3 Amendments to Annex A

In the absence of a provision, it was stressed that the future amendments of Annex A will have to be adopted according to the ordinary legislative procedure set forth in Article 294

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<sup>78</sup> With reference to the EIR, *Panzani*, Scope of application of the Council Regulation 1346/2000, [iiiglobal.org](http://iiiglobal.org), asserted that 'it follows from Art. 1 (1) EIR that proceedings listed in Annex A that serve purposes that are not confined to insolvency law, only fall within the scope of the Insolvency Regulation if they are based on the debtor's insolvency'. By reason of the amended material scope of the recast, it is now more unlikely that proceedings are listed in Annex A which are out of the scope of Article 1(1); nonetheless, the relation between Annex A and Article 1(1) could not be that envisaged by the author: EIR-R should apply to proceeding not fulfilling the conditions provided for in Article 1(1).

<sup>79</sup> See *Van Calster*, COMIng, and here to stay. The Review of the European Insolvency Regulation, [papers.ssrn.com](http://papers.ssrn.com), 2016, 6, where the author observes that 'the Annex is the trigger and it is the Member States that pull it'; and *Panzani*, Scope of application of the Council Regulation 1346/2000, [iiiglobal.org](http://iiiglobal.org).

<sup>80</sup> *Moss, Fletcher and Isaacs*, The EU Regulation on Insolvency Proceedings (2016), 8.475 (note 1), where it can be read that 'a Commission proposal to act as gatekeeper in relation to the addition of proceedings to Annex A was not accepted'.

<sup>81</sup> *Mucciarelli*, Private international law rules in the Insolvency Regulation Recast: a reform or a restatement of the *status quo?*, ECFR 2016, 11.

<sup>82</sup> *Bork and Mangano*, European cross-border insolvency law (2016), 2.50.

TFEU<sup>83</sup>. This viewpoint found a prompt confirmation in practice. On 30 May 2016, the Commission issued the first ‘*proposal for a Regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings*’<sup>84</sup>, reacting to the initiative of Poland, which on 4 December 2015 notified the Commission of a substantial reform of its domestic law on restructuring, taking effect as of 1 January 2016, and requested to change the lists set out in Annexes A and B to the Regulation accordingly. In its proposal, the Commission has maintained that ‘since the Annexes are intrinsic part of the Regulation, their modification can **only** be achieved via the legislative amendment of the Regulation’ (bold added for emphasis). By the same token, in the explanatory statement attached to the ‘*draft European Parliament legislative resolution*’ on the said Commission proposal<sup>85</sup>, it has been underlined that ‘*the Annexes to the Regulation can be amended only by a regulation to be adopted following the ordinary legislative procedure under the legal base on which the original regulation was adopted, namely Article 81 TFEU*’.

#### 2.1.4 A tentative alternative interpretation

Some of the stakeholders have highlighted the drawbacks that may be brought about by the long and cumbersome procedure to make the EIR-R applicable to newly introduced national procedures. Hence, the (provocative) suggestion to consider the EIR-R applicable also to proceedings not listed in Annex A but which satisfy the conditions set out in Article 1.

Despite this interpretation is not an easy one, it can be noted that:

- (i) the only definite statement as to the relationship between Article 1(1) and Annex A is contained in a recital (n. 9). Article 1(1)(3) and Article 2(4) maintain that proceedings meeting the conditions set out in Article 1(1) are listed in Annex A, but do not expressly state that proceedings outside the Annex are also outside the EIR-R<sup>86</sup>; for this reason, they are not far from Article 2(1)(a) of the EIR, which raised the doubts then solved in *Bank Handlowy* and *Radziejewski* judgments. As it is acknowledged, recitals are not binding provisions, but only general expressions of purpose; therefore, they should have no legal value;

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<sup>83</sup> *Bariatti and Corno*, Il Regolamento (UE) 2015/848 del Parlamento Europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione). Una prima lettura, *ilfallimentarista.it* 2015, 4 ff.; and *Mucciarelli*, Private international law rules in the Insolvency Regulation Recast: a reform or a restatement of the *status quo?*, ECFR 2016, 12.

<sup>84</sup> ‘*Proposal for a Regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings*’ (COM/2016/0317 final - 2016/0159 (COD)).

<sup>85</sup> ‘*Draft European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings*’ (COM(2016)0317 – C8-0196/2016 – 2016/0159(COD)).

<sup>86</sup> *McCormack*, Something Old, Something New: Recasting the European Insolvency Regulation, MLR 2016, 127, noted, with regard to English schemes of arrangement (not included in Annex A, see below), that the fact that proceedings not listed in the Annex are outside the EIR-R ‘is stated with admirable clarity in recital 9 of the preamble but not in any substantive provision of the Regulation’.

- (ii) the statement that ‘*in respect of the national procedures contained in Annex A, this Regulation should apply without any further examination*’, may be interpreted in the sense that only for procedures included in Annex A the EIR-R applies without any further examination, whereas for procedures not included in the Annex the EIR-R could apply after an examination having shown that they meet the conditions set out in the Regulation.

However, this tentative interpretation is destined to remain an end in itself, in view of the clear background seen above.

## 2.2 Practical problems

### 2.2.1 The shortcomings of ordinary legislative procedure

The major problems will probably arise with regard to amendments to Annex A. Indeed, several Member States are working on the modernisation of their insolvency laws, also with the aim of implementing the Recommendation mentioned above. Since the ordinary legislative procedure is rather long (approximately two years), it is unlikely that the Council will be able to react promptly to the evolution of the Member States’ legislations and thus there will always be a transitory period during which new national proceedings in line with the conditions set forth in Article 1(1) will not be covered by the Regulation<sup>87</sup>. Furthermore, concerns have been raised that Member States could tend to be more reluctant to notify new national procedures due to the difficulty to amend the Annex. For these reasons, in general stakeholders agree that the procedure to amend Annex should be rendered more flexible<sup>88</sup>.

### 2.2.2 How to deal with the difficulty to amend Annex A

A proposal to face and, in a certain sense, to ‘bypass’, the difficulty to amend Annex A should be recommended, *i.e.* to qualify new national procedures as a sub-category of proceedings which are already listed in Annex A. This solution, however, is not always viable. Firstly, there are still Member States where no pre-insolvency proceedings exist yet, and thus no general category of such proceedings is listed in Annex A. Secondly, it is not granted that sub-categories of listed national proceedings are also included automatically (under the EIR it was uncertain

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<sup>87</sup> See, in this sense, *Wessels*, The EU Regulation on insolvency proceedings (recast); the first commentaries, European Company Law 2016, 129 ff. He stated: ‘the system of amending Annex A is not mirroring the vast changes taking place in the insolvency laws of many Member States. Contrary to what the Commission proposed (to change Annex A with the instrument of a delegated act) the system chosen is to amend the Regulation itself. Only looking at the tune that may cost (apart from political squabbling), it is the worst choice that could have been made’.

<sup>88</sup> However, *Monsérié-Bon*, Commentaire de l’article 1er, in Règlement (UE) n°2015/848 du 20 mai 2015 relatif aux procédures d’insolvabilité, Commentaire article par article, 2015, 35, stressed a value of the ordinary legislative procedure: it allows to establish a blocking minority in order to decide on the new procedures to be included in the Annex, so as to prevent from the introduction of proceeding not meeting the conditions of Article 1(1).

whether it applies also to the French *sauvegarde financière accélérée* and the Italian *amministrazione straordinaria delle grandi imprese in crisi*, that are considered as sub-categories of *sauvegarde* and *amministrazione straordinaria*, respectively, that were listed in Annex A). Thirdly, this solution may lead to a systematic circumvention of the exhaustive nature of Annex A<sup>89</sup>.

### 2.2.3 Two problematic cases

Doubts have been raised concerning whether the EIR-R applies to (i) existing national procedures that qualify as *species* of proceedings included in Annex A, and to (ii) national procedures, included in Annex A, that should change their content yet maintaining their name.

As to the first issue, the example can be made of Italian *concordato preventivo con continuità aziendale*, *concordato in bianco*, *accordi di ristrutturazione with financial creditors* and *convenzione di moratoria*<sup>90</sup>, that are not expressly included in Annex A. These proceedings clearly meet the conditions set forth in Article 1, and clearly constitute sub-categories of general proceedings included in Annex A (*concordato preventivo* and *accordi di ristrutturazione dei debiti*): therefore, no reasonable Italian judge would put them outside the scope of the EIR-R. Issues may arise with reference to the recognition abroad, since it cannot be excluded that foreign courts will refuse to recognize these proceedings because they are not expressly mentioned in the Annex. A solution seems to be provided by Article 4(1), second sentence, of the EIR-R, according to which ‘*the judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based and, in particular, whether jurisdiction is based on Article 3(1) or (2)*’. Since Italian courts opening the said proceedings should specify whether they are opening a main or a secondary proceeding, foreign courts requested to recognize the judgments opening the proceedings could not but comply with the Italian judgments, and grant automatic recognition.

The solution to the second issue is more difficult. The inclusion of a certain proceeding in the Annex is always done with reference to the shape and the content it had at the moment in which the same had been notified; thus, the risk exists that Member States radically change the content of a proceeding without subsequently changing the name of the proceeding. Obviously, this change would have practical relevance only when the proceeding (as resulting after the make-up) should not fit the requirements of Article 1(1) of the EIR-R. The only way to avoid the EIR-R to be applied to a proceeding listed in Annex A but no longer satisfying the conditions set out in Article 1(1) would be to allow the courts to verify the content of that proceeding. It must though be underlined that such a check, on the one side, would hinder the efficiency of the EIR-R, since it would compel courts to perform that ‘further examination’ which should be precluded under the new regime; on the other side, would raise the concern of the framework under which the judgment as to the meeting of the conditions of Article 1(1) is conducted (whether it should

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<sup>89</sup> See, for these remarks, *Bariatti*, ‘The Extension of the Scope of the EIR, in ‘EU Project ‘Implementation of the New Insolvency Regulation’: Kick-off conference’ (paper drafted for the conference which took place in Vienna on 17 April 2015), 6-7.

<sup>90</sup> Respectively regulated by Articles 186-*bis*, 161(6), 182-*septies* and 182-*septies*(5) of Italian Bankruptcy Law (*Regio decreto 16 March 1942, n. 267*).

be that of the Member State of opening or the Member State in which recognition is sought). For this reason, it seems to be advisable to *always* apply the EIR-R to the procedures listed in Annex A *‘without any further examination’*.

#### 2.2.4 The ‘duty’ to notify new national procedures

Some of the stakeholders have underlined that Member States will be under the ‘duty’ to notify the Commission of proceedings newly introduced in their national legislations. However, it has been pointed out that a ‘duty’ would exist only if Member States could be forced to include a certain proceeding in the Annex. Since no rule can be found which provides such an obligation (or power to oblige), it seems improper to talk of ‘duty’ in the strict sense of the term.

Albeit not subject to a duty, it is nevertheless recommendable that Member States promote the amendment of Annex A as soon as new national procedures fulfilling the requirements of Article 1(1) are introduced in the national legislation. It is also advisable that Member States delay the entry into force of the national provisions until the inclusion of the new proceedings in Annex A.

### 3. Theses and recommendations

In light of the above, the following recommendations should be issued.

**3.1** Pursuant to Recital 9, proceedings covered by Regulation (EU) No 2015/848 are listed exhaustively in Annex A.

Conversely, national insolvency proceedings not listed in Annex A should fall outside the scope of the Regulation.

**3.2** Courts requested to open proceedings included in Annex A should not be permitted to examine whether they comply with the Regulation. At the same time, courts of Member States other than that in which those proceedings are opened should recognize and enforce judgments opening them without any further examination as to whether they meet the conditions set out in the Regulation.

Consequently:

- proceedings listed in Annex A automatically fall under the scope of the Regulation;
- proceedings listed in Annex A should be deemed to fall within the scope of the Regulation even if they do not meet the conditions set out in Article 1(1).

**3.3** Accordingly, courts of Member States other than that in which proceedings are opened should recognize and enforce without any further examination also:

- judgments opening proceedings whose name cannot be found in Annex A, for they constitute sub-categories of proceedings listed in Annex A;
- judgments opening proceedings whose contents have been so radically changed that they no longer meet the requirements laid down in Article 1(1).

**3.4** Although Annex A is an exhaustive list, Article 1 should be interpreted as a substantive provision.

In particular, it should function as a blueprint to be taken into account when deciding on the procedures to be included in Annex A.

**3.5** Former Article 45 (*‘Amendment of the Annexes’*) provided for a simplified procedure of amendment of Annex A.

This provision has not been recast in the Regulation.

In the absence of a specific rule, the amendment of Annex A should follow the formal ordinary legislative procedure, set forth in Article 294 TFEU.

**3.6** It is likely that the formal ordinary legislative procedure will be too long and cumbersome to react flexibly and promptly to the new national procedures which are envisaged to be introduced in the national legislations – especially with the aim of implementing the *‘Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency’*.

In order to tackle that shortcoming, Member States should, where possible without it constituting a circumvention of the exhaustive nature of Annex A, qualify new proceedings that will be introduced in their national legislations as a sub-category of proceedings that are already listed in Annex A. Also in this case, courts should apply the Regulation without any examination.

When it is not possible to update Annex A resorting to the said solution, the formal ordinary legislative procedure to amend the Regulation should be adopted.

**3.7** It is better to hold that Member States are not under any obligation to notify the Commission of new national proceedings fulfilling the requirements set out in Annex A.

Nonetheless, it is recommended that Member States should request to change their own list set out in Annex A as soon as a new procedure is introduced in the national legislation. Moreover, if possible, they should delay the entry into force of the national provisions until the inclusion has been reached.

**3.8** Member States should request to change their own list set out in Annex A with reference only to national procedures which comply with the conditions set forth in Article 1(1) of the Regulation.

## C. The boundary between the European Insolvency Regulation (Recast) and the Brussels I Regulation (Recast)

Article 1(1), Recital 7, Recital 16 EIR-R; Article 1(2)(b) Brussels *Ibis*

### 1. Legal framework

#### 1.1 Introduction

The demarcation between the Judgment Regulation (Brussels I<sup>91</sup> and then Brussels Recast Regulation<sup>92</sup> – hereafter Brussels *Ibis*) and the EIR has always been one of the most controversial problems related to cross-border insolvencies<sup>93</sup>.

Yet, according to CJEU's decisions (some of which are quite recent), the relationship between the two instruments is a very definite one: the Judgment Regulation and the Insolvency Regulation should ‘dovetail’ (*i.e.* to slot into one another leaving no spare space<sup>94</sup>). In one of the most recent judgments dealing with the question, in fact, one can read: ‘... *the Court has already held that Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation in so far as they come under ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 ...*’<sup>95</sup>.

However, a different view was taken by the CJEU in *German Graphics* decision<sup>96</sup>, in which it was established that ‘*there are some judgments which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001*’. The idea that the alignment between the two Regulations is far from being perfect emerges, by the way, also from the Virgós-Schmit Re-

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<sup>91</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>92</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>93</sup> Laukemann in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 4.2.1.

<sup>94</sup> Van Calster, COMIng, and here to stay. The Review of the European Insolvency Regulation, papers.ssrn.com, 2016, 7.

<sup>95</sup> CJEU, Case C-649/13, *Nortel Networks*, judgment of 11 June 2015, ECLI:EU:C:2015:384, para. 21; but similar wording is used in *Nickel & Goeldner*, judgment (CJEU, Case C-157/13, *Nickel & Goeldner*, judgment of 4 September 2014, ECLI:EU:C:2014:2145). See also *F-Text SLA*, judgment (CJEU, Case C-213/10, *F-Text SLA*, judgment of 19 April 2012, ECLI:EU:C:2012:215).

<sup>96</sup> CJEU, Case C-292/08, *German Graphics*, judgment of 10 September 2009, ECLI:EU:C:2009:544, para. 17.

port<sup>97</sup>. Indeed, it could be said that the two Regulations perfectly dovetail only if ‘*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*’ (that is, matters which are carved out from the scope of Brussels I and Brussels *Ibis*, pursuant to Article 1(2)(b)) coincided with the scope of the EIR, and *vice versa*, if the scope of the EIR could exhaustively and entirely be defined by referring to that *formula*.

Practice has shown that such ideal relationship cannot (always) be established. In fact, dovetailing had to face with the three following circumstances: (i) the thriving in the national legislations of pre-insolvency and hybrid proceedings; (ii) the judicial assertion of the binding force of Annex A; and (iii) the judicial building of the notion of ‘insolvency-related actions’.

## 1.2 Obstacles to the dovetailing

### 1.2.1 Pre-insolvency proceedings and hybrid proceedings

Most pre-insolvency and hybrid proceedings (those which are not listed in Annex A to the EIR) are outside the scope of the EIR, because do not fulfil the requirements set out in Article 1(1).

According to an opinion, clearly inspired by the theory of the dovetailing, these proceedings fall in the scope of Brussels I, insofar as the renegotiation of private and commercial debts qualifies as a civil and commercial matter<sup>98</sup>. The jurisdiction for the intervention of a court approving the restructuring of debts must be determined by Articles 2-24 of Brussels I (4-26 of Brussels *Ibis*): in particular Articles 2, 5(1), 6(1) and 22(2) (4, 7(1), 8(1) and (24(2) of the recast Regulation) could be relevant. As far as recognition and enforcement are concerned, debt restructuring arrangements (i) where formally approved by a court decision, are to be considered ‘judgments’ in the sense of Brussels I and Brussels *Ibis* and recognized according to Article 32 of Brussels I (Article 34 of Brussels *Ibis*)<sup>99</sup>; (ii) where not formally approved by a court, must be recognized as a settlement under Article 57 of Brussels I (Article 58 of Brussels *Ibis*): in this case, however, the substantive effects of the arrangement on the regulated debts depend on the applicable conflict of law rules - to be determined according to the Rome I Regulation<sup>100</sup>.

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<sup>97</sup> Albeit maintaining that insolvency-related actions ‘*should be considered subject to the Convention on insolvency proceedings and to its rules of jurisdiction*’ in order ‘*to avoid unjustifiable loopholes between the two Conventions*’ (para. 77), it states that proceedings fall ‘*within the scope of the Convention [on insolvency proceedings, editor’s note] only if [they are] based on the debtor’s insolvency (where appropriate the 1968 Brussels Convention will be applied)*’ (bold added for emphasis – para. 49(b)). See also the ‘Schlosser Report’ (Report on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice), which stated that ‘*the two Conventions were intended to dovetail almost completely with each other*’.

<sup>98</sup> See Hess, in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 3.4.1, note 231.

<sup>99</sup> See Article 32 of Brussels I (2(a) of Brussels *Ibis*: ‘*any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*’.

<sup>100</sup> See Hess, in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 3.4.1. The option has been suggested to apply the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) to pre-insolvency and hybrid proceedings. Since these



However, it has been observed that Brussels I does not offer appropriate and balanced solutions. Firstly, its terminology refers to ordinary civil claims, based on rules formulated in terms of contentious or adversary proceedings between a claimant and a defendant ('be sued', 'contracts', 'defendants')<sup>101</sup>. Pre-insolvency and hybrid proceedings are of a different nature, as they are not based on the structure of claimant versus defendant: the judge does not rule on a dispute existing between the parties, but intervenes to ensure that the shifting to the majority consent is not unreasonable. In other words, pre-insolvency and hybrid proceedings barely seemed to qualify as proceedings for the purpose of the application of Brussels I<sup>102</sup>. Secondly, the rules on jurisdiction of Brussels I do not appear to be suitable for these kinds of proceedings. Since Articles 2, 5(1) and 6(1) of Brussels I (4, 7(1), 8(1) of Brussels I *bis*) are based upon the notion of defendant and the proximity principle, *i.e.* the domicile of the defendant or the link with the subject matter of the litigation, they do not seem to fit in the special features of pre-insolvency and hybrid proceedings, where there is no defendant. By the same token, it is questionable whether Article 22(2) of Brussels I (Article 24(2) of Brussels I *bis*) - which establishes exclusive jurisdiction of the courts of a Member State in proceedings having as their object 'the dissolution of companies' - is applicable, since the existence of a link between debt adjustment and dissolution of companies is questionable<sup>103</sup>. In line with this criticism, the CJEU, in *Radziejewski* judgment<sup>104</sup>, affirmed that a Swedish debt relief proceeding (which belongs to the category of pre-insolvency proceedings providing for a debt adjustment in relation to consumers and self-employed persons, and is not included in Annex A) did not fall within the scope of Brussels I, since the authority which adopted the debt relief decision at issue could not be classified as a 'court or tribunal' within the meaning of Article 32 of that instrument.

Even if it was possible to dispel these doubts, a major obstacle exists to consider pre-insolvency and hybrid proceedings covered by Brussels I: (many) pre-insolvency and hybrid proceedings can be considered '*judicial arrangements*', '*compositions*', or also forms of '*analogous*

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proceedings generally imply an amendment of the terms and conditions of a contract, in fact, there are grounds to argue that they are subject to *lex contractus*. It is true that they amount to a very peculiar way of amending contracts, but in the Rome I Regulation there are no carve-outs for cases where the amendments are made by means of collective consent sanctioned by a court and aimed at preventing the insolvency of the debtor. Based on this approach, it is possible to link procedural aspects to the applicable law: on the one hand, the rules to determine the competent court should derive from the law applicable to the amendments of creditors' rights; on the other hand, recognition of such proceedings should be governed by conflict of law rules. For these remarks, see *Garçimartin*, The review of the Insolvency Regulation: Hybrid procedures and other issues, <http://www.eir-reform.eu/uploads/papers/PAPER%206-1.pdf>, 133, who underlines that this solution '*is not fitting from a policy – or lege ferenda – perspective*'.

<sup>101</sup> *Linna*, Cross-Border Debt Adjustment - Open Questions in European Insolvency Proceedings, *Int. Insolv. Rev.* 2013, 26.

<sup>102</sup> *Garçimartin*, The review of the Insolvency Regulation: Hybrid procedures and other issues, <http://www.eir-reform.eu/uploads/papers/PAPER%206-1.pdf>, 133.

<sup>103</sup> The Rome I Regulation proved even less suitable. Given that debt adjustment proceedings basically imply the amendment of a contract, it was suggested that they were subject to *lex contractus* (see, for instance, Article 12(1) of the Rome I Regulation, which states that 'the various ways of extinguishing obligations' are governed by the *lex contractus*). Following this approach, it was also suggested to link procedural aspects, *i.e.* jurisdiction and recognition, to the applicable law. The shortcoming of this solution was that only creditors whose claims were governed by, e.g., English law, would have been subject to an English debt adjustment proceeding; as a result, foreign creditors would have always been able to uphold their claims and to jeopardize the proceeding.

<sup>104</sup> CJEU, Case C-461/11, *Ulf Kazimierz Radziejewski*, judgment of 8 November 2012, ECLI:EU:C:2012:704.

*proceedings*’; thus, they should fall within Article 1(2)(b) exemption. This is the proof that the formula ‘*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*’ provided in Article 1(2)(b) of Brussels I and the definition contained in Article 1(1) of the EIR do not cover a coextended area (the former’s is broader).

### 1.2.2 Annex A

As seen above, in the *Bank Handlowy* and *Radziejewski* judgments the CJEU established that only proceedings which are listed in Annex A fall within the scope of the EIR. Following these decisions, the scope of the EIR is no longer circumscribed by Article 1(1) definition, but ‘corresponds’ with the proceedings listed in Annex A. It has been pointed out that this way to define the scope of application has arguably upset any dovetailing that might have been intended: the Brussels Convention, in fact, would have not envisaged the Member States being in the definitional driver’s seat of the EIR<sup>105</sup>. Therefore, even if the formula ‘*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*’ provided in Article 1(2)(b) of Brussels I and the definition contained in Article 1(1) of the EIR covered a coextended area (but this is not the case), no dovetailing would be guaranteed anyway, since the EIR may include in its scope all the proceedings which Member States choose to notify, whatever their contents may be.

### 1.2.3 The notion of ‘insolvency-related’ actions

‘Insolvency-related’ actions are the name with which actions ‘in some measure’ linked with insolvency proceedings (*e.g.* avoidance actions) are indicated. They are ordinary civil actions, in which a defendant is sued by a plaintiff before a court, and that according to the general rules should be brought before the courts of the State in which the former is domiciled; at the same time, they are so strictly intertwined with insolvency proceedings, that in national legislations they are often to be brought before the courts opening insolvency proceedings. No specific rule concerning international jurisdiction for these actions is provided in the EIR: according to the idea of the dovetailing, they would *consequently* be subjected to Brussels I. By contrast, Article 1(2)(b) of Brussels I excludes from its scope not only ‘*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions*’, but also ‘*analogous proceedings*’; furthermore, Article 25(2) of the EIR grants automatic recognition to ‘*judgments deriving directly from the insolvency proceedings and which are closely linked with them*’.

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<sup>105</sup> *Van Calster*, COMIng, and here to stay. The Review of the European Insolvency Regulation, papers.ssrn.com, 2016, 8.

In the light of this, uncertainties exist as to the *forum* having jurisdiction on these actions. Some national courts have applied their national provisions on jurisdiction<sup>106</sup>. Other national courts have deemed Brussels I applicable, insofar as the exemption of Article 1(2)(b) has been considered as covering only insolvency proceedings<sup>107</sup>. On the contrary, the CJEU has always stated that insolvency-related actions should be brought before the courts of the Member State in which insolvency proceedings have been opened. This principle was for the first time asserted in the *Gourdain* decision<sup>108</sup>, whereby the CJEU established that ‘*if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the [Brussels] Convention, [...] they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the ‘liquidation des biens’ or the ‘règlement judiciaire’*’<sup>109</sup>; thus, correlatively, it established that decisions not ‘so closely’ linked with insolvency proceedings should be included in the scope of Brussels Convention (then Brussels I). The *rationale* underpinning *Gourdain* was confirmed also with regard to the EIR, for the first time in the *Seagon* case<sup>110</sup>, where the CJEU reproduced the definition of insolvency-related actions which had been adopted in the former<sup>111</sup>; however, soon the puzzling issue emerged as to how to interpret that definition. In *German Graphics* case<sup>112</sup>, the CJEU suggested that Brussels I should be given as wide a reading as possible and that the EIR should be interpreted in a restrictive fashion<sup>113</sup>. In practice, however, often doubts have arisen as to whether a certain action fall legitimately within the jurisdictional rules of EIR, of Brussels I or of either Regulation. In *F-Tex SLA* case, the CJEU was expressly asked to say whether the jurisdiction conferred by the EIR to hear and determine insolvency-related actions constitute exclusive jurisdiction, but it declined to answer, stating that this was not necessary for a decision in the

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<sup>106</sup> It has been noted that this thesis is not considered to be persuasive, because national laws differ from each other and because this diversity could determine conflicts of jurisdiction: see *Bork and Mangano*, European cross-border insolvency law (2016), 3.69; and *Carballo Pineiro, Vis attractiva concursus in the European Union: its development by the European Court of Justice*, indret.com, 7.

<sup>107</sup> ‘*However, this position was considered to be inefficient, because detaching the so-called connected actions from the insolvency proceedings meant that there would be various for a: namely, one forum for the insolvency proceedings (the so-called forum concursus) and one or more for a provided by the Brussels I Regulation for the one or more related actions*’: thus, *verbatim*, *Bork and Mangano*, European cross-border insolvency law (2016), 3.69.

<sup>108</sup> This decision could be considered as a precedent *avant la lettre* because at the time this decision was rendered the EIR’s existence had only been envisaged: see *Bork and Mangano*, European cross-border insolvency law (2016), 3.70.

<sup>109</sup> In this decision the CJEU ruled that the action brought by the liquidator of an insolvent company for the declaration of enforceability of a judgment concerning a kind of wrongful trading claim regulated by French law - *action en comblement du passif* - was directly deriving and closely linked with insolvency and must be brought before the courts of the Member State in which insolvency proceedings have been opened).

<sup>110</sup> CJEU, Case C-339/07, *Christopher Seagon*, judgment of 12 February 2009, ECLI:EU:C:2009:83.

<sup>111</sup> Recital 6 of the EIR explains that it applies also to ‘*judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings*’.

<sup>112</sup> CJEU, Case C-292/08, *German Graphics*, judgment of 10 September 2009, ECLI:EU:C:2009:544.

<sup>113</sup> The recitals 7 and 15 in the preamble to Brussels I Regulation ‘*indicate the intention on the part of the Community legislature to provide for a broad definition of the concept of ‘civil and commercial matters’ referred to in Article 1(1) of [said] Regulation [...] and, consequently to provide that the article should be broad in its scope*’; such an interpretation was also supported ‘*by the first sentence of the sixth recital in the preamble to Regulation No 1346/2000, according to which that regulation should, in accordance with the principle of proportionality, be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. Consequently, the scope of application of Regulation No 1346/2000 should not be broadly interpreted*’ (para. 23-25).

case<sup>114</sup>. In conclusion, sometimes insolvency-related actions have been considered as falling in a gap between the EIR and Brussels I; more often, it has turned out difficult to distinguish when an action ‘to a some degree’ connected with an insolvency proceeding constitutes an action directly deriving and closely linked to insolvency proceedings, thus falling within the scope of the EIR; moreover, the question remains whether the EIR and Brussels I may overlap, *i.e.* whether (some) insolvency-related actions can be brought both before the courts of *forum concursus* and before the courts where the defendant is domiciled.

### 1.3 The EIR-R

The relationship between Brussels *Ibis* and the EIR-R should take into account the following elements:

- (i) the material scope of Brussels *Ibis* (*‘civil and commercial matters’*); the definition of ‘judgment’ provided in its Article 2(a) (*‘any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court’*); the rules on jurisdiction provided in Brussels *Ibis* (in particular Article 4, 7(1), 8(1) and 24(2)); the rules on recognition and enforcement, provided in chapter III;
- (ii) Article 1(2)(b) of Brussels *Ibis*, which - as said above - carves out from its scope *‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’*;
- (iii) Article 1(1) of the EIR-R, that has loosened its requirements in order to include within its scope pre-insolvency proceedings, hybrid proceedings and proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons;
- (iv) Annex A to the EIR-R, Article 1(1)(2), Article 2(4) and recital 9 of the EIR-R, which clarify that all the proceedings to which the EIR-R is applicable are listed in Annex A, and that the EIR-R is applicable only to these proceedings;
- (v) Article 6 of the EIR-R, which confers jurisdiction to hear and determine any action which derives directly from the insolvency proceedings and is closely linked with them to the courts of the Member State within the territory of which insolvency proceedings have been opened. Article 6(2) states that such actions may be brought before the courts of the Member State within the territory of which the defendant (or one of the defendants is domiciled) when they are related to an action in civil and commercial matters (see also Recital 35);
- (vi) Recital 7 to the EIR-R, that after having reproduced the exemption of Article 1(2)(b) of Brussels *Ibis* (to which *‘actions related to such proceedings’* have been added)

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<sup>114</sup> CJEU, Case C-213/10, *F-Tex SLA*, judgment of 19 April 2012, ECLI:EU:C:2012:215, para. 50.

and having established that proceedings covered by this exemption ‘*should be covered by this Regulation*’, states that ‘*the interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012*’;

- (vii) Recital 16 to the EIR-R, according to which this Regulation ‘*should apply to proceedings which are based on laws relating to insolvency*’; ‘*however proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency*’.

## 2. Evaluation

### 2.1 Legal issues

#### 2.1.1 Setting-up the relationship between Brussels Ibis and the EIR-R

There are two possible ways to combine the elements listed in para. 1.3:

- (i) a first way acknowledges the binding role of Annex A, as well as the principles of the dovetailing between the two regulations and of the broad interpretation of the scope of Brussels *Ibis*, as established in the CJEU’s judgments. Proceedings listed in Annex A are within the scope of the EIR-R; proceedings which meet the conditions laid down in Article 1(1) of the EIR-R but are not listed should fall in the scope of Brussels *Ibis*. Per this interpretation, Brussels *Ibis* and the EIR-R act as communicating vessels<sup>115</sup>: whatever is excluded from Annex A should fall within the scope of Brussels *Ibis*;
- (ii) a second way to establish the relationship is based on the following assumptions: a) the scope of the EIR-R encompasses the proceedings included in Annex A, whereas it does not encompass the proceedings which fulfil the criteria set out in Article 1(1) but are not included in the Annex; b) the exclusion of a national proceeding from Annex A does not automatically lead to its inclusion in the scope of Brussels *Ibis* (see Recital 7 of the EIR-R), since the area covered by Article 1(1) of the EIR-R and the area covered by the exemption provided for in Article 1(2)(b) of Brussels *Ibis* are not exactly the same and since proceedings outside Annex A do not *automatically* satisfy the requirements to fall within the scope of Brussels *Ibis* (see above, para. 1.2.1). These assumptions lead to a twofold outcome: firstly, proceedings should be deemed characterised as ‘insolvency proceedings’ if they fall in

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<sup>115</sup> See *Kuipers*, Schemes of arrangement and voluntary collective redress: a gap in the Brussels I Regulation, *JprivInt’IL* 2012, 228.

the material scope of the EIR-R: Annex A plays a role of ‘positive integration’, enabling States to benefit from a *safe niche* of automatic recognition and ‘curing’ possible deficiencies for the purposes of characterisation and the obligation by the other Member States to recognize their insolvency nature, but does not also play a role of negative integration, turning into non-insolvency all that which is outside Annex A<sup>116</sup>; secondly (and consequently), whatever dovetailing might have been conceived, it seems not to be maintained in practice.

### 2.1.2 Loopholes

The second way is by far the most appropriate to describe the current relationship between the EIR-R and Brussels *Ibis*: according to the vast majority of the stakeholders to whom the questionnaire prepared within this research project has been submitted, in fact, there are (still) regulatory loopholes between the EIR-R and Brussels *Ibis*. In particular, two cases of possible loopholes may be envisaged:

- (i) proceedings which are not listed in Annex A but meet the conditions set out in Article 1(1) of the EIR-R. On the one hand, these proceedings are ‘insolvency proceedings’, but fall outside the EIR-R because the corresponding Member State has opted not to include them in Annex A - or because the ordinary legislative procedure to amend Annex A is underway. On the other hand, they fall outside Brussels *Ibis* because fall within the exemption of Article 1(2)(b). As a consequence, jurisdiction should be determined and recognition be sought (unless there is an applicable convention) according to the domestic rules of insolvency law or of private international law. This outcome may have adverse relevant impact. Firstly, when a rescue arrangement is confirmed by the court, it may not be recognizable or enforceable in other Member States. As a result, creditors might be able to ‘free ride’ and to recover full debt amounts in other Member States. Secondly, when no recognition or enforcement can be obtained in other Member States, it may not be possible to collect the scheduled payments by compulsory methods in those Member States; thus, the debtor might be able to avoid its liabilities merely by moving to another State. These shortcomings encourage the inclusion in Annex A of proceedings falling in this regulatory gap. Also from this point of view, Article 1(1) of the EIR-R should be considered a substantive provision: since the proceedings fulfilling the conditions set out in it (but not included in the Annex) must be deemed falling in an unpleasant regulatory loophole, it should also play a role in ‘promoting’ their inclusion in the most fitting regulatory environment, *i.e.* the EIR-R;

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<sup>116</sup> Carrasco Perera and Torralba Mendiola, UK “schemes of arrangement” are “outside” the scope of the European Regulation on Insolvency Proceedings. What does “outside” actually mean?, <http://www.gomezacebo-pombo.com/media/k2/attachments/uk-schemes-of-arrangement-are-outside-the-scope-of-the-european-regulation-on-insolvency-proceedings-what-does-outside-actually-mean.pdf>, 2.

- (ii) proceedings which are not listed in Annex A, are based on general company law and are not designed exclusively for insolvency situations, but meet the conditions set out in Article 1(1). This possible loophole has been deliberately created having in mind UK *schemes of arrangement*, whose regulation is contained in a corporate statute and which can also be used for non-insolvency purpose (mainly to seek to transfer control of a company as an alternative to a takeover offer)<sup>117</sup>. These proceedings have allowed to restructure huge foreign companies having a ‘*sufficiently close connection*’ with England and Wales, thus ‘*enhancing the reputation of the UK as a leading commercial centre*’<sup>118</sup>; therefore, if they had been included in the EIR-R, they would have necessarily been less attractive, since the COMI requirement would have been applicable. *Schemes* are not included in Annex A: this would have sufficed to exclude them from the scope of the EIR-R; however, the UK lobbied for (and succeeded in) having inserted Recital 16 in order to emphasize such exclusion. By means of Recital 16, *schemes* seem not even eligible for a future inclusion in the Annex.

The question arises whether schemes fall in a ‘real’ loophole or fall within the scope of Brussels *Ibis*. In order to answer this question, it is necessary to establish whether *schemes* are insolvency proceedings *notwithstanding* Recital 16<sup>119</sup>: in fact, if they are not insolvency proceedings, there would be room for arguing that they fall in the scope of Brussels *Ibis*; by contrast, if they are insolvency proceedings, they should be deemed as falling in a regulatory loophole. According to the prevailing opinion, Recital 16 should not contribute to delineate the material scope of application of the EIR-R: if the requirement of ‘exclusivity’ were really an essential one, firstly, it should have been included in the body of the articles<sup>120</sup>; secondly, it would be easy

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<sup>117</sup> Companies Act 2006, Part 26. According to Section 895, a *scheme* is ‘*a compromise or arrangement between a company and its creditors, or any class of them, or its members, or any class of them*’. A *scheme* involves three stages: (i) an arrangement between the company and its members/creditors is proposed by the board of the company; (ii) a meeting of the members/creditors, summoned in order to seek approval of the *scheme*, in which members/creditors meet in classes to consider and vote on the *scheme*; (iii) the sanction of the *scheme* by the court, which requires that all of the relevant classes have approved it and a majority in number representing 75% in value has been gathered. For further information, see *Payne*, Cross-Border Schemes of Arrangement and Forum Shopping, papers.ssrn.com, 2 ff.

<sup>118</sup> See *City of London Law Society (CLLS)*, Response to Proposed changes to the European Insolvency Regulation: Call for Evidence, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279289/insolvency-lawyers-association-evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279289/insolvency-lawyers-association-evidence.pdf), 25 February 2013.

<sup>119</sup> We have assumed *a priori* that *schemes*, when proposed to effect a reorganization of the debt capital by a company in a situation of financial distress, meet the requirements of Article 1(1) of the EIR-R. As a matter of fact, in this situation *schemes* pursue the objective of rescue and adjustment of debt; make the assets and affairs of the debtor subject to control or supervision by a court; are collective for the purpose of the EIR-R, as - being aimed at rescuing - can involve also only a significant part of a debtor's creditors, especially financial ones (but see *McCormack*, Reforming The European Insolvency Regulation: A Legal And Policy Perspective, *JprivInt'IL*) 2014, 48 (note 23), who states that *schemes* are not necessarily collective); finally, can be conducted as proceeding described in Article 1(1)(c) of the EIR-R. A further element in the sense that *schemes* are insolvency proceedings is that they are capable of recognition in the United States under Chapter 15 of the U.S. Bankruptcy Code.

<sup>120</sup> *Carrasco Perera and Torralba Mendiola*, UK “schemes of arrangement” are “outside” the scope of the European Regulation on Insolvency Proceedings. What does “outside” actually mean?, <http://www.gomezacebo-pombo.com/media/k2/attachments/uk-schemes-of-arrangement-are-outside-the-scope-of-the-european-regulation-on-insolvency-proceedings-what-does-outside-actually-mean.pdf>, 4.

for Member States to escape the COMI requirement, by putting a proceeding in a corporate statute (see below, para. 2.2.1). For these reasons, it is better to hold that *schemes of arrangements* proposed by debtors in financial difficulties to restructure their debts fit the definition of ‘insolvency proceedings’: consequently, they should be considered as falling in a regulatory loophole between the EIR-R and Brussels *Ibis*<sup>121</sup>. Accordingly, jurisdiction should be determined and recognition be sought (unless there is an applicable convention) according to the domestic rules of insolvency law or of private international law.

Besides, even if *schemes* were to be regarded as a ‘civil and commercial matter’<sup>122</sup>, many doubts would arise as to whether Brussels *Ibis* would be fit for *schemes*. In fact, English courts have applied jurisdiction criteria in a *sui generis* fashion, arguing that Brussels I does not impact on their jurisdiction to convene and sanction *schemes*<sup>123</sup>. As for recognition, there has been some uncertainty as to whether a decision of a court sanctioning a *scheme* should be regarded as a judgment for the purposes of Brussels I, and as to whether such judgment should be considered as emanated from ‘a judicial body of a Contracting State deciding on its own authority on the issues between the parties’; however, it must be underlined that the Bundesgerichtshof (BGH) determined, *obiter dicta*, that decision sanctioning a *scheme* should be recognized under Brussels I because they have potential adversarial nature and because the term ‘judgment’ has a broad meaning within that Regulation<sup>124</sup>.

As it has been pointed out with regard to proceedings falling in the first loophole, the application of domestic insolvency or private international law is liable to make more difficult the recognition abroad of *schemes* in respect of foreign companies. English courts have been reluctant to affirm jurisdiction on *schemes* concerning foreign companies in cases where the recognition abroad was uncertain<sup>125</sup>: if they are not legally effective in the relevant foreign countries, creditors could always pursue their contractual claims in foreign courts and hinder the fairness of the *scheme*, as well as initiate separate insolvency or restructuring process abroad. In order to side step the difficulties associated with the recognition of *schemes* involving foreign companies, the practical solution has been proposed for companies seeking to make use of a *scheme* to re-

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<sup>121</sup> A similar approach had been adopted in the English case *DAP Holding NV* ([2005] EWHC 2092 (Ch)): according to this decision, *schemes* can be regarded as ‘judicial arrangements, compositions and analogous proceedings’, and therefore they fall outside the scope of Brussels *Ibis*. It has been underlined that ‘this approach would point to a lacuna in the law, such that *schemes* (both solvent and insolvent) fall outside both Regulations. In the event of a lacuna of this kind each Member State would then apply its own jurisdictional rules to this issue’ (Payne, Cross-Border Schemes of Arrangement and Forum Shopping, papers.ssrn.com, 17).

<sup>122</sup> In the *Rodenstock* case ([2011] EWHC 1104 (Ch)), Briggs J took the view that the court’s sanction of a *scheme* in relation to a solvent company fell within the scope of Brussels I; he left open the question whether *schemes* involving insolvent companies could fall within Brussels I as well. However, the approach adopted as to solvent companies (with reference to which he noted that the exemption of Article 1(2)(b) does not exclude from the scope of Brussels I matters which do not fall within the EIR or that are not connected with bankruptcy or insolvency) points to potentially different outcomes for *schemes* involving solvent and insolvent companies. See Payne, Cross-Border Schemes of Arrangement and Forum Shopping, papers.ssrn.com, 18.

<sup>123</sup> See *Rodenstock*, [2011] EWHC 1104 (Ch).

<sup>124</sup> BGH, *Equitable Life*, judgment of 15 February 2012, IV ZR 194/09.

<sup>125</sup> Hence, the practice of foreign applicants to deposit expert statements concerning the recognition of the *scheme* in the State where the company has its COMI: see *Vaccarella*, Recognition in Italy of an English Order endorsing an agreement between a company and its creditors. *Parere pro veritate*, Int’l Lis, 2014, 52 ff.



quire creditors wishing to take the benefit of it to sign an undertaking that they agree to be bound by the restructuring and by the *scheme*<sup>126</sup>.

In any case, the conundrum whether *schemes* fall in a regulatory gap or not may be soon nugatory. Once the withdrawal of UK from the European Union has occurred (if it occurs), in fact, in the absence of new instruments, provisions on jurisdiction and recognition contemplated in Brussels *Ibis* will no longer be available, and *schemes* will necessarily have to be governed by the domestic law of each State.

### 2.1.3 Overlaps

The question arises whether overlaps between the EIR-R and Brussels *Ibis* are possible: see below Section IV, para. 2.1.3.

## 2.2 Practical problems

### 2.2.1 Circumvention of the scope of the EIR-R by putting insolvency rules in general company law

It has been argued above that Recital 16 should not contribute to identify the notion of ‘insolvency proceedings’: proceedings which meet the requirements laid down in Article 1(1) of the EIR-R should be deemed as falling within the material scope of the EIR-R also when are based on general company law and are not designed to tackle exclusively insolvency situations. This solution seems the most fitting in order to avoid the risk that Member States escape the COMI requirement in respect of new national proceedings. If the ‘condition’ provided in Recital 16 were to be interpreted as a substantial requirement, a Member State which is interested in applying a national proceeding regardless of the COMI being in the State could include it in the *corpus* of corporate law, so as to not be under the duty (if any, see above Section II, para. 2.2.4) to notify it to the Commission for the inclusion in Annex A, and also with the aim that successive governments refrain from notifying. If Recital 16 were to be interpreted as a substantial requirement, most importantly, national courts may be inclined to consider such proceedings covered by Brussels *Ibis*, on the basis of the concept of dovetailing, which would hardly tolerate proceedings systematically outside either Regulation. The effect would be that those proceedings might anyway benefit from automatic recognition abroad, regardless of the COMI requirement.

### 2.2.2 Recital 16 and insolvency-related actions

The question arises whether Recital 16 concerns also insolvency-related actions: see below, Section IV, para. 2.1.2.

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<sup>126</sup> See *Payne*, Cross-Border Schemes of Arrangement and Forum Shopping, papers.ssrn.com, 28.

### 3. Theses and recommendations

In light of the above, the following recommendations should be issued.

**3.1** According to its Article 1(2)(b), Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shall not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

Pursuant to Recital 7, Regulation (EU) No 2015/848 and Regulation (EU) No 1215/2012 should be interpreted so as to make the scope of the two instruments to dovetail.

Always according to Recital 7, however, the mere fact that a national procedure is not listed in Annex A to Regulation (EU) No 2015/848 should not imply that it is covered by Regulation (EU) No 1215/2012.

**3.2** Two possible loopholes may be identified:

- proceedings which meet the conditions set out in Article 1(1) of Regulation (EU) No 2015/848 but are not listed in Annex A;
- proceedings based on general company law not designed exclusively for insolvency situations which meet the conditions set out in Article 1(1) of Regulation (EU) No 2015/848 and are not listed in Annex A.

**3.3** Albeit outside the scope of Regulation (EU) No 2015/848, proceedings under (i) should in any case be deemed ‘insolvency proceedings’ according to Article 1(1) of Regulation (EU) No 2015/848.

They should be considered to fall outside the scope of Regulation (EU) No 1215/2012, since can be included in the Article 1(2)(b) exception (*‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’*).

Consequently, those proceedings would fall outside the scope of both Regulation (EU) No 2015/848 and Regulation (EU) No 1215/2012.

Jurisdiction and recognition issues should be resolved according to the applicable domestic rules of insolvency law and private international law.

**3.4** Proceedings under (ii) are English *schemes of arrangement*. Albeit outside the scope of Regulation (EU) No 2015/848, they should in any case be deemed ‘insolvency proceedings’ according to Article 1(1) of Regulation (EU) No 2015/848, when aimed at a debtor’s restructuring.

In fact, if proceedings based on general company law not designed exclusively for insolvency situations were not to be deemed ‘insolvency proceedings’, Member States might always be able to circumvent the COMI requirement by putting insolvency proceedings in corporate statutes. Therefore, it is preferable to hold that proceedings based on general company law not designed exclusively for insolvency situations are

‘insolvency proceedings’ according to Article 1(1) of Regulation (EU) No 2015/848, when are aimed at a debtor’s restructuring.

Those proceedings would fall outside the scope of both Regulation (EU) No 2015/848 and Regulation (EU) No 1215/2012.

Jurisdiction and recognition issues should be resolved according to the applicable domestic rules of insolvency law and private international law.

## D. Insolvency-related proceedings

### Article 6, Recital 35 EIR-R, Article 1(2)(b) Brussels Ibis

#### 1. Legal framework<sup>127</sup>

Article 6(1) of the EIR-R (*‘the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions’*) sets up the international *vis attractiva concursus* laid down in the *Seagon* decision<sup>128</sup>. The provision concerning recognition and enforcement *‘with no further formalities’* of judgments rendered on these actions (Article 32(1)(2)) has exactly reproduced that contained in the EIR (Article 25(1)(2)). Now, it is made clear that these decisions enjoy automatic recognition all over the European Union because they fall in the scope of the EIR-R<sup>129</sup>.

The jurisdiction established in Article 6(1) is a form of accessory jurisdiction: the courts of the *forum concursus* only have to verify whether the conditions laid down in 6(1) are satisfied, while a further examination by the seized court of the jurisdictional conditions set out in Article 3 of the EIR-R is precluded<sup>130</sup>. It is noteworthy that this *vis attractiva* is solely to be understood in the context of international jurisdiction: Article 6(1) prescribes that actions connected with insolvency proceedings must be brought before *the courts of the Member State* in which insolvency proceedings have been opened; no annex jurisdiction of the court opening insolvency proceedings have been established<sup>131</sup>. Thus, jurisdiction *ratione loci* as well as substantive jurisdiction are always to be determined according to national procedural law<sup>132</sup>.

Since Article 6(1) does not distinguish between insolvency-related actions in which the insolvency practitioner (or the debtor in possession: *argumentum ex* Article 6(2)(2)) acts as a plaintiff and insolvency-related actions in which the insolvency practitioner (or the debtor in possession) is sued as a defendant, it has to be held that both the cases fall in the scope of the EIR-R. However, a rule has been introduced in Article 6(2)(1) only for actions commenced by the insolvency practitioner or the debtor in possession (*‘provided that national law allows [him] to bring actions on*

<sup>127</sup> See also above, Section III, para. 1.2.3

<sup>128</sup> CJEU, Case C-339/07, *Christopher Seagon*, judgment of 12 February 2009, ECLI:EU:C:2009:83.

<sup>129</sup> See *Carballo Pineiro*, *Vis attractiva concursus* in the European Union: its development by the European Court of Justice, indret.com, 6 ff.

<sup>130</sup> See *Bork and Mangano*, European cross-border insolvency law (2016), 3.67; and *Laukemann* in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 4.2.1; *Castagnola*, Regolamento CE 1346/2000 e *vis attractiva concursus*: verso un’universalità meno limitata?, Riv. dir. proc., 2010, 921 ff.

<sup>131</sup> This finds confirmation in Article 32(1)(2), according to which insolvency-related actions are recognized without any further formalities *‘even if they were handed down by another court’*, i.e. other than that opening the insolvency proceedings.

<sup>132</sup> *Laukemann* in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 4.2.1, note 494.

*behalf of the insolvency estate*)<sup>133</sup>. According to this rule, in cases in which an insolvency-connected claim is ‘related’ to a claim based on general civil and commercial law (*i.e.* where actions ‘are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’: see Article 6(3)), the insolvency practitioner or the debtor in possession are entitled to bring such claims before the courts of the Member State within the territory of which the defendant is domiciled (or, where the defendants are more than one, before the courts of the Member State within the territory of which any of them is domiciled), provided that those courts have jurisdiction pursuant to Brussels *Ibis*. This solution is available only if both actions are accumulated: therefore, it does not expressly permit an action to be brought before the courts of the defendant’s domicile where the insolvency practitioner only exercises an insolvency-related action<sup>134</sup>. Recital 35 provides an example of actions ‘so closely connected’: an action for director’s liability based on insolvency law combined with an action based on company law or general tort law.

As far as the notion of ‘insolvency-related’ actions is concerned, the EIR-R has merely incorporated the ‘*Gourdain* formula’, and provided two examples of actions that qualify as insolvency-related and one example of action that, on the contrary, does not qualify as insolvency-related. Avoidance actions and actions ‘concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings’ are highlighted as examples of the first category (however, only the former has been included in Article 6, while the latter is confined in Recital 35). ‘Actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings’ are brought as examples of the second category. The question arises whether the ‘*Gourdain* formula’ and such examples provide appropriate guidance on what constitutes an insolvency-related action.

## 2. Evaluation

### 2.1 Legal issues and practical problems

#### 2.1.1 The notion of ‘insolvency-related’ actions

Most of the stakeholders to whom the questionnaire prepared within this research project has been submitted have held that the ‘*Gourdain* formula’ provides appropriate guidance on what constitutes an insolvency-related action, that it should be broadly interpreted, in light of the relevant case law of the CJEU, and that the examples of insolvency-related actions provided by Recital 35 are sufficient to shed light on possible borderline cases. By contrast, the minority of

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<sup>133</sup> In accordance with the proposal formulated in the Heidelberg-Luxembourg-Vienna Report: see *Laukemann* in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 4.2.6.3.

<sup>134</sup> *Garcimartin*, The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction, papers.ssrn.com 2016, 25.

the respondents has found that recent case law failed to provide a better-suited criterion for the delineation between the realm of the EIR and of Brussels I (or Brussels Ibis), and that the ‘*Gourdain* formula’ gives no clear guidance as to what an insolvency-related action is.

Whatever may be the opinion, the choice adopted in the EIR-R seems clear: to leave to courts and practitioners the task of interpreting on a case-by-case basis the ‘*Gourdain* formula’, in light of the (several) criteria individuated in CJEU’s case law. What seems less clear is whether avoidance actions and actions ‘*concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings*’ always align with the notion of ‘insolvency-related’ actions emerging by the case-law, and thus should *always* be considered as insolvency-related, or only *usually* align with such notion, and thus should be considered as insolvency-related only *on condition that* they align with the notion of ‘insolvency-related’ in the relevant case (*vice versa* for ‘*actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings*’).

It is probably better to opt for the second alternative. As far as avoidance actions are concerned, the case law of the CJEU has provided sufficient legal certainty, and they are generally considered as insolvency-related by the national courts. However, two exceptions may be found (the second of which is dubious). The first one regards the case of an action for recovery of a sum of money on the basis of an assigned avoidance claim: in *F-Tex SLA* case<sup>135</sup>, in fact, the CJEU decided that this kind of action is not closely linked to the insolvency proceedings, because the assignee can freely decide upon the exercise and the initiation of judicial proceedings over his right and acts in his own interest and not in the interest of the insolvency estate. The second one concerns the case in which the application of the *lex fori concursus* is excluded pursuant to Article 16 of the EIR-R, for the detrimental act being subject to the *lex causae* and this one not allowing any means of challenging that act: it has been underlined that it is uncertain whether an avoidance action fulfils the double criteria set out in the ‘*Gourdain* formula’ even when an alliance between the jurisdiction and the applicable law has ceased<sup>136</sup>. By the same token, actions concerning obligations that arise in the course of insolvency proceedings are generally considered as directly deriving and closely connected to insolvency proceedings, in accordance with case-law; however, in the abovementioned *F-Tex SLA* case, the CJEU has adjudicated that an action concerning an obligation arising in the course of insolvency proceedings (namely, a claw-back obligation) was not insolvency-related. As far as actions ‘*for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings*’ are concerned, it has been underlined that, while they certainly are not insolvency-related when the debtor acts as plaintiff, they should be considered as insolvency-related when the debtor is sued as defendant and is entitled under the national insolvency law provisions to oppose the termination of the contract

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<sup>135</sup> CJEU, Case C-213/10, *F-Tex SLA*, judgment of 19 April 2012, ECLI:EU:C:2012:215.

<sup>136</sup> *Linna, Actio pauliana and res judicata in EU insolvency proceedings*, JprivInt’LL 2015, 582 ff.

in the interest of the estate: it is unquestionable, in fact, that such power *‘finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings’*<sup>137</sup>.

In light of this, it is advisable that courts and practitioners manage the examples of actions set out in Article 6(1) and Recital 35 as mere clues as to the existence (or non-existence) of an insolvency-related purpose, and always examine whether such actions are insolvency-related or not in the relevant case.

Notwithstanding in the CJEU’s case-law several elements have been identified which contribute to characterize actions as insolvency-related, and notwithstanding such actions are developed rather diversely within the national legislations, it is possible to establish some general criteria in order to specify the broad ‘*Gourdain* formula’ and to facilitate courts and practitioners to classify actions as included within the scope of either the EIR-R or Brussels I-*bis*. The three following criteria have been suggested in the Vienna-Heidelberg Report<sup>138</sup>, which should simultaneously be fulfilled:

- (i) whether the action at stake attains an insolvency-specific purpose which shapes or rather modifies its aim (*e.g.* the legal standing on behalf of and in the interest of the general body of creditors, or the binding effect of the decision upon persons other than the parties to the proceedings);
- (ii) whether the *effet utile* criterion encourages to bring the action before the courts of the Member State that opened the insolvency proceedings; *i.e.* whether the jurisdiction of these courts allows an efficient and cost-effective administration of the action;
- (iii) whether common jurisdictional interests (above all, the *actor sequitur forum rei* rule laid down in Article 4 of Brussels I-*bis*) militate against the assumption of the *vis attractiva concursus*.
- (iv) These criteria are still current, and thus their adoption should be recommended. Particular emphasis should be put on the first one, in view of the most recent CJEU’s decisions, which have stressed that *‘the decisive criterion ... to identify the area within which an action falls is ... the legal basis thereof, i.e. ‘it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings’*<sup>139</sup>.

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<sup>137</sup> CJEU, Case C-157/13, *Nickel & Goeldner*, judgment of 4 September 2014, ECLI:EU:C:2014:2145, para. 27.

<sup>138</sup> See *Laukemann* in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013), para. 4.2.5.1 ff.

<sup>139</sup> CJEU, Case C-157/13, *Nickel & Goeldner*, judgment of 4 September 2014, ECLI:EU:C:2014:2145, para. 27; see also CJEU, Case C-649/13, *Nortel Networks*, judgment of 11 June 2015, ECLI:EU:C:2015:384, para. 28; CJEU, Case C-295/13, *H.*, judgment of 4 December 2014, ECLI:EU:C:2014:2410, para. 23-24; and CJEU, Case C-594/14, *Kornbaas*, judgment of 10 December 2015, ECLI:EU:C:2015:806, para. 16.

### 2.1.2 Recital 16 and insolvency-related actions<sup>140</sup>

The CJEU's decisions in the cases *H.* and *Kornbaas*<sup>141</sup> dealt with the nature of actions brought pursuant to the first and second sentences of Paragraph 64 of the German Law on limited liability companies<sup>142</sup>. According to this provision, the managing directors of a company are obliged to reimburse payments made after the company is declared insolvent or after it has been established that its liabilities exceed its assets. In the cases at hand, the actions had been brought by the insolvency practitioner in the interest of the estate; however, according to German Law, they can be brought not necessarily in the context of insolvency proceedings, but also outside that context. The CJEU held that in both cases the said actions were closely connected to and also stemming from insolvency proceedings: they were closely linked to insolvency proceedings because, in the relevant cases, had been brought in connection with insolvency proceedings; they were directly deriving from insolvency proceedings because they were based on a provision whose application, albeit not requiring insolvency proceedings to have formally been opened, requires the actual insolvency of the debtor, '*and thus ... derogates from the common rules of civil and commercial law*'<sup>143</sup>.

The principle established by the CJEU in these decisions may seem in contrast with Recital 16 to the EIR-R<sup>144</sup>: hence, the question arises whether such principle has been superseded by this recital. The question has been answered in the negative by a large majority of the stakeholders to whom the questionnaire prepared within this research project has been submitted, according to whom also actions based on general company not designed exclusively for insolvency situations may be considered as falling within the scope of the EIR-R if they satisfy the double criteria set out in the '*Gourdain* formula'. The solution endorsed by the most of the stakeholders seems largely preferable. Firstly, it is questionable that actions based on Paragraph 64 GmbHG are not designed exclusively for insolvency situations: even if can be brought outside the context of insolvency proceedings, they require in any case the actual insolvency of the debtor, and thus, might be considered as encompassed by the expression 'insolvency situations', which has a broad meaning. Secondly, actions which lie at the intersection of company, insolvency and general civil law constitute an important part of claims that can be brought against/by an insolvency practitioner (or debtor in possession): if they were to be kept outside the scope of the EIR-R, the *vis attractiva concursus* established in Article 6 would prove to be excessively weakened; furthermore, as stated by the CJEU<sup>145</sup>, an artificial and unacceptable distinction would arise between these actions and comparable actions, such as the actions to set transactions aside. Thirdly and most

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<sup>140</sup> See above, Section III, para. 2.2.1 and 2.2.2.

<sup>141</sup> Respectively, CJEU, Case C-295/13, *H.*, judgment of 4 December 2014, ECLI:EU:C:2014:2410; and CJEU, Case C-594/14, *Kornbaas*, judgment of 10 December 2015, ECLI:EU:C:2015:806.

<sup>142</sup> § 64 GmbHG.

<sup>143</sup> CJEU, Case C-295/13, *H.*, judgment of 4 December 2014, ECLI:EU:C:2014:2410, para. 22.

<sup>144</sup> '*This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency*'.

<sup>145</sup> CJEU, Case C-295/13, *H.*, judgment of 4 December 2014, ECLI:EU:C:2014:2410, para. 24.



importantly, Recital 16 seems to be tailored to collective proceedings, not to actions directly deriving and closely connected with them: in fact, the expression ‘*proceedings based on laws relating to insolvency*’ used in Recital 16 is used in Article 1(1), which deals only with collective proceedings; moreover, ‘insolvency-related’ actions, in the text of the EIR-R, are always referred to as ‘actions’, not as ‘proceedings’. Finally, it has been argued above<sup>146</sup> that the ‘condition’ laid down in Recital 16 should not be interpreted as a substantial requirement even for collective proceedings: *a fortiori*, it should not be interpreted as such with regard to individual actions.

### 2.1.3 Overlaps between the EIR-R and Brussels Ibis

The question arises whether the *forum concursus* has exclusive jurisdiction on insolvency-related actions. The answer is easier now than under the EIR. The *forum* provided in Article 6(2) for insolvency-related actions connected to an action based on general civil and commercial law is elective. This results from the wording of Article 6(2), which lays down: ‘*where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions*’. In these cases, the debtor should be considered free to follow the rules on jurisdiction laid down by Article 6(1) and by Brussels Ibis and to bring the insolvency-related actions before the court opening the insolvency proceedings, and to bring the connected action to the court determined in accordance with Brussels Ibis. If a specific rule concerning an elective jurisdiction has been established, this would mean that the general rule for insolvency-related actions is that they *must* be brought before the courts opening insolvency proceedings. The exclusive nature of jurisdiction finds a confirmation in the phrasing of Article 6(1) (*‘the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction’*). Therefore, it has to be held that the EIR-R and Brussels Ibis are not intended to overlap as to the jurisdiction on insolvency-related actions. The provision on the elective *forum*, however, is liable to relativize the classification of insolvency-related actions connected to actions in civil and commercial matters: as a consequence, frequent (but illusory) overlaps may arise in practice.

### 2.1.4 Insolvency-related actions and secondary proceedings

The CJEU, in the *Nortel* judgment, has established that ‘*the rule on jurisdiction stated by the Court in the judgment in Seagon (EU:C:2009:83), based on vis attractiva concursus, can also apply in favour of the courts of the Member State in which secondary proceedings have been opened*’<sup>147</sup>, with reference to actions related to assets situated in the Member State of secondary proceedings. Since Article 6 does not lay down any limitation of the *vis attractiva concursus* to actions related to main proceedings, the solution adopted in *Nortel* has to be confirmed, and thus also courts of the Member States in which secondary proceedings have been opened have to be considered as having jurisdiction

<sup>146</sup> See Section III, para. 2.2.2.

<sup>147</sup> CJEU, Case C-649/13, *Nortel Networks*, judgment of 11 June 2015, ECLI:EU:C:2015:384, para. 32.

under the EIR-R to hear and determine insolvency-related actions. According to the abovementioned judgment, insolvency-related actions concerning assets located in the Member States of secondary proceedings are subject to a concurrent jurisdiction of the Member States' courts of both the secondary and the main proceedings<sup>148</sup>. Therefore, while the jurisdiction of the *forum concursus* is exclusive (in the sense that the courts of the State where the defendant is domiciled cannot have jurisdiction, except for actions falling under Article 6(2)), concurrent jurisdiction may exist within the scope of the EIR-R among different *fora concursus*. In *Nortel*, the CJEU has showed awareness that, '*where there are concurrent fora, there is a risk of irreconcilable judgments*', and has noted that '*as the law stands at present, only the mechanism for virtually automatic recognition provided for in Article 25(1) of the regulation would enable the risk of irreconcilable judgments to be avoided in cases of concurrent jurisdiction*'. Since the EIR-R does not provide any different rules, the same Article 25 (now Article 32) is applicable. This Article, however, provides a solution which is quite rudimentary, insofar as courts opening main proceedings and courts opening secondary proceedings will probably race to open the insolvency-related proceedings first<sup>149</sup>. The application of a rule similar to that laid down in Article 27 of Brussels I, '*which, in the case of lis pendens, assigns jurisdiction to the court first seised*', has been envisaged by the CJEU as a more efficient solution to the risk or irreconcilable judgments<sup>150</sup>; but the same CJEU has argued that '*it is not for the Court to incorporate such a rule into the scheme of the regulation by judicial decision*'. In view of this decision, it seems not appropriate, at the moment, to recommend that national courts apply a solution based on rules along the lines of Article 27 of Brussels I (Article 29 of Brussels Ibis); thus, it is advisable that courts solve conflicts of jurisdiction which may arise by applying Article 32 of the EIR-R.

### 2.1.5 Insolvency-related actions against Third-State defendants

With reference to insolvency-related actions brought against defendants domiciled in a non-EU State (or in Denmark), see above, Section I, para. 2.2.3.

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<sup>148</sup> CJEU, Case C-649/13, *Nortel Networks*, judgment of 11 June 2015, ECLI:EU:C:2015:384, para. 58.

<sup>149</sup> Mucciarelli, Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali, Giur. comm. 2016, II, 18; Laukemann, Regulatory copy and paste: the allocation of assets in cross-border insolvencies – methodological perspectives from the *Nortel* decision, JprivInt'lL 2016, 386-387.

<sup>150</sup> CJEU, Case C-649/13, *Nortel Networks*, judgment of 11 June 2015, ECLI:EU:C:2015:384, para. 60.

### 3. Theses and recommendations

In light of the above, the following recommendations should be issued.

**3.1** Pursuant to Article 6(1), the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them (*i.e.* that is ‘insolvency-related’).

**3.2** According to Article 6(1), avoidance actions are an example of ‘insolvency-related’ actions. Similarly, according to Recital 35, actions concerning obligations that arise in the course of the insolvency proceedings should be considered as ‘insolvency-related’; on the contrary, actions for the performance of obligations under a contract concluded by the debtor prior to the opening of insolvency proceedings should not be considered as ‘insolvency-related’.

Insofar as these categories of actions do not always satisfy the double criteria laid down in the ‘*Gourdain* formula’, it is advisable that courts and practitioners manage the examples set out in Article 6(1) and in Recital 35 as mere clues as to the existence (or non-existence) of an insolvency-related purpose, and always examine whether such actions are ‘insolvency-related’ or not in the relevant case.

**3.3** Therefore, the double criteria – ‘directly deriving’ and ‘closely linked’ – incorporated in Article 6(1) should always be interpreted.

Both requirements must be simultaneously fulfilled.

**3.4** Actions are closely linked to insolvency proceedings when they are brought in the context of insolvency proceedings.

**3.5** Actions are directly deriving from insolvency proceedings when they find their source in a provision which derogates from the common rules of civil and commercial law and specific to insolvency proceedings.

Actions are directly deriving from insolvency proceedings even if they are based on a provision the application of which does not require insolvency proceedings to have formally been opened but does require the actual insolvency of the debtor, provided that they are brought in the context of insolvency proceedings.

In this respect, Recital 16, which provides that proceedings based on general company law not designed exclusively for insolvency situations fall outside the scope of Regulation (EU) No 2015/848, should not be interpreted as applicable to ‘insolvency-related’ actions.

**3.6** In order to specify the broad ‘*Gourdain* formula’, courts and practitioners should assess whether:

- actions serve an insolvency-specific purpose (*i.e.* actions aim at protecting the rights of the general body of creditors by adjusting rules and principles of general civil law or other areas of substantive law or by compensating insolvency-conditioned detriments);

- the international jurisdiction of the courts of the Member State in which insolvency proceedings were opened improves the efficiency and effectiveness of insolvency proceedings (*effet utile*);
- the international jurisdiction of the courts of the Member State in which insolvency proceedings were opened does not infringe predominant general jurisdictional interest (e.g. the protection of the defendant, based upon the *actor sequitur forum rei* principle).

**3.7** Actions should be deemed as ‘insolvency-related’, and consequently be brought before the courts of the Member State in which insolvency proceedings have been opened, which are brought by/against defendants who are not domiciled within the territory of a Member State<sup>151</sup>.

**3.8** Article 6(1) should be interpreted as meaning that it provides for the exclusive jurisdiction of the courts of the Member State in which insolvency proceedings are opened.

Pursuant to Article 6(2), insolvency practitioners should be allowed to derogate from the exclusive jurisdiction of the *forum concursus* and to bring the action before the courts of the Member State in which the defendant is domiciled only when actions referred to in Article 6(1) are related to actions in civil and commercial matters against the same defendant (*i.e.*, they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings).

**3.9** Also courts of the Member State in which secondary insolvency proceedings have been opened should be deemed as having jurisdiction to hear and determine ‘insolvency-related actions.

‘Insolvency-related’ actions concerning assets located in the Member States of secondary proceedings should be considered as subject to the concurrent jurisdiction of the Member States’ courts of both the secondary and the main proceedings. For this reason, a concurrent jurisdiction may exist within the scope of the EIR-R among different *fora concursus*.

In order to solve possible conflicts of jurisdiction between the Member States’ courts of main and secondary proceedings, it is advisable that the ‘priority-rule’ emerging from Article 32 of Regulation (EU) No 2015/848 be applied.

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<sup>151</sup> See above, Section I, para. 2.2.3 and 3.8.

## PART 2: COOPERATION BETWEEN MAIN AND SECONDARY PROCEEDINGS

Luxembourg

### A. Instruments to avoid or postpone secondary proceedings\*

#### Articles 36 ff. EIR-R

### 1. Legal framework

#### 1.1 Introduction

Contrary to the previous case law of the CJEU,<sup>152</sup> the recast of the Insolvency Regulation (hereafter: EIR-R) aims to reduce the opening of secondary proceedings.<sup>153</sup> The main legislative motivation for this reduction is the detrimental effect secondary proceedings may have on the efficient administration of the insolvency estate: While organizational and procedural difficulties as well as potential disputes between the involved insolvency practitioners are both playing their part in this, the opening of parallel proceedings undoubtedly raises costs caused by the appointment of one or more additional insolvency practitioners and the involvement of another insolvency court.<sup>154</sup> In particular, the simultaneous application of different insolvency statutes is prone to increase complexity and hinder the coordination of proceedings, especially when it comes to the realization of assets. According to data provided by the World Bank,<sup>155</sup> the costs of insolvency proceedings may substantially burden the debtor's estate. Unilateral acts and uncoordinated splits of the estate might thus prove detrimental to the creditors as a whole. Experience has demonstrated that these structural conflicts arising between universal and local proceedings

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<sup>152</sup> According to the CJEU (4 September 2014, Case C-327/13, *Burgo Group SpA*, ECLI:EU:C:2014:2158, paras 20-7, 32-9), secondary proceedings may also be opened in the Member State in which the company's registered office is situated and in which it possesses legal personality.

<sup>153</sup> Recital 41.

<sup>154</sup> Cf. *Dammann/Menjuç/Roussel Galle*, Rév. Procéd. Coll. 2015, n° 1, 1/2015, at para 28.

<sup>155</sup> In 2010, the cost of insolvency proceedings was about 6 percent of the estate in the United Kingdom, 8 percent of the estate in Germany, 9 percent in France and Sweden and as much as 15 percent in Spain and 22 percent in Italy, s. The World Bank, *Doing Business*, Washington 2010, p. 77 ff.

are exacerbated in corporate group insolvencies,<sup>156</sup> though it cannot be ruled out that the opening of secondary proceedings might, in specific situations, prove beneficial to carry on the debtor's business.<sup>157</sup>

Following practical experience gained from the English proceedings in *MG Rover*,<sup>158</sup> *Collins & Aikmann*,<sup>159</sup> or *Nortel Networks*,<sup>160</sup> the new regime empowers the court at the request of the main insolvency practitioner to postpone or even refuse the opening of secondary proceedings in specific situations (Articles 36 ff., recitals 42 ff. EIR-R).<sup>161</sup>

## 1.2 The undertaking (“synthetic proceedings”)

### 1.2.1 Procedural objective and mechanism

In contrast to the “improvised nature” of so-called synthetic proceedings as implemented by the English courts under national rules,<sup>162</sup> the new Insolvency Regulation provides for a detailed and complex procedural framework. As an autonomous substantive provision enlarging the powers of the main practitioner, Article 36 EIR-R takes precedence over conflicting national insolvency law.<sup>163</sup> According to paragraph 1 of this Article, the main insolvency practitioner will be entitled to give an undertaking to local creditors which treats them with respect to distribution and priority rights as if secondary proceedings had been opened.<sup>164</sup> The objective of this instrument is to avoid and partially substitute the opening of secondary proceedings (Article 38(2), recital 42 EIR-R).<sup>165</sup>

<sup>156</sup> See CJEU, Case C-116/11, *Bank Handlony*, 22 November 2012, ECLI:EU:C:2012:739, paras 53-63, with detailed analysis *Koller*, IPRax 2014, 490; *Laukemann*, *ecolex* 2013, 37.

<sup>157</sup> *Undritz*, in: FS Vallender 2015, p. 745, 771; *Dammann/Rapp*, *Recueil Dalloz* 2015, 45.

<sup>158</sup> *MG Rover Belux SA/NV* [2007] BCC 446.

<sup>159</sup> *Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch).

<sup>160</sup> *Nortel Group* [2009] EWHC 206 (Ch); as to the decision of the CJEU, 11 June 2015, Case C-649/13, ECLI:EU:C:2015:384, see *Laukemann*, *J.Priv.Int.L.* 2016, 379 ff.

<sup>161</sup> Cf. *Arts*, *Norton Journal of Bankruptcy Law and Practice*, 24 (2015), 436ff; *Moss*, *Brook J Int'l L* 2006/7, 1005, 1017 f.; *McCormack*, *The Modern Law Review* 2016, 121, 133 f.; as to preliminary concepts see *Wessels*, *Brook J. Corp. Fin. & Com. L.* 2014, 63, 80 ff.; as to the concept of ‘virtual territoriality’: *Janger*, 48 *Columbia Journal of Transnational Law* (2010), 401 ff.

<sup>162</sup> For instance, in *MG Rover Belux SA/NV* [2007] BCC 446, the Court relied on para 65(3) Schedule B1 of the Insolvency Act 1986.

<sup>163</sup> At the same time, the power of the main insolvency practitioner to exercise – in the absence of secondary proceedings and preservation measures – all the powers conferred on him by the *lex fori concursus* in another Member State (Articles 7, 21(1) EIR-R), may not hamper the realization of the undertaking. In that regard, those latter provisions have to be interpreted in the light of Article 36 EIR-R. Insofar, Article 36(1) EIR-R does not encroach upon Article 21 EIR-R (= Article 18 EIR). Contra: *Thole*, *ZEuP* 2014, 39, 65.

<sup>164</sup> Also: recital 42 EIR-R.

<sup>165</sup> For further details also with regard to the conflict of laws mechanism, see *Laukemann*, in: *Bornemann/Brinkmann/Dahl* (eds.), *European Insolvency Regulation – to be published*, Art. 36, paras 4 ff.

The procedural function and effects of an undertaking are complemented by a conflict of laws mechanism.<sup>166</sup> According to Article 36(2) EIR, the approved undertaking modifies the basic conflict of laws rule (Article 7 EIR) by making reference to specific substantive provisions of the *lex fori concursus secundarii*. The deviation from Article 7 EIR-R shall however be confined to distribution and priority rights. Therefore, the realization of the debtor's assets located in the State of his establishment(s) will uniformly be governed by the *lex fori concursus*. Accordingly, assuming a sub-category of the insolvency estate (recital 43 EIR-R) will not lead to an additional procedure for the lodging of claims. Only the 'conclusion' of a binding undertaking by virtue of the practitioner's unilateral assurance, on the one hand, and the approval by the known local creditors,<sup>167</sup> on the other, approximates a contractual-related mechanism.<sup>168</sup>

### 1.2.2 Scope

According to Article 36(1) EIR-R, the scope of undertakings will be confined to those assets of the debtor which are situated in the Member State(s) in which secondary proceedings could be initiated.<sup>169</sup> At the same time, only *local* creditors, i.e. creditors whose claims against a debtor arose from or in connection with the operation of a foreign establishment,<sup>170</sup> will explicitly be addressed by an undertaking.<sup>171</sup> Yet, this does not mean that the local estate will be dedicated to local creditors only. Instead, those assets situated in the Member State in which secondary proceedings could be opened (including the proceeds received from their realization) shall form a sub-category of the insolvency estate (cf. recital 43 EIR-R) liable for *both* local and other creditors, which otherwise would be entitled to lodge their claims in secondary proceedings according to Article 45 EIR-R.

In view of the debtor's universal liability and the universal participation of his creditors as general principles underlying the Regulation (Articles 32, 39),<sup>172</sup> the undertaking should, along with the mechanism set out in Article 45 EIR, also embrace non-local creditors.<sup>173</sup>

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<sup>166</sup> Also *Mangano*, in: Bork/vanZwieten (eds.), *Commentary on the European Insolvency Regulation* (2016), Art. 36, para 36.11.

<sup>167</sup> Article 36(5) EIR-R in conjunction with Article 2(11) EIR-R.

<sup>168</sup> *Mankowski*, however, advocates a full contractual nature of the undertaking (NZI 2015, 961, 962; *Mankowski/Müller/Schmidt*, *EuInsVO 2015* (2016), Art. 36, para 4); similarly: *Henry*, *Recueil Dalloz* 2015, 979, 983 para 19 ("de type contractuel").

<sup>169</sup> The relevant point in time for determining the local assets shall be the moment at which the undertaking is given, Article 36(2), s. 2 EIR-R.

<sup>170</sup> Although the definition of 'local creditors' as laid down in Article 2(11) EIR-R requires a creditor's claim to be connected with the foreign establishment, *all* the debtor's assets – wherever located – are liable for those local claims.

<sup>171</sup> Explicitly: recital 42 EIR-R against Article 36(1) EIR-R, but also Article 36(5), (10) EIR-R.

<sup>172</sup> See *Laukemann*, *J.Priv.Int.L.* 2016, 379, 397.

<sup>173</sup> More detailed: *Laukemann*, in: Bornemann/Brinkmann/Dahl (eds.), *European Insolvency Regulation – Commentary* (2017 – to be published), Art. 36, para 16. See also *Bork/Mangano*, *European Cross-Border Insolvency Law* (2016), at para 7.39 (fn. 111).

### 1.2.3 Proposal and formal requirements

When giving the undertaking, i.e. a unilateral proposal, the insolvency practitioner has the duty to specify the factual assumptions underlying the undertaking<sup>174</sup> and meet the formal conditions as set out in Article 36(3)<sup>175</sup> and (4) EIR-R.<sup>176</sup> As can be deduced from Article 2(5) EIR-R, the provisional insolvency practitioner is equally entitled to give an undertaking based on Article 36 EIR-R.<sup>177</sup>

### 1.2.4 Approval

In view of the preclusive effect of Article 38(2) EIR-R, the undertaking shall be approved (only) by the *known* local creditors,<sup>178</sup> being previously informed by the insolvency practitioner “of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.”<sup>179</sup> In that regard, the rules on qualified majorities and voting procedures that apply to the adoption of restructuring plans under local law shall apply – as appropriate<sup>180</sup> – to the approval of the undertaking.

In addition, the undertaking shall be subject to any other *approval* requirements as to distributions, if the *lex fori concursus universalis* so requires, Article 36(4) EIR-R.

### 1.2.5 Effects

#### 1.2.5.1 Direct effects of the undertaking as to the estate and the applicable law

The undertaking produces binding effects on the estate.<sup>181</sup> As a consequence of its approval, the distribution of proceeds from the realization of local assets, the ranking of creditors' claims, and the rights of creditors in relation to the local assets will not be governed by the *lex fori concursus universalis*, but rather by the law of the Member State in which secondary insolvency proceedings could have been opened (“local law”). The term ‘priority rights’ has to be interpreted in a broad sense, comprising insolvency creditors’ claims and, as a matter of principle, debts

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<sup>174</sup> Article 36(1), s. 2 EIR-R.

<sup>175</sup> The undertaking shall be made in the official language or one of the official languages of the Member State where secondary insolvency proceedings could have been opened, or, where there are several official languages in that Member State, the official language or one of the official languages of the place in which secondary insolvency proceedings could have been opened, Article 36(3) EIR-R.

<sup>176</sup> According to Article 36(4), s. 1 EIR-R, the undertaking shall be made in writing and be subject to any other form requirements as to distributions, if the *lex fori concursus universalis* so requires.

<sup>177</sup> As to the debtor in possession see *Reinbart*, in: Münchener Kommentar InsO, 3<sup>rd</sup> ed. 2016, Art. 36 EIR 2015, at para 18 (denying).

<sup>178</sup> Cf. the legal definition of ‘local creditors’ in Article 2(11) as well as the specific provision in Article 36(11) EIR-R.

<sup>179</sup> Article 36(5) EIR-R.

<sup>180</sup> Explicitly recital 44, s. 1 EIR-R, whereas missing in the operative text of the Regulation. This is exposed to criticism.

<sup>181</sup> Article 36(6) EIR-R.



incumbent on the estate which grant, under the *lex fori concursus secundarii*, a privileged status over insolvency claims.

However, the special rules on conflict of laws (Articles 8 ff. EIR-R) should prevail over the instrument of an undertaking. In this respect, Article 36 EIR-R has to be differentiated from the scope of Article 8 EIR-R, especially when considering this provision as a substantive rule rather than a rule on conflict of laws.<sup>182</sup> Note that under the latter assumption (substantive rule), assets encumbered with a right in rem may not be covered by local *insolvency* law (Article 35 EIR-R) when an undertaking is given to avoid the opening of secondary proceedings. As a consequence, individual enforcement measures are not prohibited.<sup>183</sup> This interpretation, however, does confer a strong incentive for the opening of secondary proceedings to the detriment of an undertaking.

### 1.2.5.2 Effects on the opening of secondary proceedings

As can be deduced from Articles 37(2), 38(2) EIR-R, local creditors do not legally waive their right to request the opening of secondary proceedings by approving the undertaking.<sup>184</sup> It is important to stress that, in the context of an undertaking, a request for initiating secondary proceedings may, subject to national law, only be rejected if (i) that request has been lodged later than 30 days after receiving notice of the *approved* undertaking,<sup>185</sup> or (ii) if it has been lodged within that time limit but the court seized is satisfied that the *approved* undertaking adequately protects the general interests of local creditors.<sup>186</sup> If neither of these conditions are met the court will not be hindered to open secondary proceedings, provided the legal conditions set forth by national law are met.

### 1.2.5.3 Removal of local assets

In order to ensure an effective protection of local interests, the main insolvency practitioner should not be able to relocate, in an *abusive* manner, assets situated in the Member State where an establishment is located.<sup>187</sup> Otherwise, i.e. in the absence of abusive conduct, he is entitled to do so. When obliging the main practitioner – once secondary proceedings are opened – to transfer assets which were removed from the territory of a Member State after the undertaking had been given but before secondary proceedings were initiated, Article 36(6) EIR presumably aims to mitigate a depletion of assets subject to the secondary proceedings. Thus, Article 36(6), s. 2 EIR-R has to be read in conjunction with Article 21(1) EIR-R: The obligation according to Article

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<sup>182</sup> Cf. CJEU, 16 April 2015, Case C-557/13, *Lutz*, ECLI:EU:C:2015:227, paras 27-8.

<sup>183</sup> Also *Reinbart*, in: Münchener Kommentar InsO, 3<sup>rd</sup> ed. 2016, Art. 36 EIR 2015, at para 9.

<sup>184</sup> However, it might be argued that creditors explicitly approving the undertaking may lose their legitimate interest in subsequently requesting the opening of secondary proceedings unless the insolvency practitioner has neglected his duty to inform the creditors correctly and comprehensively.

<sup>185</sup> Article 37(2) EIR-R.

<sup>186</sup> Article 38(2) EIR-R.

<sup>187</sup> Recital 46 EIR-R.

36(6) EIR-R to retransfer assets located in the State of the debtor's establishment already applies before preservation measures further to a request for the opening of secondary proceedings have been taken to prevent the removal of those assets. However, an obligation to retransfer removed assets may only arise if secondary proceedings are opened and the previous removal of assets has taken place *after* the undertaking was given.<sup>188</sup>

## 1.2.6 Procedural safeguards

### 1.2.6.1 Remedies

According to Article 36(7), (8) and (9) EIR-R, local creditors are entitled to challenge the distribution of assets<sup>189</sup> and proceedings not complying with the undertaking or to request suitable measures necessary to implement its terms.<sup>190</sup> Both actions should be classified as annex actions in the sense of the new Article 6(1) EIR-R. Moreover, *local* creditors may require the local courts in the State of potential secondary proceedings to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.<sup>191</sup>

### 1.2.6.2 Liability of the insolvency practitioner under Article 36(10) EIR-R

According to Article 36(10) EIR-R, the insolvency practitioner who is obliged to ensure compliance with the terms of the undertaking shall be liable for any damage caused to local creditors in that respect. The wording of Article 36(10) EIR-R proves ambiguous as to whom this claim is attributed, and whether it shall cover the individual loss of single local creditors or rather the total loss sustained by the sub-category of the insolvency estate.<sup>192</sup> Given the extended personal scope of an undertaking (s. *supra*), non-local creditors should be addressed by Article 36(10) EIR-R as well.

## 1.2.7 Information of creditors and publication

The process of approval necessitates that comprehensive information is given by the administrator pursuing an undertaking, notably the rules and procedures of approval.<sup>193</sup> The equiv-

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<sup>188</sup> Article 36(6) EIR-R.

<sup>189</sup> Article 36(7), s. 2 EIR-R presupposes that the practitioner's information about the intended distributions does not comply with the terms of the undertaking or the applicable law, cf. *Weiss*, Int. Insolv. Rev. 24(2015), 192, 205 f.

<sup>190</sup> Article 36(8), (9) EIR-R

<sup>191</sup> Article 36(9) EIR-R.

<sup>192</sup> In that latter sense: Article 102c § 14 RegE EGInsO (Government draft from 11 January 2017 on the German Introductory Act to the Insolvency Act, "Entwurf eines Gesetzes zur Durchführung der Verordnung (EU) 2015/848 über Insolvenzverfahren", Bundestagsdrucksache 18/10823), available at: <http://dip21.bundestag.de/dip21/btd/18/108/1810823.pdf>. (last visited 24 January 2017).

<sup>193</sup> Article 36(5), s. 4 EIR-R.

alent duty applies, for instance, in the aftermath of the approval process, with regard to the intended distributions.<sup>194</sup>

### 1.3 The stay of proceedings

Apart from an undertaking, the court seized to initiate secondary proceedings will, at the request of the main practitioner or the debtor in possession, be empowered to stay their opening for a period not exceeding three months.<sup>195</sup> This instrument, however, may only apply if, firstly, a temporary stay of individual enforcement proceedings has been granted to allow negotiations between the debtor and his creditors, and, secondly, if suitable measures are adopted to protect the interests of local creditors.<sup>196</sup>

## 2. Evaluation

The objective of the recast to repel those secondary proceedings which might hamper the efficient administration of the insolvency estate is to be welcomed. For some aspects, however, the implementation of the undertaking seems inconsistent and insufficient. First practical experiences will demonstrate under what conditions local creditors may be inclined to abstain from the opening of secondary proceedings, especially in terms of procedural costs, the volume of local assets, the number of (secured) local creditors and value of their claims, and, not least, their reliance on local law and domestic procedural bodies. So far, the new regulatory scheme is, to a large extent, conceived as complex, formalistic and cumbersome.<sup>197</sup> Whether or not the concept of “synthetic proceedings” will prove to be a useful and attractive instrument in cross-border insolvencies to balance out (universal) efficiency with local protection remains to be seen – particularly in the context of corporate group insolvencies where the debtor’s COMI is deemed to be different from its registered office and with a view to the EIR’s new approach to permit the opening of secondary proceeding with an objective different from liquidation.<sup>198</sup>

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<sup>194</sup> Article 36(7), s. 1 EIR-R.

<sup>195</sup> Article 38(3) EIR-R. This period is perceived as being too tight, cf. *Brinkmann*, KTS 2014, 381, 400.

<sup>196</sup> As to the combination of Article 38(3) EIR-R with the French *procédure de sauvegarde (financière) accélérée*, see *Dammann/Rapp*, Recueil Dalloz 2015, 45.

<sup>197</sup> Cf. *Garcimartin*, ZEuP 2015, 694, 727; *Thole/Swierczok*, ZIP 2013, 550, 555; *Wessels*, European Company Law 2016, 129, 133; *Eidenmüller* even suspects negative economic effects, thereby criticizing the general approach of ‘modified universalism’ in favor of a ‘straightforward universalism’, see *Maastricht Journal of European and Comparative Law* 20 (2013) 133, 147, 150; as to the potential costs incurred by an undertaking: *Mendiola*, ‘Synthetic’ insolvency proceedings (11/2015), 2; less critical: *Bewick*, *Int. Insolv. Rev.* 24 (2015), 172, 182; *Piekenbrock*, *KSzW* 2015, 191, 196.

<sup>198</sup> See also Article 38(4) EIR-R allowing to align the restructuring objectives in main and secondary proceedings.

## 2.1 Legal issues

### 2.1.1 Article 36 EIR-R as a non-mandatory rule?

The recast does not provide a clear picture on the (non-)mandatory character of Article 36 EIR-R. This question is particularly relevant – and only partly relativized by the alleged consequences of the Brexit – for ensuring whether the insolvency practitioner remains entitled to give an undertaking on the basis of national law. In that regard, the European legislator does not explicitly forbid the giving of an undertaking if the *lex fori concursus universalis* so permits. Simultaneously, the new Regulation has implemented an instrument that has been practiced so far on a purely national level and enlarged its application to procedural structures comprising, *inter alia*, information duties, remedies and a liability regime. In order to prevent a circumvention of these legal guarantees and ensure their application to be ascertainable especially for local creditors, the insolvency practitioner should clearly indicate whether an undertaking is given on the basis of Article 36 EIR-R or rather under a specific provision of national law. However, once the insolvency practitioner opts for the European instrument, Article 36 EIR fully applies and becomes binding as to its prerequisites and legal (especially preclusive) effects. The latter aspect generally increasing the bargaining position of local creditors may, in the individual case, tip the scale in favor of the European mechanism. By providing a clear perspective for all participants on whether territorial proceedings may still be opened regardless of an approved undertaking, this instrument might conceivably preserve its practical relevance also under Article 36 EIR-R.<sup>199</sup>

With respect to group structures, secondary proceedings opened in a coordinated way after the concerted realization of the group-wide assets might, in individual cases, turn out to be an alternative to giving an undertaking under Article 36 EIR-R. As demonstrated in *Emtec*, this approach proves particularly appropriate (albeit more expensive) in the presence of a complex structure or unclear allocation of the group assets, thus demanding for territorial proceedings administered and supervised by independent procedural bodies (court, insolvency practitioner) presumably creating more confidence to local creditors than a foreign practitioner appointed in the main proceedings is expected to do.<sup>200</sup>

### 2.1.2 Approval of the undertaking

#### 2.1.2.1 Approval by the known local creditors

When referring to the *lex fori concursus secundarii*, Article 36(5) EIR-R remains silent on which voting rules designed under national law for the approval of restructuring plans may be conceived as (in-)appropriate in the sense of recital 44 to be (dis-)applied to the different instrument

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<sup>199</sup> However, pleading for a mandatory nature of Article 36 EIR-R excluding the giving of an undertaking under national law: *Mankowski/Müller/Schmidt*, EuInsVO 2015 (2016), Art. 36, para 8.

<sup>200</sup> We owe this insight to Dr. *Reinbart Dammann*.

of an undertaking.<sup>201</sup> If those rules were comprehensively relevant, this would also activate a number of provisions which would or might be inconsistent with the function of an undertaking as set out in Article 36 EIR.<sup>202</sup> Evidently, this does not preclude national (implementing) law providing for voting rules on the basis of body representation, e.g. by a (preliminary) creditors' committee.<sup>203</sup> By contrast, it would run counter to the very purpose and wording of Article 36(1) and (5), s. 1 EIR-R if an undertaking were subject to the debtor's consent<sup>204</sup> or to the mandatory approval of the local court (arg e Article 38(2) EIR-R).<sup>205</sup> In order to keep the instrument of undertakings flexible and unfettered by (additional) formalism and legal uncertainty, the involvement of local courts should only be envisaged on an exceptional or, at least, reduced basis<sup>206</sup> to supervise, for instance, the voting procedure under paragraph 5, to decide on the obstructive voting of individual creditor groups ("class cram-down")<sup>207</sup> or on the voting rights of creditors with disputed claims.<sup>208</sup>

### 2.1.2.2 Approval by the creditors of the main proceedings?

According to Article 36(4) EIR-R, the undertaking shall be subject to any other approval requirements as to distributions, if the *lex fori concursus universalis* so requires. However, requiring a dual approval of the undertaking both by the known local creditors and, commonly, by the creditors of the main proceedings raises doubts: In particular, conferring on the latter a right to approve the undertaking, conceived as a partial substitution of secondary proceedings, might not only give rise to delay, obstruction and legal uncertainty,<sup>209</sup> but would also contradict the general

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<sup>201</sup> Moreover, it is still unclear which voting mechanism shall apply if the rules on qualified majority referred to in Article 36(5) EIR-R do not exist under national law.

<sup>202</sup> This, for instance, would rather be the case with § 251 InsO (German Insolvency Act) dealing with the request of individual creditors that pretend to be placed at a disadvantage by the plan compared with his situation without a plan. This standard, however, proves inappropriate for an undertaking: Being an advantageous instrument compared with the opening of secondary proceedings is not only difficult to predict, but – due to the compromise nature of Article 36 EIR-R – not a formal legal (albeit an often practical) prerequisite for giving an undertaking. Differently, however, Article 102c §§ 17(1), 19 RegE EGInsO (Government draft from 11 January 2017 on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>203</sup> See *MG Rover Belux SA/NV* [2007] BCC 446, 451, at para 9 (approval by the Belgian creditors' committee); *Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch), at para 46; cf. also *Mankowski/Müller/Schmidt*, EuInsVO 2015 (2016), Art. 36, para 46 with reference to French law.

<sup>204</sup> Cf. § 247 InsO (German Insolvency Act). Likewise: *Pluta/Keller*, in: FS Vallender (2015), p. 437, 445.

<sup>205</sup> Cf. § 248 InsO (German Insolvency Act). In the same sense: *Fritz*, DB 2015, 1882, 1888 against *Wimmer*, jurisPR-InsR 7/2015 Anm. 1, II 7 b.

<sup>206</sup> In that direction also: Article 102c § 17(1) RegE EGInsO (Government draft from 11 January 2017 on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>207</sup> Cf. § 245 InsO (German Insolvency Act).

<sup>208</sup> Cf. § 237(1) in conjunction with § 77 InsO (German Insolvency Act), cf. Article 102c § 18 RegE EGInsO (Government draft from 11 January 2017 on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>209</sup> Applying § 160 InsO (German Insolvency Act) will give rise to legal uncertainty, especially if the creditor's vote is subject to the condition that the local assets are of minor importance, in that sense, however, Article 102c § 12 RegE EGInsO (Government draft from 11 January 2017 on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823); also *Wimmer*, in: *Wimmer/Bornemann/Lienau* (eds.), *Die Neufassung der EuInsVO* (2016), para 435. As a consequence, it may occur that local creditors participating in the main proceedings vote on both sides of the undertaking.

principle according to which (non-local) creditors cannot avoid the opening of subsequent territorial proceedings through disapproval. As described above, the debtor's local assets are also held liable for non-local creditors.<sup>210</sup>

### 2.1.2.3 *Approval of the undertaking after the opening of secondary proceedings*

Principally, both mechanisms (i.e. synthetic proceedings and stays of proceedings) may not come into play once secondary proceedings are opened.<sup>211</sup> This shortcoming considerably undermines the general policy approach of the proposal: *Before* an undertaking becomes binding through approval,<sup>212</sup> a court is permitted to initiate secondary proceedings even if the process of approving the undertaking is underway. This bears the risk that local creditors might be tempted to pressure the administrator to grant privileges that exceed those gained by “regular” secondary proceedings or even outright subvert the undertaking by requesting the opening of secondary proceeding *before* the undertaking has been approved. This is exacerbated by the fact that the main practitioner will lack power to request the closing of secondary proceedings following an intermediate approval of the undertaking. Article 38(3) EIR-R does not address that issue either.<sup>213</sup> Apart from that, it remains unclear whether and under what conditions the court shall be entitled under Article 38(3), subpara. 3 EIR-R to refuse the opening of secondary proceedings if an agreement in the sense of subpara. 1 has been concluded in the meantime.

## 2.1.3 Undertaking and secondary proceedings

### 2.1.3.1 *The start of time limit to request the opening of secondary proceedings*

One of the most relevant practical issues is the start of time limit to request the opening of secondary proceedings. According to Article 37(2) EIR-R, this request shall be lodged within 30 days of having received notice of the approval of the undertaking. A specific practical problem arises from the unclear wording as to the addressee receiving notice of the approved undertaking. The provision excludes neither a uniform nor an individual start of the time limit. In our view, this time limit should, for reasons of legal certainty, be determined collectively/uniformly rather than individually by referring to the respective date of an individual creditor's reception of that notice. Evidently, the insolvency practitioner may fulfil his obligation under Article 36(5), s. 4 EIR-R to inform the known local creditors about the approval or rejection of the undertaking

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<sup>210</sup> Contra, *Mankowski/Müller/Schmidt*, EuInsVO 2015 (2016), Art. 36, para 42; *Prager/Keller*, WM 2015, 805, 808.

<sup>211</sup> See also *Brinkmann*, KTS 2014, 381, 397.

<sup>212</sup> Article 36(4), (5) EIR-R.

<sup>213</sup> However, one could assume Article 38(3) EIR-R to serve as a basis for negotiating an undertaking, see *Fritz*, DB 2015, 1882, 1887, referring to a proposal of *Madaus*. This, however, presupposes that a request for the opening of secondary proceedings has been lodged.

individually.<sup>214</sup> However, the insolvency practitioner should additionally ensure a collective and reliable reception of notification under Article 37(2) EIR-R, also vis-à-vis unknown local creditors and even non-local creditors, whose (unimpeded) right to request the opening of secondary proceedings requires that they are given information regarding the deadline which is relevant for all creditors.<sup>215</sup> To that end, creditors should be informed through national insolvency registers both in the Member State of the main proceedings and in the Member State subject to the respective undertaking.<sup>216</sup> In order to achieve a uniform start of that time limit, the register entry should indicate this specific date as well as possible rules under the *lex fori concursus secundarii* determining the time of publication and, thus, the start of the time limit under Article 37(2) EIR-R.<sup>217</sup>

### 2.1.3.2 The court's criterion to reject the opening of secondary proceedings, Article 38(2) EIR-R

According to Article 38(2) EIR-R, a court shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors. In that regard, however, the court shall, when assessing the interests of local creditors take into account that the undertaking has been approved by a qualified majority of local creditors.<sup>218</sup> Thus, even though the wording of Article 38(2) EIR-R states that the court should examine the protection provided by the undertaking only if and when the main administrator files a corresponding request, we suggest that the court should (i) examine *ex officio* if an undertaking has been given and whether or not it meets the criteria under Article 38(2) EIR-R whenever the opening of secondary proceedings is requested and (ii) treat an approved undertaking as an assumption that the interests of local creditors are being protected. This assumption should furthermore include those local creditors, who did not participate in the approval procedure, if they are bound to the outcome according to the domestic voting rules, and as long as they are given the realistic chance to become aware of the undertaking (e.g. via the publication in a register). It would thus fall (iii) to the local creditors to reverse this presumption by providing evidence that their interests are being endangered. In this regard, the mere fact that local creditors will suffer additional effort and costs by participating and lodging their claims in (foreign) main proceedings governed by foreign insolvency law may, by itself,

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<sup>214</sup> In that regard, Article 102c § 20 in conjunction with § 11(2), s. 2 RegE EGInsO (Government draft on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823, p. 35) provides for a notification of the known local creditors through individual service. The same mechanism applies to the giving of an undertaking according to § 11(2) RegE EGInsO.

<sup>215</sup> Contra *Reinhart*, in: Münchener Kommentar InsO, 3<sup>rd</sup> ed. 2016, Art. 37 EIR 2015, para 4, advocating that Article 37(2) EIR-R is not binding upon non-local creditors. This, however, would mean conferring those creditors – within the limits of Article 38(2) EIR-R – the power to deprive a binding undertaking from its effects at any time after the expiry of the time limit, thus causing legal uncertainty. Equally in favor of an individual start of time limit: *Legend*, Petites affiches 2015, n° 16, 8, 11.

<sup>216</sup> See also *infra* 3.4.2.

<sup>217</sup> One could imagine, for instance, a national implementation rule similar to § 9(1), s. 2 InsO (German Insolvency Act) according to which a publication shall be deemed to have been effected when two additional days following the day of publication have expired.

<sup>218</sup> Recital 42, s. 4 EIR-R.

not suffice to deny an adequate protection of local creditors' general interests. Equally, the fact that the secondary proceeding might provide other rules, which exceed the general scope of an undertaking, should not be considered a sufficient limitation of the local creditors' general interests.

That being said, there remains an undeniable danger that judges in the Member State of potential secondary proceedings may, for reasons of protectionism, be inclined to conclude that an undertaking will *not* adequately protect the general interests of local creditors (Article 38(2) EIR-R).

#### **2.1.4 Undertaking and corporate group insolvencies**

Finally, the mechanism of synthetic proceedings lacks adequate adjustment with the concentration of insolvency proceedings for several group companies in one single jurisdiction. Under the scenario of a "group COMI", recital 24 EIR-R explicitly mentions the possibility of instituting secondary proceedings in the Member State(s) of the debtor's registered office(s), without, however, providing guidance as to whether the respective insolvency practitioners remain entitled to give an undertaking according to Article 36 EIR-R. In our view, this question should clearly be answered in the affirmative.

### **2.2 Practical problems**

#### **2.2.1 Criteria to be taken into account by an insolvency practitioner when giving an undertaking**

It goes without saying that the decision of an insolvency practitioner to give an undertaking can only be reached by reference to the individual circumstances of each case. And, of course, the relevant aspects can be identified in a more conducive and fine-grained manner when this new mechanism will be applied under the new regime.

Nonetheless, we gathered non-exhaustive aspects that may play a role in the decision-making process of the insolvency practitioner (see below, 3.2).

#### **2.2.2 Identification and information of local creditors / publication**

Another and even more important issue as to the practical implementation of Article 36 EIR-R is the identification and information of local creditors. Apart from the opening of main proceedings, creditors should generally be informed of (i) the intention of the insolvency practitioner to give an undertaking and the factual assumptions underlying the undertaking;<sup>219</sup> (ii) the undertaking being subject to approval (or disapproval), including the respective legal conse-

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<sup>219</sup> Article 36(1), s. 2 EIR-R.



quences therefrom, in particular as to the start of the time limit for requesting secondary proceedings (Article 37(2) EIR-R);<sup>220</sup> (iii) the time of reception of the notice that the undertaking has been approved (Article 37(2) EIR-R) and (iv) legal remedies set forth in Article 36 EIR-R.

In so far as means of information are concerned, we ask whether or not (local) creditors can or should be reliably informed: (i) either through *non-individual* notification, such as national insolvency registers or nationwide daily newspapers in the Member State where secondary proceedings could be opened; or through a website specifically created by the insolvency practitioner; (ii) or rather through *decentralized individual* notification? In our view, national insolvency registers are best suited to guarantee reliable information of all creditors in combination with an individual notification of the undertaking's approval vis-à-vis the known local creditors. In that regard, the insolvency register in the Member State subject to the respective undertaking seems to be the most appropriate instrument for giving notice of the undertaking's (dis-)approval in order to ensure a uniform and ascertainable start of the time limit under Article 37(2) EIR.<sup>221</sup> Given that this Regulation only determines the *minimum* amount of information to be **published** in the insolvency registers, Member States should not be precluded (and indeed be encouraged) from including additional information, cf. recital 77, Article 24(3) EIR-R.<sup>222</sup>

As to the addressee of the information, we recommend that, considering the right of all creditors to request the opening of secondary proceedings (Article 37(1)(b) EIR-R), all – including non-local – creditors should be informed about the approval/disapproval of an undertaking.

### 3. Theses and recommendations

#### 3.1 Scope of undertakings

3.1.1 Those assets situated in the Member State in which secondary proceedings could be opened (including the proceeds received from their realization) shall form a sub-category of the insolvency estate (cf. recital 43 EIR-R) liable for both local and other creditors, which otherwise would be entitled to lodge their claims in secondary proceedings according to Article 45 EIR-R.

3.1.2 The scope of an undertaking, i.e. the distribution and priority rights under the law of the Member State where secondary proceedings could be initiated, should apply to all creditors, including non-local creditors.

3.1.3 The special rules on conflict of laws (Articles 8 ff. EIR-R) should prevail over the instrument of an undertaking. In this respect, Article 36 EIR-R has to be differentiated from the

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<sup>220</sup> Article 36(5), s. 4 EIR-R.

<sup>221</sup> See *supra* 2.1.3.1.

<sup>222</sup> Information on certain aspects of insolvency proceedings is essential for creditors, such as time limits for lodging claims or for challenging decisions, recital 78 EIR-R.

scope of Article 8 EIR-R, especially when considering this provision as a substantive rule rather than a rule on conflict of laws.

### **3.2 Giving of an undertaking**

In view of the non-mandatory nature of Article 36 EIR-R, the insolvency practitioner remains entitled to give an undertaking on the basis of national law. However, in order to prevent a circumvention of its procedural guarantees and ensure their application to be ascertainable especially for local creditors, the insolvency practitioner should clearly indicate whether an undertaking is given on the basis of Article 36 EIR-R or rather under a specific provision of national law. Once the insolvency practitioner opts for the European instrument, Article 36 EIR-R fully applies and becomes binding as to its prerequisites and legal effects.

### **3.3 Assessing the adequacy and efficacy of Article 36 EIR-R**

The decision of an insolvency practitioner to give an undertaking according to Article 36 EIR-R can only be reached by reference to the individual circumstances of each case. Nonetheless, we recommend the following aspects to be taken into account:

- first, possible adverse effects to be expected from the opening of secondary proceedings with regard to the efficient administration of the main proceedings that could be avoided or mitigated by giving an undertaking;
- second, the complexity of the debtor's local assets or the complexity of applying different insolvency laws as to distribution and priority rights;
- third, reasons for local creditors to disapprove an undertaking and, instead, to request the opening of secondary proceedings, especially due to *(i)* the beneficial rules on the realization of assets under local insolvency law; *(ii)* the higher costs of lodging claims in the Member State of the main proceedings; *(iii)* greater confidence in a secondary insolvency practitioner to pay due regard to their local interests; or *(iv)* particularities of a corporate group structure;
- and finally, the role of national judges when requested to open secondary proceedings who might be inclined to conclude that an undertaking will not adequately protect the general interests of local creditors (Article 38(2) EIR-R).

### **3.4 Identifying and informing (local) creditors**

The identification and information of (local) creditors is of vital importance when giving an undertaking. In that regard, the following aspects have to be kept in mind:

### 3.4.1 Creditors should be informed of...

- the opening of main insolvency proceedings (Article 28 EIR-R);
- the intention of the insolvency practitioner to give an undertaking and the factual assumptions underlying the undertaking;
- the undertaking being subject to approval (or disapproval), including the respective legal consequences therefrom, in particular as to the start of the time limit for requesting secondary proceedings (Article 37(2) EIR-R);
- the time of reception of the notice that the undertaking has been approved (Article 37(2) EIR-R);
- legal remedies set forth in Article 36 EIR-R.

### 3.4.2 Means of communication

In our view, national insolvency registers in combination with an individual notification of the undertaking's approval vis-à-vis the known local creditors are best suited to guarantee reliable information of all creditors. In that regard, the insolvency register in the Member State subject to the respective undertaking seems to be the most appropriate instrument for giving notice of the undertaking's (dis-)approval in order to ensure a uniform and ascertainable start of the time limit under Article 37(2) EIR.<sup>223</sup>

### 3.4.3 Creditors' information on the (dis-)approval of the undertaking

We recommend that, in light of the right of all creditors to request the opening of secondary proceedings (Article 37(1)(b) EIR-R), all – including non-local – creditors should be informed as to the approval/disapproval of an undertaking.

## 3.5 The start of time limit to request the opening of secondary proceedings (Article 37(2) EIR-R)

3.5.1 The starting point of the 30-day time limit to request the opening of secondary proceedings according to Article 37(2) EIR-R should, for reasons of legal certainty, be determined collectively/uniformly rather than individually.

3.5.2 The insolvency practitioner should ensure a collective and reliable reception of notification under Article 37(2) EIR-R, also vis-à-vis unknown local creditors (and non-local creditors), see also 3.4.2.

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<sup>223</sup> See *infra* 2.1.3.1.

### 3.6 Temporary stay of the opening of secondary proceedings

3.6.1 The instrument of Article 38(3) subpara. 1 EIR-R – so as to be more in line with the proposal’s key objective to avoid detrimental secondary proceedings – should be extended to situations where the main insolvency practitioner has given or envisages giving an undertaking in the sense of Article 36 EIR-R, which, however, has not been approved yet.

3.6.2 This instrument should include the judicial power to close secondary proceedings at the request of the main practitioner once an undertaking, meeting the conditions under Article 38(2) EIR-R, has been approved according to Article 36 EIR-R.

### 3.7 Implementing Regulation

Article 36 EIR-R gives rise to national implementing regulation, especially with regard to the relevant domestic rules referred to in paragraph 5 on the approval of undertakings. As a general principle, national norms implementing EU regulations may not contravene the wording and objectives of the European legal act and its provisions. Consequently, the implementing legislator should, in the context of Article 36 EIR-R, generally avoid rules promoting formalism, legal uncertainty and increased complexity which makes the instrument of an undertaking less flexible or, at worst, practically irrelevant.<sup>224</sup> This is particularly true for two aspects:

- National voting rules on the adoption of restructuring plans should fit in with the purpose of an undertaking as set out in Article 36 EIR-R. In that respect, a provision under national law would prove inappropriate to undertakings in the sense of recital 44 if it provides, for instance, for the debtor’s consent or mandatory approval of the local court (see *infra* 2.1.2.1).
- Given the partly substituting effect of undertakings vis-à-vis the opening of secondary proceedings, national implementing rules should not contradict this structural element by introducing provisions that might hamper, or even inhibit the approval and performance of an undertaking. Accordingly, domestic rules implementing a creditor’s approval in the *main* proceedings<sup>225</sup> would clearly infringe Article 36 EIR-R.

By contrast, the following issues should be subject to implementing regulation while respecting the limitations set by Article 36 EIR-R:

- Provisions obliging the insolvency practitioner to indicate whether he is giving an undertaking under Article 36 EIR-R or rather on the basis of national law;
- Provisions concretizing the information to be given under Article 36(1), s. 2 EIR-R;

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<sup>224</sup> Pointing in the same direction: *Fritz*, DB 2015, 1882, 1887.

<sup>225</sup> See above fn. 209.

- Rules specifying those provisions on the adoption of restructuring plans that are appropriate to apply to the approval of undertakings according to Article 36(5), s. 2 EIR-R;<sup>226</sup>
- Rules on proofing the status of local creditors in the voting process, including the justification and amount of their claim;<sup>227</sup>
- Rules specifying local jurisdiction in relation to the remedies provided for by Article 36(7), s. 2, (8) and (9) EIR-R, potential time limits and whether or not the respective court decision is subject to appeal;<sup>228</sup>
- Provisions concretizing the liability regime under Article 36(10) EIR-R.<sup>229</sup>

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<sup>226</sup> Cf. Article 102c § 17(1), 19 RegE EGInsO (Government draft on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>227</sup> Cf. Article 102c § 18(1) RegE EGInsO (Government draft on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>228</sup> Cf. Article 102c § 22 RegE EGInsO (Government draft on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

<sup>229</sup> Cf. Article 102c § 14 RegE EGInsO (Government draft on the German Introductory Act to the Insolvency Act, Bundestagsdrucksache 18/10823).

## B. Cooperation, Communication, Coordination\*

### Articles 41-44 EIR-R (*single debtor*)

#### 1. Introduction

According to Article 31 EIR liquidators in the main proceedings and liquidators in the secondary proceedings shall be duty bound to communicate information to each other. Although the provision only refers to insolvency practitioners (IP), some interpretations extended it to encompass cooperation between courts, and also between courts and IPs. Case law applying this understanding of the text is to be found in the form of communication between courts to decide on the COMI – thus on jurisdiction –, or on the type of proceeding to be opened. Well-known examples of the working together of courts in cross-border insolvency settings are the BenQ and the PIN Group<sup>230</sup> cases. However, examples pointing to the opposite direction also exist,<sup>231</sup> and actually the prevailing opinion on Article 31 EIR qualifies it as insufficient. As the Commission's Report on the application of the EIR stated:

*“The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings.”*<sup>232</sup>

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\* Prof. Dr. **Marta Requejo Isidro**, Senior research fellow MPI Luxembourg; Professor at the University of Santiago de Compostela.

<sup>230</sup> District Court of Amsterdam, 27 February 2007. BenQ Holding BV had a permanent location in the Netherlands and a subsidiary in Munich. Employees were working in Munich and also in the Netherlands. All the activities were taking place in Munich. There were two managing directors, one in Amsterdam and one ‘travelling part-time manager’. For all his decisions, the second director needed the consent of the other director. The director residing in the Netherlands had the power to make decisions on his own. In December 2006 the Dutch company filed a petition for a moratorium (‘surseance van betaling’). The Amsterdam Court granted an immediate, but preliminary order. A couple of days later the German part of the company filed for bankruptcy in Munich. The judge granted the opening of insolvency proceedings, but did not yet decide on the type of proceedings. The story goes that the German judge phoned the judge in Amsterdam in order to decide what type of proceedings should be opened. The result was that on January 31, 2007 the Amsterdam Court opened main proceedings and a few days later secondary proceedings were opened in Munich. The communication between the courts (judges) prevented main insolvency proceedings from being opened in both the Netherlands and in Germany.

<sup>231</sup> Amtsgericht Köln, 19 February 2008. The PIN group was a German enterprise with most of the operating companies having their registered office in Germany. The holding company had its registered office and its COMI in Luxembourg for financial reasons. A COMI shift to Germany occurred on the eve of insolvency; the Amtsgericht Köln held that the shift's purpose was to facilitate the restructuring of the group by coordinating the proceedings over all of the group's subsidiary companies, therefore it was not abusive. The German court requested information to the Luxembourg court by fax on the opening of main proceedings there and got an immediate answer, also by fax, on the same day.

<sup>232</sup> As exemplified by the national proceedings underlying the preliminary question to the ECJ in case C-116/11. Following the approval of a rescue plan (procédure de sauvegarde) by the French court in Meaux, the Polish court

The reasons underlying the lack of cooperation between liquidators, which seem to be also pertinent regarding court-to-court and court-IP cooperation, are both legal and practical. The most relevant among the former are the lack of an explicit authorization or a mandate addressed to the actors involved; the lack of specific instructions or guidelines on how to proceed to actually implement the cooperation; the complexity of the legal framework, i.e. the plurality of procedural and substantive insolvency laws throughout Europe; the differing policies underlying national insolvency systems. Additional legal difficulties such as divergent national standards on data protection may also concur.

Typical practical difficulties are the lack of command of a foreign language; the fear (the actual risk) of losing time and increasing costs while organizing the cooperation, and in case it fails; depending on the jurisdiction, the (mediocre) quality and insufficient specialization of judges; the (poor) court' infrastructure and available means; the lack of detailed knowledge of the Insolvency Regulation; the limited experience in dealing with international insolvency cases; the absence of a real awareness of the impact of insolvency and local proceedings in international business; and the unwillingness to cooperate, based on the absence of real mutual trust.<sup>233</sup>

## 2. Legal framework

Under the new Regulation, Articles 41 to 44 set up a framework for enhanced cooperation between insolvency practitioner, courts, and insolvency practitioner and courts involved in main and secondary/territorial proceedings concerning the same debtor.<sup>234</sup>

Article 41 EIR-R instructs the insolvency practitioners to communicate and cooperate among them in order to facilitate the coordination of main and territorial or secondary insolvency proceedings concerning the same debtor.<sup>235</sup> Cooperation is subject to the requirement that it does not run against the rules applicable to the proceedings; additional caveats are added in the case of insolvency of group of companies. Within the framework of those restrictions cooperation may take any form, including the conclusion of agreements or protocols, and some specific actions are proposed to the IPs.

An additional rule – Article 42 EIR-R establishes the duty to cooperate and communicate regarding the courts involved in proceedings concerning the same debtor. Once again, cooperation is subject to the conditions that it does not run against the rules applicable to the proceedings. Some examples of means of cooperation are included.<sup>236</sup>

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asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification; the referring court then consulted an expert.

<sup>233</sup> *Wessels*, *Ins. Int.* 2014, 100-105.

<sup>234</sup> For the case of insolvency proceedings relating to two or more members of a group of companies see Articles 56 ff, and *infra* Part 3 0.

<sup>235</sup> According to Article 41(3), the rule also applies in cases where the debtor remains in possession of its assets.

<sup>236</sup> Indirect cooperation via the appointment of an independent person or body acting on the court's instructions (Articles 42(1)); direct communication (Articles 42(2)). Courts may agree on the IP; share information; coordinate the

Article 43 EIR-R introduces a duty for the IP in insolvency proceedings to cooperate and communicate with a court before which a request to open another insolvency proceedings is pending, or which has already opened such proceedings, in order to facilitate the coordination of main, territorial and secondary insolvency proceedings affecting the same debtor.

Article 44 has been included on the allocation of the costs of cooperation and communication.

According to recital 48 EIR-R, in their cooperation IP and courts should take into account best practices set out in principles and guidelines adopted by European and international organizations active in the area of insolvency law and in particular those prepared by UNCITRAL. Recital 49 EIR-R adds the possibility of entering into agreements and protocols.

### 3. Recommendations

Articles 40-44 of the new regulation create a framework of duties<sup>237</sup> where some of the previous obstacles to cross-border cooperation disappear - such as the lack of a specific provision addressed to the courts-; others remain and new ones come up.<sup>238</sup> In the absence or while waiting for answers from the European institutions (the CJEU included) the hurdles will be handled with by the Member States. Some obstacles are likely to be surmountable through an object-oriented interpretation of already in-force rules by the authorities in charge of applying the law. For others, some legislative activity is required, either to purge obstacles, or to facilitate compliance with the duties or the exercise of the faculties set up by the new regulation. It is to be hoped as well that future practice will be eased by the resource to the soft law instruments as advised by the EU lawmaker in recital 48 of the EIR.

It is here submitted that number of soft law principles and guidelines already existing to support insolvency practitioners and courts in their cooperative endeavours would make pointless a new effort in the same lines. The research conducted to date under the present project has led to the belief that the genuine problem lies with the lack of awareness and knowledge of the available soft law instruments and/or their contents, together with the mistrust towards by the new rules - Articles 41 to 44 EIR-R. Therefore, our recommendations (actions to be undertaken by the European Commission, the national lawmaker, the courts or other authorities applying the law and the academia) are the following.<sup>239</sup>

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administration and supervision of the debtor's assets and affairs; coordinate the conduct of hearings and the approval of protocols.

<sup>237</sup> Both to provide the means and to engage in the efforts to cooperate.

<sup>238</sup> For instance, whether the insolvency court has to, or is allowed to, adopt soft law instruments related to cooperation. Should the answer be "yes", whether it has to be made in a particular form - which kind of decision; whether motivation is needed; whether the decision is subject to appeal. Other questions relate to the quality of the information provided by the foreign insolvency practitioner or court (is it an evidence?). How to qualify foreign insolvency practitioners (are they parties or third parties to the proceedings?) is also a source of debate.

<sup>239</sup> For the purposes of illustration we focus on Spain. Some examples are also provided by German law, as it stands today. It should nevertheless be recalled that an amendment of the Insolvency Statute (and other Statutes, when needed) is on its way in Germany (RegE EGIInsO, cf. supra fn. 192), including some specific rules on cooperation entai-



### 3.1 To the European Commission

***Explaining the rules. Raising awareness of the instruments to comply therewith.***

Once the regulation is in force and applicable, the European Commission's role is to a large extent a pedagogic one, focused in explaining the rules and raising awareness of the instruments and tools facilitating compliance therewith. In the current scenario a practice guide of the European Commission for practitioners (courts and insolvency practitioners) may prove to be a valuable document.<sup>240</sup> In general, practice guides include technical advice, recollections of best practices, case studies, and links to other pertinent documents. They have neither a binding effect nor an enhanced interpretative value, but they illustrate the applicable law and help understanding it. In the field of cross-border communication and cooperation in insolvency cases a practice guide should introduce to and explain the new rules<sup>241</sup> (1). It should also raise awareness of the available soft law instruments (2) as well as of the relevant national and CJEU case law (3).

Examples:

#### 3.1.1 Introducing and explaining the rules

***In their systematic relation.*** Ad ex., doubts have arisen on what's the relationship between Articles 40-43 EIR-R and other rules setting up specific forms of cross-border cooperation: do they share a common purpose? Are Articles 40-43 EIR-R residual or subsidiary rules on cooperation? Could it be claimed that specific rules -such as Article 38(1) EIR-R<sup>242</sup>; Article 46 EIR-R<sup>243</sup> - imposing direct obligations are dependent upon their compatibility with the procedural national rules (i.e., the caveat foreseen in Articles 41-43 EIR-R)? Could an insolvency practitioner complying with Articles 28, 29 EIR-R<sup>244</sup> be considered as acquitted of his obligations under Articles 41 and 43 EIR-R if the objective of the latter is reached in relation to the persons/bodies targeted by those provisions, i.e., the insolvency practitioner/court in the parallel proceeding?

***In their individual wording.*** Ad. ex., Article 31 EIR 2000 prompted a debate on whether courts – and not only insolvency practitioners – were duty bound to collaborate between them.

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ling communication: see § 3(3) of the new Article 102c: “Vor der Einstellung nach § 2 Absatz 1 Satz 2 hat das Insolvenzgericht das Gericht des anderen Mitgliedstaats der Europäischen Union, bei dem das Verfahren anhängig ist, und den Insolvenzverwalter, der in dem anderen Mitgliedstaat bestellt wurde, über die bevorstehende Einstellung zu unterrichten.” Other provisions focus on cooperation in the framework of the insolvency of groups of companies. We would like to thank *Sandra Becker*, research fellow of the MPI, for her help in identifying the German examples.

<sup>240</sup> Formally, the appropriate instrument should be a recommendation according to *Wessels* (ed), *EU Cross-Border Insolvency Court-to-Court Cooperation Principles*, 2015, at 39. The same proposal had been made for the Co-Co guidelines 2007, see *Wessels*, “The role of courts in solving cross-border insolvency cases”, *Ins. Int.*, 2011, 65-73.

<sup>241</sup> Although the final word lies with the MS courts and finally with the CJEU.

<sup>242</sup> A court seized of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner in the main insolvency proceedings and accord him an opportunity to be heard on the request.

<sup>243</sup> Stay the process of realization of assets in whole or in part on receipt of a request from the insolvency practitioner in the main insolvency proceedings.

<sup>244</sup> Publication in another Member State; registration in public registers of another Member State.

Whereas in the new regulation this doubt has been sorted out further problems remain, such as what's the meaning of "court": is "court" to be understood as encompassing as well agents of the court or other bodies to whom the national legal rules entrust with duties to communicate, such as the Spanish *secretario judicial*,<sup>245</sup> the *mediador concursal*,<sup>246</sup> or even the registrar at the public insolvency registry?<sup>247</sup> In the same lines, what about the German senior judicial officer, in the light of the tasks assigned by Section 3.2, e and g of the Act on Senior Judicial Officers?<sup>248</sup> To some extent the definitions in Article 2.6 EIR-R may help, especially lit. *ii* where the bodies empowered "to take *decisions* in the course of such [insolvency] proceedings" (italics added), are mentioned; but it could still be discussed whether the "decisions" alluded to encompass those taken by the above mentioned professionals.

***In their application in practice.*** The above mentioned practice guide should include a non-exhaustive list of occasions for communication and cooperation, thus opening the eyes of practitioners and courts to envision chances to make it.<sup>249</sup>

### 3.1.2 Raising awareness and promoting the use of soft law instruments

Soft law instruments are meant to support cooperation and communication among the main actors in cross border insolvency proceedings. However, they are not always easy to handle: they are admittedly not well known by their intended public; their growing number makes it more difficult.<sup>250</sup> They are usually accompanied by commentaries which, while providing for a better understanding,<sup>251</sup> make of them too lengthy documents.

<sup>245</sup> See for instance Article 178 bis 4, *Ley 22/2003, de 9 de julio, Concursal* (LC, Insolvency Act).

<sup>246</sup> See Título X LC.

<sup>247</sup> According to Article 178 bis, 3.5 v) LC he is the one to decide on whether the applicant requesting access to a specific section of the Register -thus the information contained therein- is entitled to it. See also Article 27 Regulation.

<sup>248</sup> Of 5 November 1969, as most recently amended by Art. 5 para 2 of the Act of 10 October 2013, Federal Law Gazette [BGBl.] Part I 3799.

<sup>249</sup> Such as the appointment of a common insolvency practitioner; allocation of tasks between insolvency practitioners in the concurrent proceedings; administration and supervision of debtor's assets and affairs; conduct of hearings (joint hearings; invitation to other court to attend the hearings before the concurrent court); approval of protocols; stay or moratorium of litigation pending relating to the debtor's assets; postponement of decision opening secondary proceedings; identification of the debtor's assets in the respective countries; debtor's assets realization; distribution of product; drafting of a reorganization plan.

<sup>250</sup> To mention just some:

- UNCITRAL Model Law on Cross-border Insolvency 1997;
- American Law Institute Principles of Cooperation among the North American Free Trade Association (USA, Canada, Mexico) 2000 ("ALI NAFTA Principles");
- American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2000 ("ALI NAFTA Guidelines");
- European Bank of Reconstruction and Development Core Principles for an Insolvency Law Regime 2004;
- American Law Institute/UNIDROIT Principles of Transnational Civil Procedure 2004;
- UNCITRAL Legislative Guide on Insolvency Law Recommendations 2004, in 2009 supplemented with a Part Three: "Treatment of enterprise groups in insolvency";
- European Bank of Reconstruction and Development Office Holders Principles 2007;
- European Communication & Cooperation Guidelines for Cross-border Insolvency 2007;
- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009 (the "Practice Guide");

A European Commission practice guide addressed to the insolvency practitioner and courts could compile and link to the existing bodies of soft law,<sup>252</sup> and briefly explain some of their main characteristics and how they could be used under the recast regulation, especially where they have drawn inspiration on the common-law world. *A priori* no soft law instrument is to be given precedence over the rest. It could be submitted that the UNCITRAL principles have some priority or better authority, as they are explicitly mentioned in recital 48. Actually, other instruments may be considered more appropriate because specifically conceived for the EU: the CoCo guidelines 2007, the EUJudgeCo principles and guidelines 2015. The correspondence with the regulation is however not always ensured: while some of the principles' rationale can be found in the CJEU case law,<sup>253</sup> not all the proposals are clearly in line with the regulation. By way of example: the commentary to principle 11, "modification of recognition" where it is submitted that in case of clear evidence to support the allegation of fraud in the opening of the main proceedings "the appropriate form of modification could be revocation", gives raise to some doubts.<sup>254</sup>

### 3.1.3 Spreading the knowledge about case law

Article 40 EIR-R is not completely new for the EU Member States; Articles 42-43 are. Courts and insolvency practitioners are likely to be puzzled by them, and to face in many occasions the lack of provisions, or even of ideas, showing them how to proceed in order to achieve the cooperation aimed. To date the European – continental – practice on communication and cooperation involving insolvency practitioner and/or courts is scarce. A European Commission's practice guide should highlight the experiences where insolvency practitioners and courts of Member States have been involved, recollecting the practical and legal problems they faced, offering them as examples of ways-out for their colleagues.<sup>255</sup> The decisions on interpretation delivered by the CJEU should be included in such compilation. The instrument should be dynamic, i.e., be continuously updated.

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- Guidelines for Coordination Multi-National Enterprise Group Insolvencies (July 2010 Draft);
  - Prospective Model International Cross-border Insolvency Protocol.

<sup>251</sup> See for instance in the EUjudgeCo principles the use of different verbal tenses: "may", "should", sometimes even "shall" in spite of their self-declared non-binding nature.

<sup>252</sup> Or other interesting documents, such as the glossary of terms and descriptions included as Appendix to the 2012 ALI Global Principles Report.

<sup>253</sup> Ad. ex., Principle 22, Assistance to reorganization, is allegedly based on case C- 116/11; as a consequence correspondence with the EU objectives is guaranteed, see *Wessels* (ed.), *EU Cross-Border Insolvency...*, at 92.

<sup>254</sup> Revocation may be allowed under national law (see Article 220.5 LC), but it is impossible under the EU rules.

<sup>255</sup> National cases such as *Sendo*, *Emtec*, *PIN Group II*, *BenQ*, *Nortel*. As for preliminary rulings, see aff. C- 116/11, *Bank Handlony* and aff. C-327/13, *Burgo*.

### 3.2 To the National Lawmaker

***Taking stock. Removing obstacles, paving and showing the way.*** As all European regulations the new one on cross-border insolvency is of direct application in the Member States; therefore, it could be thought that no further elaboration on the part of the Member States is needed for the EU provisions to be applied. Of course, this does not hold true. Self-explaining, self-executing and exhaustive EU obligations are rare; the legal systems of the Member States are usually called upon to support them; sometimes an active intervention of the national lawmaker is required.<sup>256</sup> To assess whether intervention is needed a task of assessment of the existing legal framework in each Member State must be performed to determine where the system stands, and to what extent it already allows for a swift implementation of the regulation -or, conversely, it hinders it (1). In the light of the outcome of the exam the next step may be a regulatory one, entailing the abrogation or amendment of the existing rules, and/or the adoption of new ones (2). Besides, the national lawmaker may also be willing to undertake a pedagogic or advisory role similar to the one we recommended above to the Commission (3).

Examples:

#### 3.2.1 Taking stock

- Under Article 31 EIR 2000 some EU Member States already prescribed some specific forms of cooperation. In Spain the duty of international cooperation among insolvency practitioners, involving to some extent the courts,<sup>257</sup> had been formalized in some detail in Article 227 LC. German law provides also good examples: see the duty (*shall*) of the foreign insolvency administrator to inform the tribunal of essential changes in foreign proceedings, section 347 Insolvency Statute;<sup>258</sup> on the duty (*shall*) of cooperation between insolvency administrators, see section 357 Insolvency Statute; extending the possibility (*may*) to cooperate with a foreign court to the national ones, see section 348 Insolvency Statute.
- The analysis of the legal system in force in a Member State for the purposes of the assessment mentioned above should not be restrained to insolvency laws: an appropriate framework may be provided for by general rules. In Spain, the *Ley 29/2015, de 31 de julio de 2015, de cooperación jurídica internacional*, is *a priori* not applicable to cross-border insolvency by virtue of the *lex specialis* principle;<sup>259</sup> however, where the Insolvency Act does not provide for a solution (especially if the gap is due to the fact that the law was adopt-

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<sup>256</sup> When interpretation of the existing materials is not enough to reach the desired outcome: see below.

<sup>257</sup> See Article 222. 2.3 LC on the approval of protocols: “La cooperación [of insolvency practitioners] podrá consistir, en particular, en: (...) La aprobación y aplicación por los tribunales o autoridades competentes de acuerdos relativos a la coordinación de los procedimientos?”.

<sup>258</sup> Insolvency Statute of 5 October 1994, as last amended by Article 19 of the Act of 20 December 2011 (Federal Law Gazette I page 2854).

<sup>259</sup> See Preamble, under n° I.

ed before the solution was felt as needed), it may be resorted to as “common” law for cooperation in cross border civil matters. Interestingly, the *Ley 29/2015* allows for direct communication among courts in Article 4.<sup>260</sup>

### 3.2.2 Removing obstacles, paving the way

The regulation will be (generally) applicable from 26 June 2017; therefore, where the need for new rules is felt as unavoidable for a swift implementation of the Regulation, the national lawmaker should profit from the closest opportunity to introduce them. A current example can be found in Spain in relation to the appointment of the insolvency practitioner. Recital 50 EIR-R contemplates the choosing a single one for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner.<sup>261</sup> In this regard it is worth recalling that the requirements to be met by insolvency practitioners are under debate in Spain since 2014. Article 27 LC on the “Condiciones subjetivas para el nombramiento de administradores concursales”, awaits further development by a “reglamento”.<sup>262</sup> To the best of our knowledge<sup>263</sup> no agreement has been reached so far in spite of the several attempts made to date. Therefore, the opportunity remains to introduce a provision clarifying under which conditions a foreign insolvency practitioner may also be designated insolvency practitioner for the proceeding in Spain. A specific provision would be useful in the context of a regime such as the Spanish one, moving towards limiting the judge’s margin of manoeuvre in the choice of the insolvency practitioner.<sup>264</sup>

A common obstacle to communication between courts lies with language: not only with the lack of command of a foreign language - a *de facto* problem-, but also with the legal rules on the language of the proceedings.<sup>265</sup> Very little is said in the Spanish LC in this regard, thus the gen-

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<sup>260</sup> By contrast direct communication is regarded in the JudgeCo Guidelines as a last resort mechanism. *Wessels* (ed.), *EU Cross-Border Insolvency...*, pp. 104-106 (Commentary to Guideline 1).

<sup>261</sup> And provided independence is ensured. Recital 50 does not allude to this requirement, neither does it appear as such in the dispositive parts of the EIR-R.

<sup>262</sup> Disposición Transitoria nº 2 *Ley 17/2014, de 30 de septiembre, por la que se adoptan medidas urgentes en materia de refinanciación y reestructuración de deuda empresarial.*

<sup>263</sup> Last checked: December 2016.

<sup>264</sup> The current system (Article 27 LC) imposes the sequential order of a pre-drafted list of potential insolvency practitioners. Some leeway is of course permitted in complex cases, but complexity is defined by the size of the insolvency - that it is a cross-border one does not have *per se* any particular weight. The retribution of the insolvency practitioner is also fixed by reference to rigid rules; it may nevertheless exceed the limits imposed according to Article 34 LC, but what “complexity” means here is unclear.

<sup>265</sup> The Regulation itself is not particularly intrusive in this regard, with the exception of Article 73, para 2 (below, fn. 268): see Article 22, on the proof of the insolvency practitioner's appointment, para 2 (a translation into the official language or one of the official languages of the Member State within the territory of which it intends to act may be required). Regarding the duty to inform creditors according to Article 54, it is for the MS to declare whether and which non-official languages they accept to communicate the opening of proceedings. For the lodging of claims, see Article 55, para 5: Claims may be lodged in any official language of the institutions of the Union, but the court, the insolvency practitioner or the debtor in possession may require the creditor to provide a translation in the official language of the State of the opening of proceedings. See also Article 36, on the language of the undertaking in order to avoid secondary insolvency proceedings.

eral rule of Article 231 LO 6/1985, de 1 de julio, *Ley Orgánica del Poder Judicial*, should apply. This entails that only Spanish official languages (Castilian or the official language of a Comunidad Autónoma) are accepted. Article 219 LC foresees the translation to French and English of the terms “Convocatoria para la presentación de créditos. Plazos aplicables” when the Spanish insolvency proceeding is part of a larger, cross-border setting; however, the information included under such heading will still be drafted in one of the Spanish official languages. Besides, foreign creditors shall communicate their claims in Spanish; insolvency practitioners are empowered to ask them for a translation.<sup>266</sup> It is disputable to what extent the activities in which cooperation materialize pertain to the proceedings (and therefore are subjected to strict language requirements);<sup>267</sup> at any rate, for the sake of efficiency their language regimen should be as flexible as possible.<sup>268</sup>

### 3.2.3 Valuable clarifications; pro-cooperation orientations

According to Article 42.3 EIR, “the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them”. The figure of an independent intermediary is unknown to the Spanish system—therefore its regimen, how to appoint him, who should be informed about, whether the appointment can be contested... are open questions. However, in 2013<sup>269</sup> a new tool was added in the field of insolvency, in which the skills of a mediator and knowledge of insolvency converge: the “mediador concursal”, bankruptcy mediator. Whereas we would advise against limiting the choice of independent intermediaries in the sense of Article 43 EIR-R to the *mediadores concursales*, their existence and (presumed) capacities<sup>270</sup> to undertake such function should not be forgotten: in this sense an explicit reference to them as suitable persons in the LC (or/and in the *Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles*) would be welcome.

An express statement of the consequences of non-compliance with the duties imposed in Article 41 ff EIR-R (for instance: the liability of the insolvency practitioner could be engaged should he refuse to cooperate with the foreign insolvency practitioner/court, or to ask them for cooperation) would effectively help to raise awareness about their existence.

The national lawmaker may be willing to engage in an advisory role. Such mission may be fulfilled via the preambles to the articulated texts - see for instance *Ley 29/2015*, Preamble, n° II,

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<sup>266</sup> Article 33.1.g.9 LC, Article 219 LC.

<sup>267</sup> What exactly is comprised within the “perimeter” of the proceeding may be discussed.

<sup>268</sup> See nevertheless Article 73, in the framework of groups of companies, on the language for the communication of the coordinator and the IP (a common one may be agreed upon), and the coordinator and the court (the official language of the court).

<sup>269</sup> *Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización*.

<sup>270</sup> Whereas proper functions of mediation are probably not needed in the context of Article 42, the capacity to communicate, the (presumed) knowledge of techniques and skills to act as an intermediary make of mediators appropriate for the task.

*in fine*, where an explicit mention is made to the *Principios Generales para las comunicaciones judiciales* (sic) drafted by The Hague Conference.<sup>271</sup>

### 3.3 To the national interpreter and authorities applying the law

***Interpretation/application of the existing rules in the light of the obligations imposed by the regulation and the underlying principles.*** The implementation of the rules of the regulation does not necessarily require new ones at the national level. Sometimes an appropriated, object-oriented interpretation and application of already existing national provisions will be enough; in-force rules may be given a further utility and serve the purposes of cross-border communication and cooperation.

In Spain the principles underlying the insolvency regime in force since 2003 set a background favorable to interpretations pro-coordination and cooperation. The Preamble of the LC refers in several occasions to the flexibility of the insolvency proceedings; it also recalls that the system “concede al juez del concurso una amplia discrecionalidad en el ejercicio de sus competencias, lo que contribuye a facilitar la flexibilidad del procedimiento y su adecuación a las circunstancias de cada caso”.<sup>272</sup> Besides, the Preamble recognizes the inspiration drawn from the UNCITRAL Model Law, and explains the objective pursued by the rules on cross-border situations as follows: “establecer la mejor coordinación entre ellos, en beneficio de la seguridad jurídica y de la eficiencia económica en el tratamiento de estos fenómenos, lo que constituye una de las materias en las que con mayor relieve se pone de manifiesto la modernización introducida por la reforma concursal”. In the light of it it’s legitimate to conclude that support is given to the courts to apply already existing national provisions with a view to facilitate the aim of the EIR-R.

Examples:

- Article 190 LC enables the judge to switch between the so called “common procedure” to the “abbreviate procedure”. Such faculty could be used in cross-border cases when useful for a better coordination with the foreign insolvency proceedings.<sup>273</sup>

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<sup>271</sup> What the value of the mention is, in particular whether it has any beyond that of exemplifying the topicality of the subject-matter, may be disputed.

<sup>272</sup> Interesting examples of flexibility can be found in the case law: see for instance *Juzgado de lo Mercantil núm. 3 de Barcelona, Auto de 9 enero 2012*, JUR 2014\176918, on the appointment of an administrator for the purposes of “tutelar interinamente las actuaciones de la deudora durante el plazo de vigencia de las diligencias preliminares, así como familiarizarse con los datos y circunstancias de la compañía para garantizar con ello la agilidad que permita en su caso y en su día tramitar un procedimiento abreviado en los términos que prevé el artículo 190 y 191 de la Ley Concursal”. The court continues: “Ciertamente no hay en la Ley concursal ningún precepto que permita directamente el nombramiento de un órgano interino de administración concursal –tampoco hay una prohibición expresa– de ahí que se acuda a un expediente de jurisdicción voluntaria para articular esa solicitud.”

<sup>273</sup> See by way of example a domestic case of related proceedings (which according to Spanish insolvency law are to be managed separately but in a coordinated form): “a fin de garantizar la tramitación coordinada de los concursos, procede la tramitación de todos ellos por los mismos trámites [del procedimiento ordinario] al amparo del Artículo 190.1 LC, el cual faculta al juez a escoger el tipo de procedimiento, sin perjuicio de la posibilidad de modificarlo en cualquier momento en atención a las circunstancias concurrentes conforme al apartado 4”, *Juzgado de lo Mercantil núm. 9 de Barcelona, Auto de 27 marzo 2013*, AC 2013\1619. Some flexibility is also given to the German courts: see ad ex Section 5 of the Insolvency Statute.

- The *Auto* opening the insolvency proceedings sets as well the competences of the appointed insolvency practitioner (Article 21.2 LC). Specific mention to the duties and faculties to cooperate, communicate, etc, with a foreign court are advisable:<sup>274</sup> ad. ex., an indication whereby the insolvency practitioner shall cooperate with the foreign court, and the extension/precautions to be taken into account when doing it.
- Foreign insolvency practitioners are vested with different functions or roles in the regulation, which make their classification a difficult endeavor.<sup>275</sup> Courts should be flexible in their approach and try not to stick to pre-determined national categories which may not suit the European regulation's frame.
- Following the general rule set in Article 131 *Ley 1/2000, de 7 de enero, de enjuiciamiento civil*, Article. 187 LC empowers the insolvency judge to enable working days and hours for the practice of urgent measures for the sake of a good administration of the insolvency proceedings. The provision could be useful for the coordination of the conduct of hearings referred to in Article 42.3 EIR-R.
- Rules enacted with a view to the managing of related insolvency proceedings of several debtors should be explored to ascertain their application (by analogy) to parallel proceedings against one single debtor in a cross-border situation. Examples are provided by Article 27.8 LC on the appointment of insolvency practitioners for related insolvency proceedings affecting several debtors.<sup>276</sup>
- A similar initiative should be undertaken in regard to the rules applying to complex proceedings, such as Article 31 LC, on the appointment of "auxiliares delegados". Under Article 31 the appointment of "auxiliares delegados" aims to alleviate the burden of the insolvency practitioner, or to complement his skills - the "auxiliar delegado" holding the professional knowledge the insolvency practitioner lacks himself. The provision is meant to ensure both the economic and the legal capacities of the insolvency practitioner: it could therefore be useful in the case of parallel proceedings, where the insolvency practitioner appointed for all of them is not familiar with the Spanish insolvency law.

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<sup>274</sup> Instructions in this regard can be made later as well. A French example is the initiative of the *Tribunal de Lons-le-Saunier* in a case of French (main) proceedings of *redressement judiciaire*, and Spanish (secondary) proceedings for liquidation. The French court empowered the French insolvency practitioner to present the sales plan approved in France to both the Spanish court and the insolvency practitioner. See *Martínez Casado*, "El tratamiento de la insolvencia de un grupo de sociedades francés implantado en España", *Anuario de Derecho Concursal*, 21/2010.

<sup>275</sup> For purposes such as appearance before the court: ad. ex., are legal counsel and representation compulsory for them? As a matter of fact it is unlikely that one single category fits all: the foreign insolvency practitioner equates sometimes the national insolvency practitioner while in other cases his position is similar to that of a creditor, or of a third party holding nevertheless a legitimate interest (in the sense, for instance, of Article 234.1 LOPJ, "Los Letrados de la Administración de Justicia y funcionarios competentes de la Oficina judicial facilitarán a los interesados cuanta información soliciten sobre el estado de las actuaciones judiciales, que podrán examinar y conocer, salvo que sean o hubieren sido declaradas secretas o reservadas conforme a la ley").

<sup>276</sup> The underlying logic is the same; as the *Juzgado de lo Mercantil núm. 9 de Barcelona, Auto de 27 marzo 2013*. AC 2013\1619 said in a case of related insolvency proceedings, "no hay razón alguna para designar a dos administradores concursales y encarecer innecesariamente los gastos del concurso en perjuicio de la masa activa y pasiva".



- Article 23.2 LC enables the insolvency court to agree on giving additional publicity to the *Auto* opening the proceedings as well as to further procedural acts, upon request or ex officio, for their effective diffusion. In a broad interpretation the provision could be used for supporting cooperation among the main actors (insolvency practitioners and courts) in cross-border proceedings.<sup>277</sup>

### 3.4 To the academia

***Gloss of the legal provisions with useful examples. Analysis of compatibility with national systems.*** Academia and legal literature should engage in an effort to understand the new rules correctly. They should promote awareness about them, and support their proper implementation and application in the context of each Member State's legal system. An example in this regard is the well-known study of P. Busch, A. Remmert, S. Rüntz, H. Vallender, "Kommunikation zwischen Gerichten in grenzüberschreitenden Insolvenzen - Was geht und was nicht geht",<sup>278</sup> studying the correspondence between the ALI Principles and the German Insolvency Act (as of 2010).

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<sup>277</sup> It should nevertheless be recalled that the provision addresses the publicity procedural acts require for producing the effect which is consubstantial with them (*publicidad procesal*) - as opposed to simply informing about them (see *STS Sala de lo Contencioso-Administrativo, Sección 6ª, Sentencia de 28 marzo 2007*, RJ\2007\2142). Accordingly it might not be the more suitable basis for the purpose indicated in the text.

<sup>278</sup> *Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NIZ)*, 2010, 417-430. Admittedly, in the light of the position of the authors the pure „academic“ nature of this contribution may be disputed.

## C. Protocols\*

### Article 41 f. EIR-R

#### 1. Introduction

The EIR-R explicitly refers to insolvency “agreements or protocols”,<sup>279</sup> which go back to the common law insolvency practice.<sup>280</sup> The vast majority of EU Member States have no or little experience in the conclusion of insolvency protocols in cross-border cases. Under the EIR 2000 they have been used in several major insolvency cases, including the *Sendo*<sup>281</sup> and *Nortel Networks*.<sup>282</sup>

Article 41(1) EIR-R states that the cooperation between insolvency practitioners “may take any form, including the conclusion of agreements or protocols”. Moreover, Article 42(3)(e) EIR-R provides for the “coordination in the approval of protocols, where necessary” as a means of cooperation between insolvency courts.

However, the EIR-R neither defines the notion of “agreements or protocols” nor contains any clear-cut rules on their content, conclusion, approval and legal effects. Except for Member States that have implemented the 1997 UCITRAL Model Law on Cross-border Insolvency,<sup>283</sup> Member States lack, by and large, rules on insolvency protocols. Lately, bar and insolvency practitioner’s associations have concluded bilateral agreements, in order to facilitate the conclusion of protocols across jurisdictions. In that context, the French-German Protocol between the German Deutscher Anwaltsverein (DAV) and der French Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (CNAJMJ)<sup>284</sup> or the French-Italian Protocol between the Italian Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili and the

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<sup>279</sup> *Eidenmüller*, A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond, MJ 20 (2013), 133, 147; *McCormack*, Reforming the European Insolvency Regulation: A Legal and Policy Perspective, JPIL 10 (2014), 41, 57.

<sup>280</sup> As to the origins of insolvency protocols see *Omar*, Communication and co-operation between insolvency courts and personnel, International Company and Commercial Law Review 17 (2006), 120, 121 ff.; *Flaschen/Silverman*, Cross-border Insolvency Cooperation Protocols, Tex. Int’l L. J. 33 (1998), 587.

<sup>281</sup> Protocol Agreement for the Coordination of a Main Insolvency Proceeding with Secondary Insolvency Proceeding Filed In Conformity With European Regulation N° 1346-2000 Of 29 May 2000, available at: [www.iiiglobal.org](http://www.iiiglobal.org).

<sup>282</sup> Not published, see *Braun/Tashiro*, Cross-border Insolvency Protocol Agreements between Insolvency Practitioners and their Effect on the Rights of Creditors, p. 12 ff., available at: <https://www.iiiglobal.org/sites/default/files/BraunTashiroandBraunCBProtocols.pdf>.

<sup>283</sup> Greece, Poland, Romania, Slovenia and UK.

<sup>284</sup> „Internationaler Leitfaden für die Zusammenarbeit der Gerichte in Europa“ mit dem Ziel, den Abschluss von Protokollen der Abstimmung zwischen Verwaltern von Hauptinsolvenz- und Sekundärinsolvenzverfahren zu ermöglichen, die in Anwendung der Europäischen Verordnung Nr. 1346-2000 vom 29. Mai 2000 eröffnet wurden.

French Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (CNAJMJ) should be mentioned.

## 2. Legal Issues

### 2.1 “Agreements or protocols”

The EIR-R does not contain any definition of the term “agreements or protocols” under Article 41 ff. It seems that the terminology used is broad enough to accommodate any form of insolvency agreement, oral or written, generic or specific, binding and non-binding, considering possible discrepancies among national laws or practices.<sup>285</sup> Recital 49 EIR-R explicitly recognizes that agreements or protocols “may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions”.

Although this report does not distinguish between “agreements” and “protocols”, it seems that the term “agreements” is intended to cover binding arrangements, whereas the term “protocols” refers to non-binding arrangements, i.e. gentlemen’s agreements.<sup>286</sup>

### 2.2 Cooperation “not incompatible with the rules applicable to each of the proceedings” – Legal basis for the conclusion of agreements or protocols

The EIR-R does not provide for a direct legal basis for the conclusion or approval of insolvency “agreements or protocols”.<sup>287</sup> Instead, the EIR-R states that the conclusion of insolvency agreements and protocols, as a form of cooperation, should not be “incompatible with the rules applicable to each of the proceedings” (Article 41(1) EIR-R). Courts may cooperate in their approval, “where necessary” (Article 42(3)(e) EIR-R). It follows therefrom that insolvency agree-

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<sup>285</sup> Recital 49 EIR-R.

<sup>286</sup> Under EIR 2000 *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9 paras 61 ff.

<sup>287</sup> See *Hess/Koutsoukou*, in *Kronke/Melis/Kuhn*, *Handbuch Internationales Wirtschaftsrecht* (2nd ed. 2017), Teil O para 85; under the EIR 2000 *Geroldinger*, *Die Koordinierung von Parallelverfahren nach der EuInsVO*, in *Clavara/Garber*, *Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt – die EuInsVO*, 133, 135; contra *Mangano*, in *Bork/Mangano*, *European Cross-Border Insolvency Law*, para 6.41; *Wessels*, *Cross-border insolvency agreements: what are they and are they here to stay?*, in *Faber et al* (eds.), *Overeenkomsten en insolventie* (2012), p. 359, 376.

ments or protocols are considered insolvency-related arrangements<sup>288</sup> and, as such, are subject to the cumulative application of the insolvency laws (*lex fori concursus*) of the parties involved.<sup>289</sup> Consequently, it is a matter of the *lex fori concursus* of each of the parties involved<sup>290</sup> to determine whether or which parties are authorized to conclude an insolvency agreement or protocol, the legal nature and the effects of insolvency agreements or protocols, the conditions for judicial approval, or even the content and scope of the participation rights of the creditors' committee.<sup>291</sup> The cumulative application of two or more insolvency laws may hamper the conclusion of insolvency protocols.<sup>292</sup>

In the absence of implementation of the 1997 UNCITRAL Model Law on cross-border insolvency, which explicitly allows for the “approval or implementation by courts of agreements concerning the coordination of insolvency proceedings”, insolvency practitioners may have difficulties in concluding insolvency protocols or agreements. To promote the use of insolvency protocols or agreements, Member States are encouraged to disapply restrictive insolvency rules or introduce rules on insolvency agreements or protocols, providing an explicit legal basis for their conclusion. This could prevent complicated questions relating to the validity of protocols or insolvency arrangements, or even to the liability of the contracting parties.

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<sup>288</sup> *Eidenmüller*, Der nationale und der internationale Insolvenzverwaltungsvertrag, ZZZP 114 (2001), 3, 5. Under Article 7 EuInsVO, all issues related to the opening, conduct and closure of insolvency proceedings – issues usually addressed in insolvency protocols – are subject to the *lex fori concursus*. An insolvency “agreement or protocol” cannot be considered as contract under Rome I Regulation, since under Article 1(e) excludes company law issues from the scope of that regulation. Contra *Wessels*, Cross-border insolvency agreements: what are they and are they here to stay?, in Faber et al (eds.), *Overeenkomsten en insolventie* (2012), p. 359, 377.

<sup>289</sup> A choice-of-law clause in favour of the laws of the involved parties has been made, in different contexts, in several insolvency protocols concluded outside the EU. See, for instance, *Everfresh* Protocol (Ontario Court of Justice, Toronto, Case No. 32-077978 (20 December 1995), and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405(20 December 1995)): “The proceeds of all Transactions shall be distributed in accordance with the laws of the jurisdiction approving such Transactions”; further III.1.b of the *AIOC Corporation and AIOC Resources AG* Protocol (United States Bankruptcy Court for Southern District Court of New York (Chief Judge Tina L. Brozman), Case Nos. 96 B 41895 and 96 B 41896, (April 3, 1998)): “The claims reconciliation process shall be administered in accordance with the procedural and substantive laws (both bankruptcy and non-bankruptcy) governing the respective case in which the Party is appointed unless considerations of comity otherwise require”.

<sup>290</sup> The application of the *lex fori concursus principalis* would disregard the relationship between main and secondary insolvency proceedings under the EIR-R, since secondary proceedings are not subordinated to the main proceedings.

<sup>291</sup> As to the requirements of the German insolvency law see *Braun/Tashiro*, Cross-border Insolvency Protocol Agreements between Insolvency Practitioners and their Effect on the Rights of Creditors, p. 5 ff., available at: <https://www.iiiglobal.org/sites/default/files/BraunTashiroandBraunCBProtocols.pdf>; Busch/Remmert/Rüntz/Vallender, Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen: Was geht and was geht nicht, NZI 2010, p. 417 ff.

<sup>292</sup> Under the EIR 2000 *Hass/Herweg*, in Geimer/Schütze, Europäisches Zivilverfahrensrecht, Art. 3 EuInsVO a.F., paras 65 ff.

### 2.3 Content of an insolvency protocol: Derogation from the coordination rules of the EIR-R?

In the absence of a comprehensive legal framework on the coordination of cross-border insolvency proceedings, U.S. or Canadian insolvency protocols<sup>293</sup> usually address, *inter alia*, issues that are covered at EU level by the EIR-R, such as jurisdictional issues, the determination of the insolvency estate of each of the parallel proceedings, the insolvency practitioners' right to appear or be heard in parallel proceedings, the recognition of judicial decisions etc.<sup>294</sup> Consequently, it comes as no surprise that most of the protocols concluded under the EIR 2000 dealt with issues that were not explicitly regulated by the EIR 2000 or merely intended to specify the coordination and cooperation rules of the EIR 2000.<sup>295</sup> For instance, the *Sendo* protocol focused on the following aspects: the practical means of treating the liabilities of the insolvent debtor and the notification of the creditors; the verification of the lodged claims; the treatment of the assets of the insolvent debtor (including the disposal of assets and the distribution of proceeds); and treatment of legal costs related with the opening of secondary insolvency proceedings, where the debtor's assets are not sufficient to cover the costs and expenses of such proceedings.

In that context, the question arises whether and to what extent a derogation from the coordination rules of the EIR-R is possible. As a matter of principle, the EIR-R is based on a minimum harmonization approach in the field of coordination of cross-border insolvency proceedings. Therefore, involved parties may derogate from the coordination system provided for in the EIR-R through an insolvency agreement or protocol. This should be possible, under the following conditions: it is in the interest of maximization of the estate's value or the organisation of the debtor's business; adequate safeguards for the affected estate are foreseen; and the *pari passu* principle, as established in the EIR-R, is not affected. In this context, the insolvency practitioners must seek the formal or informal approval of the creditors' committee, in order to prevent liability claims.

## 3. Practical Guidelines

It goes without saying that there are certain practical difficulties in concluding or adopting a cross-border insolvency agreement or protocol, since interested parties may be concerned that the protocol will not be in the best interests of their creditors or will not be compatible with the applicable insolvency laws.<sup>296</sup> Therefore, the conclusion of cross-border insolvency protocols

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<sup>293</sup> *Cannell*, United States - Canadian Insolvencies: Reviewing Conflicting Legal Mechanisms, Challenges and Opportunities for Cross-Border Cooperation, J. Int'l Bus. & L. 4 (2005), 8, 14.

<sup>294</sup> As to the typical content of protocols *Zumbro*, Cross-border insolvencies and international protocols, Bus. L. Int'l 11 (2010), 157, 161 f.

<sup>295</sup> As to the need to specify the duty to cooperate under the EIR 2000, see *Omar*, Communication and co-operation between insolvency courts and personnel International Company and Commercial Law Review 17 (2006), 120, 130.

<sup>296</sup> See the threats to the *Lehman* Protocol, *Altman*, A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency, San Diego Int'l L.J. 12 (2011) 463, 493.

could benefit from national implementing measures or practice guidelines. As national implementing measures are left to each national legislator, the following analysis merely aims at providing guidelines to insolvency practitioners and courts for the conclusion and approval of cross-border insolvency agreements and protocols under the EIR-R, drawing on the relevant past and current practice and considering the coordination regime of the EIR-R. In drafting protocols, interested parties are advised to make use of the soft law instruments,<sup>297</sup> such as the 2009 UNCITRAL Practice Guide (see recital 48 EIR-R)<sup>298</sup> as well as of the CoCo Guidelines.<sup>299</sup> Several insolvency agreements or protocols incorporate the 2000 ALI Guidelines for Court-to-Court Communications in Cross-Border Cases in their text, usually as an annex.<sup>300</sup>

### 3.1 Circumstances supporting the use of insolvency agreements or protocols

Protocols or insolvency agreements are a tool increasingly used in cross-border proceedings. They are intended to create case-specific solutions<sup>301</sup> in accordance with the applicable *lex fori concursus*. In particular, protocols or insolvency agreements can facilitate the administration of the proceedings, prevent disputes or conflicts between the insolvency practitioners, reduce administration costs and contribute to maximization of the value of the insolvency estate.<sup>302</sup> For instance, in the *Everfresh* case, the conclusion of an insolvency protocol contributed to an estimate aggregate value maximization of 40%.<sup>303</sup>

Given that the conclusion of a protocol or insolvency agreement is costly and requires significant effort and timely negotiations, insolvency practitioners should contemplate their use, taking into account several factors. Protocols or insolvency agreements might be of particular importance, where the debtor's assets are spread across jurisdictions or the insolvency estate is

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<sup>297</sup> As to the relevance of soft law instruments, see *Wessels*, Towards a next step in cross-border judicial cooperation, *Insolv.Int.* 27 (2014), 100, 103.

<sup>298</sup> Available at: [http://www.uncitral.org/pdf/english/texts/insolven/Practice\\_Guide\\_english.pdf](http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf).

<sup>299</sup> Available at: <http://www.insol.org/INSOL/faculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>. The Protocol in *Nortel Networks* was based upon the CoCo Guidelines, see <http://bobwessels.nl/2015/05/2015-05-doc5-coco-guidelines-apply-to-nortel-networks-coordination-protocol>.

<sup>300</sup> See *Systech* Protocol, *Androscoffin Energy* Protocol, *Nortel* Protocol (Nortel Networks Inc., Case No. 09-10138 (Bankr. D.Del. 2009)); *Madoff Securities* Protocol Order Pursuant to Sections 1526, 1527 and 105(a) of the Bankruptcy Code Approving Protocols By And Between the Trustee and the Joint Provisional Liquidators of the Madoff Securities International Limited, Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities Ltd., Adv. Pro. No. 08-1789 (Bankr. S.D.N.Y June 9, 2009)); *Lehman* Protocol, Exhibit C.

<sup>301</sup> Insolvency agreements or protocols are better placed to provide case specific solutions than model laws or guidelines, cf. *Kamalath*, Cross-Border Insolvency Protocols: A Success Story?, *International Journal of Legal Studies and Research* (IJLSR) 2013, 172, 173, 186.

<sup>302</sup> *Wessels*, Cross-border insolvency agreements: what are they and are they here to stay?, in Faber et al (eds.), *Overeenkomsten en insolventie* (2012), p. 359, 370.

<sup>303</sup> Cf. 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 28.

particular complex.<sup>304</sup> In addition, protocols or insolvency agreements are to be considered where the debtor's assets are intermingled (e.g. where a common cash management system has been put in place).<sup>305</sup> The conclusion of insolvency protocols might not be the appropriate solution, where the debtor's assets are limited.<sup>306</sup>

In practice, the parties involved explain in the introductory part the case background as well as the reasons that led to the conclusion of the agreement or protocol. For instance, the *Lehman* protocol<sup>307</sup> refers to the “Need for a Cross-Border Insolvency Protocol”, i.e. the “global and integrated nature” of the *Lehman* business, which extended across several jurisdictions. Including such an explanatory part in an insolvency agreement or protocol could increase the chances of judicial approval of an insolvency protocol or agreement, where necessary, or prevent creditors' objections before court.<sup>308</sup>

### 3.2 Negotiations

Insolvency practitioners are encouraged to engage in negotiations for the conclusion of protocols or insolvency arrangements at an early stage of the proceedings, so as to avoid possible disputes or unnecessary litigation. Protocols or insolvency agreements can be concluded even prior to the formal opening of insolvency proceedings in a Member State,<sup>309</sup> for instance when a provisional liquidator has been appointed or the initiation of insolvency proceedings can be anticipated. However, early negotiations may result in non-flexible solutions or solutions that do not correspond to the future needs of the insolvency administration.<sup>310</sup>

All in all, the timing of negotiations is dependent on the circumstances and needs of each case. Interested parties may take into account all relevant aspects before deciding to enter into negotiations for the conclusion of an insolvency agreement or protocol. Depending on the complexity of a case, negotiations may last from several days to several months.<sup>311</sup> For instance, in the *Lehman* case, which is regarded as highly complex, the protocol negotiations were concluded within seven months.

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<sup>304</sup> See for instance the *Madoff Securities* Protocol (and the *Lehman* Protocol (Notice of Debtors' Motion Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of a Cross-Border Insolvency Treaty, Lehman Brothers Holdings Inc. et al., Case No. 08-13555 (Bankr. S.D.N.Y., May 26, 2009)).

<sup>305</sup> See 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 25 ff.

<sup>306</sup> *Berends*, Insolventie in het internationaal privaatrecht (2005), 53. In any case, the debtor's assets must be sufficient to cover the expenses of the conclusion or implementation of the protocol, see 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 25.

<sup>307</sup> *Lehman* Protocol, p. 3 f.

<sup>308</sup> In the *Nakash* case, it was the insolvent debtor that opposed to the insolvency protocol before Israeli courts, see 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 130.

<sup>309</sup> *Raykin/Wouters*, Corporate group cross-border between the United States & European Union: Legal & economic developments, *Emory Bankruptcy Developments Journal* 29 (2013), 387, 419 ff.

<sup>310</sup> *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9 para 62; *Ehricke*, *Die Zusammenarbeit der Insolvenzverwalter bei grenzüberschreitenden Insolvenzen nach der EuInsVO*, *WM* 2005, 397, 401.

<sup>311</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 26 ff.

### 3.3 Authorization and parties to an insolvency agreement or protocol

Insolvency agreements and protocols should contain an introductory section on the parties to the agreement or protocol. Since the EIR-R does not provide a direct legal basis for the conclusion of protocols or insolvency agreements and interested parties should rely on the applicable insolvency law, contracting parties should determine the legal basis for the conclusion of an insolvency agreement or protocol under the applicable national law. In addition, the parties should state whether it should be approved by the courts or the creditors' committee or other formal requirements are necessary.<sup>312</sup>

Broadly speaking, the successful conclusion of a cross-border insolvency agreement or protocol depends on how parties and courts involved deal with restrictive national rules or with the lack of any rules on the authorization to conclude or approve such an arrangement.<sup>313</sup> For instance, in case *Nakash*<sup>314</sup> and *Sendo*,<sup>315</sup> the involved insolvency practitioners concluded a protocol, which was subsequently approved – despite the lack of a direct legal basis for the conclusion and authorisation of a cross-border insolvency protocol – by Israeli and French Courts respectively.

Given that most of the national statutory insolvency provisions of the EU Member States fail to establish legal certainty as to which parties are entitled (insolvency practitioners, courts etc.) to conclude insolvency agreements or protocols, interested parties are advised to consult with the creditors' committee before entering into such an arrangement. It is noteworthy that in the *Lehman* case, the signatories felt the need to secure the consent of the creditors' committee to a non-binding insolvency arrangement (protocol).<sup>316</sup>

### 3.4 Language of the insolvency agreement or protocol

Insolvency agreements or protocols are to be drafted in a language to be determined by the contracting parties at their convenience or in a language shared by all contracting parties.<sup>317</sup> The use of the English language should also be encouraged, in order to spare unnecessary translation costs. However, in practice an insolvency agreement or protocol might be drafted in more than one language (e.g. *Sendo* and *Pioneer* Protocol, both in English and French).<sup>318</sup>

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<sup>312</sup> See for instance the *Madoff Securities* Protocol, p. 7.

<sup>313</sup> *Ibid*, p. 29.

<sup>314</sup> Order Approving Cross-border Protocol, Granting Comity to Jerusalem District Court letter for Request, Setting Damages for Intial Stay Violation and Granting Nuc Pro Tunc Stay Relief in Respect of Alleged Further Stay Violations, In Re Nakash, Ch. 11 Case No. 94-B-44840 (BRL) (Bankr. S.D.N.Y. May 23, 1996).

<sup>315</sup> Insolvency proceedings before the High Court of Justice, Chancery Division of London, and before the Commercial Court of Nanterre (2006).

<sup>316</sup> *Lehman* protocol, para 19.

<sup>317</sup> Cf. CoCo Guideline 10.1.

<sup>318</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 37.



### 3.5 Terminology and interpretative rules

The legal systems of Member States differ significantly. As a result, the legal terms used in a protocol may be read differently by the contracting parties or the competent courts in the relevant jurisdictions. To prevent disputes on the interpretation of insolvency agreements and protocols, insolvency practitioners should include definitions of the terms used in the protocol or insolvency agreement. The Glossary in the Appendix of the ALI III Global Principles for the Cooperation in International Insolvency Cases could provide useful assistance. In practice, several insolvency agreements or protocols make use of the Glossary of the 1995 IBA Cross-Border Insolvency Concordat (e.g. *Everfresh*).<sup>319</sup> Others contain a case-specific glossary – usually in an Appendix – defining the terms used in the agreement or protocol.<sup>320</sup>

In addition, contracting parties should introduce interpretive rules to eliminate divergent interpretation and possible disputes.<sup>321</sup> Insolvency agreements or protocols incorporating model laws or guidelines usually provide that the guidelines prevail, should a discrepancy between the protocol and the guidelines arise.<sup>322</sup> Several protocols set out procedure for the prevention of interpretative disputes. By way of illustration, the *Nortel* protocol<sup>323</sup> states that “the U.S. and Canadian Court may in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures [...]”.

### 3.6 Determining the purpose of the insolvency agreement or protocol

Contracting parties should determine the objective of the protocol or insolvency agreement, with a view to promoting the coordination of the insolvency proceedings.<sup>324</sup> A common understanding of the goals of the proceedings could serve the maximisation of the value of the insolvency estate and prevent interpretive disputes.

An insolvency agreement or protocol may specify a general framework on the coordination of parallel proceedings and the efficient administration to the benefit of all involved parties or also specific goals. For instance the *360NETWORKS* protocol<sup>325</sup> states that the contracting parties intend to “(a) harmonize and coordinate activities in the Insolvency Proceedings [...]; (b) promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort; (c) honour the independence and integrity of the

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<sup>319</sup> *Everfresh* protocol, p. 3.

<sup>320</sup> See *360NETWORKS* protocol, Appendix A (360Networks Inc., Case No. 01-13721, (Bankr. S.D.N.Y. 2001) (New York – British Columbia)).

<sup>321</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 27.

<sup>322</sup> *Madoff Securities* protocol, p. 5.

<sup>323</sup> *Nortel* protocol, p. 12.

<sup>324</sup> *Zumbro*, Cross-border insolvencies and international protocols, Bus. L. Int'l 11 (2010), 157, 168.

<sup>325</sup> *360NETWORKS* protocol, p. 1 ff. Similar provisions can be found in several protocols, see for instance *Systemch* protocol, p. 2; *Nortel* protocol, p. 3; *AIOC* protocol, p. 3.

Courts [...]; (d) promote international cooperation and respect for comity among the Courts, the 360 Group, the Committees, the Estate Representatives and other creditors and interested parties in the Insolvency Proceedings; (e) facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the creditors of the 360 Group and other interested parties, wherever located; and (f) implement a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the Insolvency Proceedings”.

Other insolvency agreements or protocols may provide for specific coordination measures or determine the goal of the parallel proceedings (e.g. restructuring of the insolvent debtor’s business).<sup>326</sup> The *Madoff Securities* protocol,<sup>327</sup> for instance, aims at the coordination, efficiency, communication among representatives, the information and data sharing as well as the identification, preservation and realisation of assets. The *Everfresh* protocol<sup>328</sup> provides that “[t]o the extent permitted by the laws of the respective jurisdictions and to the extent practicable, the Interim Receiver and the Debtors shall endeavor to submit a proposal in Canada and a plan of reorganization in the United States substantially similar to each other and the Debtors, the Interim Receiver and the Trustee shall endeavor to coordinate all procedures in connection therewith [...]”.

### **3.7 Issues to be addressed in insolvency agreements or protocols under the EIR-R**

Insolvency practitioners might specify their duty to cooperate under the EIR-R or address issues left open by the Regulation in an insolvency agreement or protocol. It is noteworthy, that under the EIR 2000, the contracting parties in the *Sendo* protocol<sup>329</sup> “ha[d] come to understand that the (EC) regulation establishes very general operating principles” and, therefore, “a practical means of functioning which would allow for the efficient coordination of the two insolvency proceedings” was necessary. In addition, insolvency agreements or protocols aim at preventing future litigation between insolvency practitioners.

The following analysis relies on a closer examination of the issues addressed in agreements or protocols concluded in the context of major cross-border insolvency, considering also the current coordination regime of the EIR-R.

#### **3.7.1 Communication**

Agreements or protocols typically address the information sharing and communication between the parties involved, in particular the means of communication and the language of communication, which are subject to possible limitations under the applicable laws.

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<sup>326</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 36 ff.

<sup>327</sup> *Madoff Securities* protocol, para 1.2.

<sup>328</sup> *Everfresh* protocol, para 13.

<sup>329</sup> *Sendo* protocol, p. 2.

As regards the communication between Courts, the current practice varies. Several arrangements refer to the 2000 ALI Court-to-Court Communications in Cross-Border Cases.<sup>330</sup> Others provide for case specific means of communication. For instance, the *Nakash* protocol<sup>331</sup> requires courts to cooperate to the maximum extent possible in order to avoid conflicting rulings through the insolvency practitioners or and/or via telephonic conference. In the *Matlack* case,<sup>332</sup> the contracting parties appointed an intermediary, an “information officer” that was, inter alia, entrusted with the task of delivering information/reports to the courts involved. The *360NETWORKS* protocol allows for joint hearings between the insolvency courts.<sup>333</sup>

As to the communication between the insolvency practitioners, agreements or protocols usually determine the formal aspects of that communication. In fact, some of the protocols contain detailed provisions on the language, the means (e-mail, telephone, meetings in person) and the frequency of the communication.<sup>334</sup>

In practice, insolvency agreements or protocols adopt diverging approaches as to the confidentiality of communication. Depending on the applicable law, confidentiality clauses may affect the position of the creditors’ committee.<sup>335</sup>

### 3.7.2 Preservation of the debtor’s assets

Contracting parties should agree on information exchange in order to identify the insolvent debtor’s assets or coordinate their efforts in order to protect the insolvency estate. The *Lehman* protocol<sup>336</sup> contains a lengthy list of measures aiming at preserving the debtor’s assets. In addition, the said protocol provides for the insolvency practitioners’ obligation to cooperate in order to maximize the value of assets, for which multiple debtors (members of the same group of companies) have an interest.

### 3.7.3 Notification of the debtor's creditors

The EIR-R aims at enabling creditors to lodge their claims in parallel insolvency proceedings (Articles 45(1), 53 and 55 EIR-R), *inter alia* through a standardized form on the “lodgment of claims”. Interested parties should be notified individually of the opening of insolvency proceedings by the insolvency court or appointed insolvency practitioner, so that they will be able to lodge their claims (Article 54(1) EIR-R). In order to meet that obligation, insolvency practitioners may specify in insolvency agreements or protocols the modalities of that notification: the

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<sup>330</sup> Cf. *Madoff Securities* protocol, para. 5.

<sup>331</sup> *Nakash* protocol, para. 4.

<sup>332</sup> *Matlack Systems, Inc.*, Case No. 01-01114 (Bankr. D. Del. 2001).

<sup>333</sup> *360NETWORKS* protocol, p. 3.

<sup>334</sup> See for instance the detailed provisions of the *Manhattan Investment Fund* protocol, paras. 2-12 (United States Bankruptcy Court for the Southern District of New York, Case Nos. 00-10922(BRL) and 00-10921(BRL)).

<sup>335</sup> See 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 84 ff. with further reference to the diverging practice.

<sup>336</sup> *Lehman* protocol, p. 6 ff.

time limits for lodging a claim under the applicable laws; the penalties related to those time limits; the bodies empowered to accept the lodgment of claims; and whether creditors should indicate whether their claim has a privileged status or not.

#### **3.7.4 Lodgment of the creditors' claims by insolvency practitioners**

Insolvency practitioners are equally allowed, under circumstances, to lodge claims – already lodged in their proceedings – in concurrent insolvency proceedings (Article 45(2) EIR-R). Insolvency agreements or protocols may contain specific provisions, in order to enable the practitioners of parallel proceedings to lodge the claim lodged in their procedure in the concurrent insolvency procedures. For instance, insolvency practitioners may assume the obligation to notify the other insolvency practitioners of the time limits for the lodgment of the creditors' claims under Article 45(2) EIR-R. Insolvency practitioners may also undertake, for the lodgment of claims, to list the creditors' claims that are already lodged in their respective procedure and specify the amount of the claim as well as the status of the lodged claims, i.e. whether the claims proven by judicial decision or documents with evidentiary value.

#### **3.7.5 Verification of the debtor's liabilities**

In addition, insolvency agreements or protocols should contain rules on the verification of the debtor's liabilities, given the possibility of multiple lodgments of the same claim (by the creditor or the insolvency practitioner, Article 45(1) and (2) EIR-R). For instance, the *Sendo* protocol<sup>337</sup> provides for the independent verification of the debtor's liabilities in accordance with the applicable law in each proceeding. However, in order to avoid multiple payments to the same creditor in one proceeding, the said protocol requires that both insolvency practitioners double-check whether, a claim lodged by the insolvency practitioner in the parallel proceeding has already been lodged by the creditor of that claim.

#### **3.7.6 Administration of the insolvency estate**

Protocols or insolvency agreements usually contain provisions on the administration of the insolvency estate. As a first step, insolvency practitioners may commit themselves to provide a list of the assets that are covered by their respective proceedings within a certain time limit. In addition, they might agree to propose informally within a certain time limit their proposal for the realisation of the assets or the restructuring of the business company. In that context, the insolvency practitioner may address several issues such as the treatment of executory contracts, the possible liquidation of assets or the post commencement financing and the restructuring of the debtor's business.<sup>338</sup>

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<sup>337</sup> *Sendo* protocol, p. 5.

<sup>338</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 66 ff.

The *Sendo* protocol provides again an example of cooperation on the liquidation of assets under the EIR 2000. In particular, the insolvency practitioners of the main proceedings had committed not to request the 3-month stay of the liquidation in the secondary proceedings. In exchange, the French liquidator committed not to liquidate the assets covered by the secondary proceedings during the 3-month period. This agreement aimed at enabling, at a later stage, the global transfer and sale of the debtor's assets in the main insolvency proceedings. The global transfer of the assets covered by the secondary proceedings was made contingent upon the French insolvency court's approval.

### 3.7.7 Preventing conflict of powers among insolvency practitioners

With a view to preventing overlapping or conflicting actions of the insolvency practitioners, contracting parties should also insert provisions on the delineation of the insolvency practitioners' powers, e.g. with regard to avoidance actions or allocation of certain assets to a particular insolvency estate. Such provisions could mitigate the risk of parallel litigation or irreconcilable judgments as to the allocation of an asset to a certain insolvency estate, given that according to the CJEU ruling in *Nortel*<sup>339</sup> the courts in both states where main and secondary insolvency proceedings were opened have concurrent jurisdiction on this matter.

### 3.7.8 Distribution of the proceeds

Article 23(2) EIR-R purports to ensure the equal treatment of creditors. According to that provision, a creditor which has obtained a dividend on its claim shall share in distributions made in other proceedings "only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend". To that aim, insolvency agreements or protocols may specify how proceeds are to be distributed to creditors. For instance, insolvency practitioners may commit themselves to submit a draft distribution plan within a certain time limit to the insolvency practitioners of the parallel proceedings, in order to safeguard the principle of equal treatment of the creditors. Should other involved insolvency practitioners not object to the distribution plan, the insolvency practitioner concerned should be allowed to proceed with its distribution plan. After the distribution of the proceeds, insolvency practitioners should provide each other with a complete list of the creditors that have received a share of the proceeds, specifying also the exact amount distributed to each creditor.<sup>340</sup>

### 3.7.9 Conflict-of-laws issues

Articles 7 ff. EIR-R provide for a comprehensive set of conflict-of-laws rules for cross-border insolvency cases in the EU. However, contracting parties may wish to determine the law

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<sup>339</sup> Judgment in *Nortel Networks*, C-649/13, ECLI:EU:C:2015:384

<sup>340</sup> *Sendo* protocol, p. 8f.

applicable to certain transactions, where the conflict-of-laws rules of the EIR-R fail to provide sufficient clarity. The same applies to (protected) transactions/assets are subject to the law of third countries, where insolvency proceedings have been initiated, given the limited scope of the conflict-of-laws rules of the EIR-R.

### 3.7.10 Costs of the proceedings

Contracting parties may also reach an agreement as to the allocation of the costs of the insolvency proceedings, in particular the costs incurred by the insolvency practitioners during the implementation of the protocol and/or the remuneration of the insolvency practitioners. In allocating the costs, contracting parties should take into account the circumstances of each case and in particular, the debtor's assets in each of the parallel proceedings.

The CoCo Guidelines<sup>341</sup> state that “[o]bligations incurred by the liquidator during proceedings and the liquidator’s fees are funded from the assets within those proceedings in which the liquidator is appointed”. This principle was followed by the *Manhattan Investment Fund* protocol,<sup>342</sup> which allocated the costs incurred by each insolvency practitioner to the proceedings in which the practitioner has been appointed. In addition, under the CoCo Guidelines<sup>343</sup> the costs incurred by the main insolvency practitioner prior to the opening of secondary insolvency proceedings, which are related to the assets that will be covered by the future secondary proceedings, will be funded, in principle, by the estate of the secondary proceedings.

However, the CoCo Guidelines do not address the issue of the cost allocation, when the assets of the secondary insolvency proceedings are not sufficient to cover the costs of that proceedings. In such cases, it would be appropriate to allocate these costs to the assets of the main insolvency proceedings, if the opening of secondary insolvency proceedings was requested by the main insolvency practitioner. For instance, the *Sendo* protocol under the EIR 2000,<sup>344</sup> stated that, in the absent of sufficient assets in France, the costs of the French secondary insolvency proceedings initiated by the English insolvency practitioners, should be paid by *Sendo* assets, “as an expense of the administration in England”.

## 3.8 Legal effects and effectiveness of insolvency agreements or protocols

For the sake of clarity, contracting parties should determine whether the insolvency protocols or agreements have a binding effect upon the parties (usually insolvency practitioners),<sup>345</sup> or

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<sup>341</sup> CoCo Guideline 11.1.

<sup>342</sup> *Manhattan Investment Fund* protocol, para. 14.

<sup>343</sup> CoCo Guideline 11.2.

<sup>344</sup> *Sendo* protocol, p. 6.

<sup>345</sup> Cf. *Madoff Securities* protocol, para. 12.1 (“This protocol shall be binding on, and inure to the benefit of the representatives’ respective successors and assigns, including any liquidator subsequently appointed over MSIL) and para 12.3 (“Each Representative represents and warrants to the other that its execution, delivery and performance of this Protocol is within its power and authority, except to the extent that Tribunal approval is required”).

merely establish a non-binding framework for cooperation (gentlemen's agreement),<sup>346</sup> taking into account *possible limitations and liability concerns under the applicable insolvency law*. Contracting parties should also determine the conditions precedent to the effectiveness of the protocol or insolvency agreement (court approval, approval of the creditors' committee).<sup>347</sup>

Insolvency practitioners are advised to seek (formally or informally) the insolvency court's approval and, possibly, the approval of the creditors' committee under national law, even in case where the agreement or protocol has a non-binding effect, so as to avoid possible liability claims.<sup>348</sup>

### 3.9 Flexibility of insolvency agreements or protocols

Contracting parties should safeguard flexibility of protocols or insolvency agreements, by stipulating that they could be modified in order to accommodate unforeseen events or changing circumstances. This is of particular importance, since protocols or insolvency agreements are usually concluded at an early stage, when contracting parties have no insight in the insolvent debtor's financial situation, and cannot anticipate the progress of the proceedings.

Amendments are possibly subject to constraints under the applicable insolvency law or to additional requirements laid down in the protocol or insolvency agreement (e.g. court approval, approval of the creditors' committee etc.). For instance, the *Lehman* protocol<sup>349</sup> states that "[t]his Protocol may not be amended, waived, or modified orally [...] except by a writing signed by a party to be bound, and where applicable, approved by the Tribunal with jurisdiction over that party".

### 3.10 Safeguards

Protocols or insolvency agreements must contain a caveat in favour of court' authority/public policy<sup>350</sup> and non-signatories' substantive rights under the applicable law. Such clauses usually serve only clarification purposes.

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<sup>346</sup> See for instance *Sendo* protocol, p. 2 ("It is not intended to create a binding precedent"); *Lehman* protocol, p. 2 ("In recognition of the substantive differences among the Proceedings in each jurisdiction, this Protocol should not be legally enforceable nor impose on Official Representatives any duties or obligations [...] (i) that may be inconsistent with or that might conflict the duties or obligations to which the Official Representative is subject under the applicable law or (ii) that are not in the interest of the debtor's estate).

<sup>347</sup> Cf. *Nortel* Protocol, p. 11 ("This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court").

<sup>348</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 32 ff.

<sup>349</sup> *Lehman* protocol, p. 10, para 12.1

<sup>350</sup> *Wessels*, Cross-border insolvency agreements: what are they and are they here to stay?, in Faber et al (eds.), *Overeenkomsten en insolventie* (2012), p. 359, 366. See for instance, the public policy exception in the *AIOC* Protocol, II.I: "Nothing in this agreement shall prevent the Bankruptcy court and the Swiss court from refusing to approve or take an action required by this agreement, if such action would be manifestly contrary to public policy".

### 3.11 Dispute resolution clauses

Contracting parties should include dispute resolution clauses for disputes arising under protocols or insolvency agreements. A survey of protocols or insolvency agreements concluded in major cases reveals that dispute resolution clauses vary considerably.

Several arrangements require that the contracting parties take all possible steps in order to reach an out-of-court settlement, before bringing a dispute to the court(s) having jurisdiction under the agreement. Should all efforts fail, contracting parties may bring the dispute to the court(s) having jurisdiction under the agreement.<sup>351</sup>

Other protocols or insolvency agreements allow contracting parties to refer all disputes directly to the court designated under the agreement. The court seized of the dispute might then be required to consult or seek a joint hearing with another court. For instance the *360NETWORKS* protocol<sup>352</sup> states: “Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice as set forth above. Where an issue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole discretion, either: (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court; or (iii) seek a joint hearing of both Courts”.

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<sup>351</sup> 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 46 with further references.

<sup>352</sup> *360 NETWORKS* protocol, p. 9.



## PART 3: INSOLVENCIES OF GROUPS OF COMPANIES\*

Vienna

### Articles 56 ff. EIR-R

#### A. Introduction

After the EIR came into force, it was frequently pointed out that the Regulation failed to provide for express rules on insolvencies of groups of companies. This is indeed true. However, one must not ignore the impact the EIR had on group scenarios even without containing such express rules.

The EU legislator considered the EIR's lack of specific rules dealing with groups of companies as an obstacle to the efficient administration of the insolvency of members of a multinational group and to the successful restructuring of the group as a whole. The reform is based on a "procedural coordination" approach which respects each group member's separate legal identity.<sup>353</sup> Moreover, the legislator adopted an approach which can be described as both cautious and, unfortunately, very bureaucratic. One might say that the reform mainly succeeded in creating additional Articles containing express wording on group cases and, therefore, accomplished a symbolical and political rather than a practical goal.

The following sections will focus on key reform issues having an impact on the insolvency of groups of companies<sup>354</sup>: the jurisdiction with respect to insolvencies of groups of companies (I.), the coordination between insolvency proceedings relating to group members (II.) and the provisions specifically introducing so called "group coordination proceedings" (III.). Additionally, conflict of laws issues relating to corporate insolvencies will briefly be touched upon, although they are not specifically affected by the reform (IV.).

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<sup>353</sup> Cf. Recital 54. Consequently, a "substantive consolidation" approach was not considered a viable option for obvious reasons. – See also Article 72(3) EIR-R providing that the group coordination plan shall not include recommendations as to any consolidation of proceedings or insolvency estates.

<sup>354</sup> According to Article 2 no 13 EIR-R "*group of companies*" means a parent undertaking and all its subsidiary undertakings. Article 2 no 14 EIR-R further defines a "*parent undertaking*" as an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking.

## B. Jurisdiction with Respect to Insolvencies of Groups of Companies

One of the main objectives of the reform was the implementation of new rules regarding the clarification of the COMI concept and the prevention of allegedly abusive forum shopping. These provisions are of particular importance with respect to the coordination of group insolvencies and will therefore be discussed in the following subsections on the determination of the COMI of a member of a group of companies (1.) and on COMI-migration (2.). Another innovation introduced in the framework of the reform is the definition of “group of companies” in Article 2 nos 13 and 14 EIR-R, which will be dealt with at the end of the section (3.).

### 1. Determining the COMI of a Member of a Group of Companies

#### 1.1 Legal Framework

The question whether Article 3 EIR allows for the coordination of insolvencies of groups of companies by concentrating all (main) insolvency proceedings relating to different members of the group in one jurisdiction, thereby creating a sort of “group COMI”, has raised significant questions in practice.

The reform aims to refine the COMI concept by including a definition in Article 3 EIR-R which, in essence, corresponds to today’s Recital 13. According to Article 3(1) EIR-R, the debtor’s centre of main interest “*shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*”<sup>355</sup>

In addition, the new provision curtails the presumption enshrined in Article 3(1) subpara. 2 EIR-R according to which the debtor’s COMI is located at the place of the company’s registered office. It should, however, according to Recital 30, be possible to rebut the presumption “*where the company’s central administration is located in a Member State other than that of its registered office, and 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 that other Member State.*”

Furthermore, the presumption shall only apply if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.<sup>356</sup> It is said to be the purpose of this provision to prevent “*fraudulent or abusive forum shopping*”.<sup>357</sup> As we will show below, this is, however, incorrect.

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<sup>355</sup> Recital 28 highlights that special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests when determining whether the debtor’s COMI is ascertainable by third parties.

<sup>356</sup> See Article 3(1) subpara. 2 second sentence EIR-R.

<sup>357</sup> Cf. Recital 31.

## 1.2 Recommendations and Guidelines

### 1.2.1 Recommendations

The concept of the COMI is an obvious and effective tool for the improvement of coordination in groups of companies' insolvencies. The European legislator refrained from creating a real "group COMI". It did, however, incorporate major elements of the CJEU's findings in *Interedil*<sup>358</sup> in the EIR-R.<sup>359</sup> The reform, thereby, provides a sufficient basis for a flexible approach taking into account group COMI considerations in order to improve the coordination of insolvencies related to different members of a corporate group.<sup>360</sup> In that sense, it allows a further development of the court practice which has emerged after the EIR came into force in order to obtain an even better coordination of group cases.

The new Recital 30 highlights the significance of the company's "*central administration and supervision*" and of the "*management of its interests*". It therefore, albeit cautiously, opens the door for a more "head office" or "mind of management" oriented approach, which, in turn, renders it possible to locate the COMI of a subsidiary company at the COMI of its parent company (or another group company). We believe that future revisions of the EIR should make additional steps in this direction, e.g., by including such wording into the actual text of the EIR and by providing a broad definition of the term "*a company's central administration*" clarifying that the main aspect of this concept lies in the "location" where major decisions of the insolvent company are taken (and not mere decisions relating to the day-to-day business administration). The future development not only of CJEU's, but also of national case law should be closely examined in order to identify other aspects which might play a role in this respect.

In order to safeguard the interests of the subsidiary company's creditors, Article 3(1) EIR-R requires the place where the debtor conducts the administration of his/her interests to be ascertainable by third parties. In other words, it must be ascertainable by creditors where essential management decisions, e.g. relating to operational strategy or the financing of the company, are implemented. Note that "*ascertainable*" does not mean that the creditors must have actual knowledge of such facts, but must only be in a position to obtain the relevant information by reasonable inquiries. Such understanding of the term "*administration of interests*" should not be undermined by the wording of (new) Recital 28 which states that in the event of a COMI-shift, it may be required to inform the creditors of "*the new location from which the debtor is carrying out its activities (...), for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means*".

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<sup>358</sup> CJEU, Case C-396/09, *Interedil*, judgment of 20 October 2011, ECLI:EU:C:2011:671, para. 50 et seqq; see also CJEU, C-191/10, *Rastelli*, judgment of 15 December 2011, ECLI:EU:C:2011:838, para. 34 et seqq.

<sup>359</sup> Cf. Recitals 28 and 30. Moreover, Recital 13 of Regulation No 1346/2000, which is included in Article 3 EIR-R, already formed the basis for the CJEU's interpretation of Article 3 of Regulation No 1346/2000 in the *Interedil* case. Thereby, the CJEU has departed from his earlier approach expressed in C-341/04, *Eurofood*, judgment of 2 May 2006, ECLI:EU:C:2006:281, para. 36 et seq.

<sup>360</sup> This seems to be acknowledged by Recital 53; for a more critical assessment see *Eidenmüller*, Maastricht Journal of European and Comparative Law 20 (2013) 133, 145.

Furthermore, it has, in principle, of course to be accepted that the drafters of the EIR-R were of the opinion that preventing abusive forum shopping is an important policy objective. According to Recital 29, the Regulation “*should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping*”. It is, however, unclear which “*safeguards*” are exactly meant here, and under what circumstances forum shopping is considered “*fraudulent*” and/or “*abusive*” and whether these terms are used interchangeably or whether forum shopping is “*abusive*” as such according to the opinion of the drafter of the recitals. Recital 5 suggests that a transfer of assets or judicial proceedings from one Member State to another in order “*to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping)*” should be avoided. All this, however, is of little help as moving a business to another Member State will usually be caused by the objective of gaining advantages and, of course, will always affect the position of its creditors to some extent. Moreover, we believe that on the one hand, the dangers and detriments of such COMI shifting were overestimated in the legislative process. On the other hand, one must bear in mind that restricting businesses from mobility within the Union always touches upon the freedoms guaranteed under primary law. All in all, we believe that the actual provisions of the EIR-R should be the basis for dealing with this aspect, and not the vague representations made in the recitals.

### 1.2.2 Guidelines

#### *Guideline 1: Determining the COMI of a member of a group of companies*

A court examining *ex officio* (according to Article 4 EIR-R) whether it has jurisdiction to open insolvency proceedings with regard to a member of a group of companies will have to determine the respective group member’s COMI. We recommend that the court should take into account whether the group member’s “*central administration*” is located in a Member State other than that of its registered office. In such case, the presumption enshrined in Article 3(1) subpara. 2 EIR-R, according to which the debtor’s COMI is located at the place of the company’s registered office, may be rebutted if (i) a comprehensive assessment of all relevant factors shows that the company’s “*actual centre of management and supervision and of the management of its interests*” is located in that other Member State and (ii) such centre (of management and supervision) is ascertainable by third parties (see Recital 30). Such assessment heavily depends on the facts of each individual case. Relevant factors may, however, include:

- where the bodies responsible for the management and supervision of a company are located;<sup>361</sup>
- where the management decisions of the company are taken,<sup>362</sup> in particular, if important decisions going beyond the day-to-day business of the company are generally taken at the level of a parent (or other group) company;

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<sup>361</sup> See judgment in CJEU, C-396/09, *Interdil*, ECLI:EU:C:2011:671, para. 50.

- the place where decisions relating to contracts crucial for the debtor's business are taken;
- the location where financing was organized or authorized, or from where the cash management system was run;
- the places from which (and in which) the debtor is carrying out its activities and the location of the primary assets,<sup>363</sup> both, however, only in connection with other factors;
- information regarding the factors set forth above that was communicated to creditors by way of commercial correspondence or otherwise;<sup>364</sup>

## 2. COMI-migration

### 2.1 Legal Framework

In the wake of the reform process there has been an extensive debate on whether the EIR should contain provisions preventing “abusive” COMI-transfers. The decision of the European legislator to provide an exemption from the presumption that the debtor's COMI is located at the place of the company's registered office that has been added to Article 3 EIR-R, can be understood in that context. According to the new Article 3(1) subpara. 2 EIR-R, the presumption shall not apply if the company's registered office has been moved to another Member State in the three months preceding the request for the opening of insolvency proceedings. As we will show below, this provision, however, does not at all prevent “*abusive*” or “*fraudulent*” COMI shifting, but only becomes relevant in situations where the COMI was not (yet) moved to another Member State. It is not about “abusive” or “fraudulent” COMI shifting, but rather only about COMI simulation.

### 2.2 Evaluation

In the light of the foregoing, Questions 34 and 35 questions were included in the study's questionnaire.<sup>365</sup> Summarizing the results for both, it can be said that the vast majority (Q 34: 80 %, 16 Pers; Q 35: 90 %, 18 Pers) of participants is not concerned about problems that could arise in practice as a result of the exemption from the COMI presumption under these specific circumstances.

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<sup>362</sup> See CJEU, C-396/09, *Interdil*, ECLI:EU:C:2011:671, para. 50.

<sup>363</sup> See Recital 28; CJEU, C-396/09, *Interdil*, ECLI:EU:C:2011:671, para. 52.

<sup>364</sup> See Recital 28.

<sup>365</sup> *Q 34: Do the provisions characterized as “safeguards aimed at preventing fraudulent or abusive forum shopping” (cf. Recital 5 and Recitals 28 to 31 EIR-R), in particular the exemption from the presumption in favour of the place of the registered office included in Article 3 EIR-R, in your view, raise practical problems with regard to insolvencies of groups of companies?; Q 35: Does the exemption from the presumption in favour of the place of the registered office included in Article 3 EIR-R, in your view, raise practical problems with regard to insolvencies of groups of companies?*

In their individual comments, the participants specified, *inter alia*, that

- both the group's discipline as well as the question of coordination proceedings are not related to the COMI notion;
- these rules are more procedural than substantive and that, if the new seat is the "real COMI", it should be easy to demonstrate that, since it is only an exemption from a "presumption";
- the exemption does not necessarily want to prevent relocations of the registered offices but it aims to protect creditors and third parties; where a shift is made without any harm for these groups of stakeholders, there should be no problem;
- the actual underlying problem is that there is no group COMI as such.
- Several commented that this is a workable solution and will be dealt with appropriately in practice.

## 2.3 Recommendations and Guidelines

### 2.3.1 Recommendations

In its Article 3(1) subpara. 2, the revised EIR seeks to prevent abusive "COMI shopping" by providing for a new three-months-period. However, the added value of this amendment seems questionable. The relocation of a company's registered office does not automatically transfer its COMI.<sup>366</sup> By the same token, the transfer of a company's COMI does not necessarily require relocating the company's registered office. The amendment to Article 3(1) EIR-R merely prevents the court from relying on the presumption under Article 3(1) EIR-R when examining its jurisdiction (*ex officio* according to Article 4 EIR-R) and determining the debtor's COMI. Therefore, a debtor applying for insolvency within said time limit has to prove to the court that he has actually moved its COMI to the respective Member State. Therefore, this provision cannot be understood as an indication that the debtor "abusively" relocated its registered office when a request to open insolvency proceedings is filed within three months after such relocation. On the contrary, the fact whether the shifting of the COMI was "abusive" according to whatever standard is not relevant at all here. If the creditor can prove that it actually moved its COMI to another Member State, this is the basis for this State's jurisdiction to open main proceedings irrespective of allegations of "abuse". As a consequence, this provision does not at all prevent whatever kind of "abusive" COMI shifting, but only helps the creditors in cases where a recent COMI shifting alleged by the creditor did not really take place – irrespective of whether the in-

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<sup>366</sup> Cf. *Steffek* in Münchener Handbuch Gesellschaftsrecht, VI (2013) § 37 margin no. 29. In addition, a change in a company's registered office is generally considered less problematic from the perspective of creditor protection because it can only be undertaken on the basis of the rules adopted by the Member States to implement the tenth company law directive on cross-border mergers; cf. *Eidenmüller*, Maastricht Journal of European and Comparative Law 20 (2013) 133, 145.

correct representation that the COMI was shifted is based on abusive or fraudulent behaviour or not. Accordingly, the only “abuse” this provision might prevent is a situation where the debtor relies on the presumption under Article 3(1) EIR-R within three months after the relocation of the company’s registered office although the COMI was not (yet) actually migrated to this place. On balance, the amendment should therefore not have a significant impact on COMI-transfers undertaken with regard to insolvencies of groups of companies, e.g. in order to benefit from a certain restructuring regime.

We believe that it cannot be excluded that this provision will cause problems in practice such as: a delay of a company’s filing for insolvency due to this period; problems with respect to legal certainty and procedural delay based on the complicated situation arising from the necessary establishment of the relevant facts; expectations of new creditors might be frustrated. However, such concerns have only been shared by some (20%) of the answers which indicates that the impact of this new rule is (correctly) not overestimated already today. All in all, it might turn out to be just a harmless piece of symbolic legislation. Nevertheless, we suggest to closely evaluate the effects of this new provision in practice after the coming into force of the revised EIR for a period of about two or three years.

### 2.3.2 Guidelines

*Guideline 2: Interpretation of the exemption from the presumption in favour of the place of the registered office in Article 3(1) subpara. 2 EIR-R in a group context*

When confronted with an application for insolvency within three months after the registered office of the debtor was moved to another Member State, courts are under an obligation to examine *ex officio* whether the COMI was also shifted to this State. However, Article 3(1) subpara. 2 EIR-R is no basis whatsoever for the Court to examine whether an actual shifting of the COMI was “*abusive*” or “*fraudulent*”. If the COMI is located in the respective Member State, main proceedings have to be opened irrespective of such factors.

## 3. The Definition of “Group of Companies” in Article 2 EIR-R

### 3.1 Legal Framework

Accompanying the new provisions on coordination with respect to insolvency proceedings of different members of groups of companies, the EIR-Recast has introduced a definition of “*group of companies*” and its respective group members in Article 2 nos 13 and 14 EIR-R. According to no 13 “*group of company*” encompasses a parent undertaking and all its subsidiary undertakings. No 14 seeks to define the two mentioned types of group members, determining that a “*parent undertaking*” is an entity exercising direct or indirect control over one or more “*subsidiary under-*

*takings*”. In addition, an undertaking, which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council (EU Accounting Directive), shall be deemed to be a parent undertaking. In particular, this reference to the EU Accounting Directive, which contains a number of Member State Options, might lead to some difficulties with regard to the interpretation and application of the new provisions on insolvencies of international groups of companies.

Moreover, no reference is made to the question of a requirement of an independent legal personality of the entities mentioned in Article 2 EIR-R. The recast Regulation contains no express delineation between the definition of a “*subsidiary undertaking*” (Article 2 no 13 EIR-R) and an “*establishment*” (Article 2 no 10 EIR-R). In *Burgo Group*<sup>367</sup>, the CJEU held that secondary proceedings can be opened when the establishment has a distinct legal personality. In this context it is, again, relevant whether the COMI of the subsidiary undertaking can be located at the place of business of the parent company. Subsequently, secondary proceedings might be opened in the Member State where the subsidiary’s registered place of business is located, this being determined as an “*establishment*” in accordance with the *Burgo Group* doctrine.

### 3.2 Evaluation

In the light of the foregoing, question 32 and 33 were included in the study’s questionnaire.<sup>368</sup>

The answers to Q 32 show that there seems to be significant uncertainty when it comes to the determination and delimitation of between the terms “*establishment*” (Article 2 no 10 EIR-R) and “*subsidiary undertaking*” (Article 2 no 13 EIR-R). We received as well some individual comments that summarize as follows:

- “*subsidiary undertaking*” is a separate legal entity, while “*establishment*” is not;
- “*subsidiary undertaking*” can be considered as an “*establishment*” for the purpose of secondary proceedings;
- “*subsidiary undertaking*” may itself have an “*establishment*” in the State where its registered office is situated.

As to Q 33, on whether the new coordination proceedings for group of companies exclude the application of main and secondary proceedings within a group of companies, the responses given thereto evince that the question of the parallel or non-parallel existence of these two concepts with respect to groups of companies does not seem to be clear either.

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<sup>367</sup> See CJEU, C-327/13, *Burgo Group*, judgment of 4 September 2014, ECLI:EU:C:2014:2158, para. 39.

<sup>368</sup> Q 32: *How would you distinguish the concept of “establishment” (Article 2 no 10 EIR-R) from the concept of “subsidiary undertaking” (Article 2 no 13 EIR-R)? Q 33: Do the new coordination proceedings for group of companies exclude the application of main and secondary proceedings within a group of companies?*



### 3.3 Recommendations and Guidelines

#### 3.3.1 Recommendations

According to more than 50% of the answers to the questionnaire, the concepts of establishment (Article 2 no 10 EIR-R) and of subsidiary undertaking (Article 2 no 13 EIR-R) are exclusive in the sense that secondary proceedings are not possible with regard to a “*subsidiary undertaking*”. Moreover, approximately 45% answered that the new coordination proceedings for group of companies would exclude the application of main and secondary proceedings within a group of companies. They concluded that the CJEU’s decision in *Burgo Group*<sup>369</sup> does no longer apply to the definition of the term “*establishment*” in Article 2 no 10 EIR-R.

In light of these answers, it seems appropriate to recommend a guideline clarifying that the newly introduced group coordination proceedings only aim to provide an additional tool box.<sup>370</sup> They do not exclude the possibility to open secondary proceedings in respect of a subsidiary company at its place of registration where main insolvency proceedings against said subsidiary company have been opened at the COMI in the Member State of its parent company (or another group company). The CJEU’s decision in *Burgo Group*<sup>371</sup> has clearly not been overruled by the revised Insolvency Regulation. This view is supported by Recital 53 EIR-R which explicitly acknowledges that the introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State.

With regard to Article 2 no 14 EIR-R, it should be noted that because of this reference to the EU Accounting Directive, the concept of “*group of companies*” can take different forms, depending on how Member States exercised the options provided for by the Accounting Directive. Evidently, the European legislator’s intention was to base the EIR’s definition of groups of companies at least also on the group concept of the EU Accounting Directive in order to achieve a higher degree of consistency in European business law.<sup>372</sup> Therefore, the definitions given in Article 2 nos 13 and 14 EIR-R should be interpreted in conformity with the group concept enshrined in the Accounting Directive. However, the phrase “*shall be deemed*” in Article 2 no 14 EIR-R clearly indicates that the definition of “*parent undertaking*” is not limited to companies affected by Directive 2013/34/EU. An undertaking which controls, either directly or indirectly, one or more subsidiary undertakings may still be considered as a “*parent undertaking*” even if it is

<sup>369</sup> See CJEU, C-327/13, *Burgo Group*, ECLI:EU:C:2014:2158.

<sup>370</sup> Cf. *Bornemann* in Wimmer/Bornemann/Lienau, Die Neufassung der EuInsVO (2016) margin no. 521.

<sup>371</sup> See CJEU, C-327/13, *Burgo Group*, ECLI:EU:C:2014:2158.

<sup>372</sup> Cf. J. Schmidt, Eurofenix Autumn 2015, 17; J. Schmidt, KTS 2015, 19, 36; van Zwieten in Commentary on the European Insolvency Regulation (2016) Art. 2 margin no. 2.38; Eble, NZI 2016, 115, 118; critical towards this approach: Mock, GPR 2013, 156, 164; other European legislative acts which refer to the EU Accounting Directive’s Group Concept include e.g. Directive 2014/65/EU (Markets in Financial Instruments Directive II - MiFID II), cf. Articles 4(1), (32) and (33).

not required to prepare consolidated financial statements in accordance with the Accounting Directive.<sup>373</sup> The second sentence of Article 2 no 14 EIR-R, therefore, only establishes a rebuttable presumption that all undertakings that have to prepare consolidated financial statements in accordance with Directive do constitute “parent undertakings” within the meaning of the EIR-R.<sup>374</sup>

While the definition of “parent undertaking” in Article 2(1) lit. j of the original Commission proposal only seemed to refer to subordination groups, comprising a parent undertaking and at least one subsidiary, the wording of Article 2 no 14 EIR-R seems to allow for a broader interpretation. According to Article 22 no 7 of the EU Accounting Directive, Member States may require undertakings, which are managed on a unified basis or have a common administrative, managerial or supervisory body, to draw up consolidated financial statements. Groups consisting of companies that operate on the same level and are subject to common direction (such as the so-called *Gleichordnungskonzerne* in German law<sup>375</sup>) could therefore come into the scope of the presumption of the second sentence of Article 2 no 14 EIR-R. The wording of the actual definition of “group of companies” in Article 2 no 13 EIR-R<sup>376</sup>, however, might suggest that the new provisions on group insolvencies are still only applicable to subordination groups. However, none of the legal consequences provided for under Articles 56 et seq and 61 et seq EIR-R require a narrow understanding of the terms “group of companies” or “parent undertaking”. Rather, a broad understanding of these notions might help to flexibly cope with specific situations in order to give at least some effect to these provisions.

All in all, the attempt to define these terms did not bring about much progress. This is not problematic, as the EIR-R as a whole and in particular Articles 56 et seq and 61 et seq EIR-R did not bring much progress with respect to group issues anyway. One should, however, bear in mind with respect to both the development of case law and future legislative steps that these definitions are not the fruits of in-depth reflections of all possible implications of international group companies and should therefore not be regarded as the *ratio scripta* in this field. Rather, they are only an empty frame for future objective-based decisions on specific group issues.

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<sup>373</sup> Cf. MüKoInsO/*Thole* VO (EG) 2015/848 Art. 2 margin no. 22; *van Zwieten* in Commentary on the European Insolvency Regulation (2016) Art. 2 margin no. 2.38; *Bork and Mangano*, European Cross-Border Insolvency Law (2016) margin no. 8.20; *Prager and Keller*, WM 2015, 805, 809; *Eble*, NZI 2016, 115, 118.

<sup>374</sup> The matter whether this presumption is rebuttable is disputed: Cf. for an irrebuttable presumption MüKoInsO/*Thole* VO (EG) 2015/848 Art. 2 margin no. 22; *van Zwieten* in Commentary on the European Insolvency Regulation (2016) Art. 2 margin no. 2.38; *contra Eble*, NZI 2016, 115, 119 who takes the view that the second sentence of Article 2 no 14 EIR-R establishes a rebuttable presumption.

<sup>375</sup> See Section 18(2) dAktG (German Stock Corporation Act): “If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group.”

<sup>376</sup> See Article 2 no 13 EIR-R: “a parent undertaking and all its subsidiary undertakings.”

### 3.3.2 Guidelines

*Guideline 3: Interpretation of the definitions of “group of companies” and “parent undertaking” in Article 2 nos 13 and 14 EIR-R*

1. The definition of “group of companies” in Article 2 no 13 EIR-R should be interpreted in a broad fashion and applied also in accordance with the Directive 2013/34/EU.

2. An undertaking which controls, either directly or indirectly, one or more subsidiary undertakings may still be considered to be a “parent undertaking” within the meaning of Article 2 no 14 EIR-R, even if it is not required to prepare consolidated financial statements in accordance with the Directive 2013/34/EU.

3. All in all, one should not overestimate the wisdom of these definitions. They should not be construed narrowly, as long as they are only the basis for rather weak mechanisms under Articles 56 et seq and 61 et seq EIR-R.

*Guideline 4: Clarifying the relation between “subsidiary undertaking” (Article 2 no 13 EIR-R) and “establishment” (Article 2 no 10 EIR-R)*

The concepts of “subsidiary undertaking” (Article 2 no 13 EIR-R) and “establishment” (Article 2 no 10 EIR-R) operate independently of each other. If the COMI of the subsidiary undertaking is, in application of the criteria set out in Guideline 1, to be located at the seat of the parent company, the courts of this Member State shall have jurisdiction to open insolvency proceedings for all respective group members. Secondary proceedings may be opened in any other Member State where the subsidiary company has an establishment.

*Guideline 5: Relation between the application of main/secondary proceedings and the newly introduced measures to facilitate coordination in the context of groups of companies*

The new provisions introduced for a better coordination of insolvencies concerning members of a group of companies *do not exclude* the possibility of opening secondary proceedings in a group context. Both the group-specific provisions on cooperation and communication (Articles 56–60 EIR-R) as well as the new group coordination proceedings (Articles 61–77 EIR-R) have to be regarded as additional tools which do not restrict the already available means of coordinating the insolvency proceedings of members of a group of companies.

## C. Coordination between Insolvency Proceedings Relating to Group Members

### 1. Legal Framework

The reform aims to ensure the efficient administration of insolvency proceedings relating to different companies forming part of a corporate group (cf. Recital 51). As a consequence of the introduction of new provisions for groups of companies, three scenarios have to be distinguished: the coordination between main and secondary insolvency proceedings in group settings (a), the coordination between main insolvency proceedings opened against different group members (b), and finally the newly introduced group coordination proceedings (which will be discussed in a separate section *infra* D.).

*a) Coordination between Main and Secondary Insolvency Proceedings:* The rules for coordination between main and secondary proceedings (in particular Articles 41 et seq EIR-R) apply to groups of companies in cases in which main insolvency proceedings are opened against a subsidiary company at the COMI of the parent company (or another group company) while secondary proceedings are opened at the registered office of the subsidiary company.<sup>377</sup> The main insolvency practitioner may, therefore, exercise the following powers: to give an undertaking to local creditors according to Article 36 EIR-R in order to prevent the opening of secondary proceedings, to request the opening of secondary proceedings to be stayed (cf. Article 38[3] EIR-R)<sup>378</sup> and to request the conversion of secondary proceedings into another, more appropriate type of proceedings than initially requested or already opened (cf. Article 51[1] EIR-R). The main insolvency practitioner's ability to apply for a suspension of the realisation of assets in the secondary proceedings (cf. Article 46 EIR-R) and to propose a restructuring plan or composition (cf. Article 47 EIR-R) has not been subject to major changes.<sup>379</sup>

*b) Coordination between Main Insolvency Proceedings Opened against Two or More Group Members:* The coordination between these proceedings is, on the one hand, governed by the Section 1 of the newly introduced Chapter V on Insolvency Proceedings of Members of a Group of Companies (Articles 56 et seq EIR-R)<sup>380</sup> and, on the other hand, by the new group coordination proceedings.<sup>381</sup> Apart from the provisions on communication and cooperation and the usage of agree-

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<sup>377</sup> This is only possible if the subsidiary company meets the requirements of an establishment (according to Article 2 no 10 EIR-R); cf. Recitals 24 and 53. See on this question also *supra* Part 3 B. 3.3.1.

<sup>378</sup> For the question of coordination between main and secondary proceedings in general, see *supra* Part 2 B.

<sup>379</sup> Cf. Recital 48.

<sup>380</sup> According to Recital 62, “[t]he rules on cooperation, communication and coordination in the framework of the insolvency of members of a group of companies provided for in this Regulation should only apply to the extent that proceedings relating to different members of the same group of companies have been opened in more than one Member State”. (Emphasis added)

<sup>381</sup> See *infra* Part 3 O. Pursuant to Recital 60 particularly the insolvency practitioner's powers under Article 60 EIR-R should provide for an “*alternative mechanism*” to achieve a coordinated restructuring of the group for members of the group *not* participating in group coordination proceedings.

ments and protocols as coordination tools,<sup>382</sup> the rules dealing with the powers of the insolvency practitioner in proceedings concerning (other) group members are to be mentioned. The European legislator decided against establishing a hierarchy between insolvency proceedings opened against members of a group of companies similar to the relation between main and secondary proceedings. In this regard and outside the scope of group coordination proceedings, the reform rather follows a “market economy oriented approach”<sup>383</sup> according to which all relevant insolvency practitioners should, in principle, have the right to be heard and to request a stay of any measure related to the realisation of assets in (all) proceedings concerning other group members (cf. Article 60[1] EIR-R).<sup>384</sup> Therefore, the EIR-R correctly refrained from attempts (which were originally suggested e.g. by the German government) to denominate a “main main practitioner” for group cases; this would indeed have been an impossible task, as groups of companies differ strongly from each other. The insolvency practitioner may, however, only exercise his/her powers “*to the extent appropriate to facilitate the effective administration of the proceedings*”. In addition, the insolvency practitioner’s right to request a stay – which is, or rather could, be the most powerful tool of coordination – is subject to (no less than) four conditions, most notably the existence of a coordinated restructuring plan (according to Article 56[2] lit. c EIR-R) that presents a “*reasonable chance of success*” (Article 60[1] lit. b [j] EIR-R) and the requirement that the insolvency proceedings, which should be stayed, are not subject to group coordination proceedings.<sup>385</sup>

## 2. Evaluation

In the light of the foregoing, Q 36 was included in the study's questionnaire.<sup>386</sup> The question aimed at individual answers. Those were indeed not uniform; the overall view expressed was, however, rather positive towards the new powers of insolvency practitioners with regard to insolvency proceedings concerning another member of the group.

The participants, *inter alia*, stressed that

- it could be a useful tool to isolate spoilsports in the group (while admitting that it can also help spoilsports to intervene in other proceedings);

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<sup>382</sup> See *supra* Part 2 C.

<sup>383</sup> *Oberhammer in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013) margin no. 610.*

<sup>384</sup> With regard to the powers of the group coordinator see *infra* Part 3 D.1.

<sup>385</sup> Article 60(1) lit. b EIR-R requires for a stay to be granted that: (ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan; (iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and (iv) neither the insolvency proceedings in which the insolvency practitioner referred to in paragraph 1 of this Article has been appointed nor the proceedings in respect of which the stay is requested are subject to coordination under Section 2 of this Chapter. With regard to the latter proceedings only the group coordinator may request a stay (cf. Article 72 [2] lit. e EIR-R).

<sup>386</sup> *Does the implementation of Section 1 of the newly introduced Chapter V, in particular the powers of the insolvency practitioner in proceedings concerning members of a group of companies under Article 60 EIR-R, in your view, have an impact in practice on the coordination of insolvency proceedings related to group members and, if so, in what respect?*

- the possibility to exercise these powers could urge the involved bodies towards a more voluntary cooperation;
- it could be useful for coordinating the realization of the assets and rights;
- by means of joint agreements and protocols, the insolvency practitioners could determine some sort of hierarchy amongst them and the “most-powered” insolvency practitioner according to this hierarchy would then make use of all the measures listed in Article 60 EIR-R (e.g. request the stay); in the lack of an agreed hierarchy, however, the powers enshrined in Article 60 EIR-R would be of little use, according to this view, since it would be too likely, for instance for a request to stay the proceedings, to be rejected;
- it will heavily depend on the interpretation of the relevant provisions by national courts, in particular the provision according to which a restructuring plan must have a “reasonable chance of success”.

### 3. Recommendations and Guidelines

#### 3.1 Recommendations

The provisions on cooperation and communication in group insolvency proceedings (Articles 56 et seq EIR-R) are to a large extent congruent with the corresponding rules on coordination between main and secondary proceedings (Articles 41 et seq EIR-R).<sup>387</sup> Although it is true that the group-specific rules differ in some aspects from those only concerning main and secondary proceedings,<sup>388</sup> the essential objective of the EIR-R’s rules on cooperation and communication, namely to ensure the efficient administration of the insolvency estate,<sup>389</sup> remains the same. It seems, therefore, only reasonable that the concepts of communication, coordination and cooperation should be interpreted and applied in a consistent manner.<sup>390</sup>

One of the particular characteristics of the group specific provisions in Section 1 of the newly introduced Chapter V (Articles 56 et seq EIR-R) is that the duties of cooperation and communication within the group context are subject to a number of rather strict limits, most notably that the cooperation must be appropriate to facilitate the effective administration of the

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<sup>387</sup> This has been a deliberate decision of the European legislator; cf. Recital 52 sentence 2.

<sup>388</sup> Cf. *Bork and Mangano*, European Cross-Border Insolvency Law (2016) margin no. 8.35.

<sup>389</sup> Cf. Recitals 48, 51 and 52 sentence 1.

<sup>390</sup> See *supra* Part 2 B.3 - Art. 41 ff EIR-R. Moreover, Recital 48 points out that “best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation” should be taken into account by insolvency practitioners and courts. In this regard, mention must be made of the “European Communication and Cooperation Guidelines for Cross-Border Insolvency” of 2007 (often referred to as “CoCo Guidelines”); of the “Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines” of 2014 (“EU JudgeCo Principles”) and of the “Draft INSOL Europe Statement of Principles and Guidelines for Insolvency Office Holders in Europe” of 2014, available at [www.trileiden.eu/publications/](http://www.trileiden.eu/publications/).

proceedings, that it has to be compatible with the rules applicable to the insolvency proceedings and may not entail any conflict of interest (cf. Articles 56[1] and 57[1] EIR-R). These limits must be respected, but should in no way serve as an excuse for courts and insolvency practitioners which are reluctant to cooperate and should therefore be interpreted in a restrictive manner. In particular, the requirement of compatibility with the applicable rules does not change the fact that national insolvency law may not be construed as incompatible with the duties of cooperation and communication laid down in the EIR.<sup>391</sup>

Another intricate issue which might hamper efficient cooperation and communication in group insolvencies is the allocation of costs. According to Article 59 EIR-R, costs of cooperation and communication pursuant to Articles 56-60 EIR-R shall be regarded as costs and expenses incurred in the respective proceedings. In other words, each insolvency estate must bear its own costs resulting from the cooperation without being indemnified. This may lead to unfair results and is particularly problematic in cases where an individual group company incurs disproportionately high costs because it has to provide the information on most of the group's assets.<sup>392</sup> Article 59 EIR-R should, therefore, not be interpreted as a mandatory provision, but only as a default rule which can be overridden by agreements or protocols between the insolvency practitioners.<sup>393</sup> Such an interpretation is further supported by Article 56(2) EIR-R which allows insolvency practitioners to grant additional powers to a practitioner appointed in an insolvency proceeding of another member of the group and to allocate certain tasks amongst them because such agreements would only be possible if insolvency practitioners are allowed to deviate from the strict cost allocation of Article 59 EIR-R.<sup>394</sup>

Outside the scope of group coordination proceedings, Article 60 EIR-R is the key provision for the coordination between main insolvency proceedings opened against two or more members of a corporate group. The interpretation of this provision will, therefore, be crucial for the efficient coordination of insolvencies relating to different members of a corporate group. Article 60 EIR-R subjects the rights and powers of the insolvency practitioner in proceedings concerning members of a group of companies to certain requirements. A rigid interpretation of these requirements might leave practically no room for the application of Article 60 EIR-R. Consequently, the requirements laid down in Article 60 EIR-R should be interpreted in conformity with its purpose, i.e. to enable efficient coordination by establishing a non-hierarchical network in which a level playing field exists among the insolvency practitioners which should in turn yield the best solution for the whole group.

It should generally be accepted that the reform does not stipulate a strict hierarchy between proceedings relating to different companies of a corporate group. In a non-hierarchical network,

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<sup>391</sup> Cf. *Bork and Mangano*, European Cross-Border Insolvency Law (2016) margin no. 8.49.

<sup>392</sup> Cf. *Madans*, IILR 2015, 235, 240 who mentions the case of *Lehman Brothers Inc.* in which the Lehman Brothers UK subsidiary was in particular affected by information requests.

<sup>393</sup> Cf. *Madans*, IILR 2015, 235, 240; *Bork and Mangano*, European Cross-Border Insolvency Law (2016) margin no. 8.51; reluctant *J. Schmidt* in Commentary on the European Insolvency Regulation (2016) Art. 59 margin no. 59.05; see also *MüKoInsO/Reinhart VO (EG) 2015/848 Art. 59* margin no. 2.

<sup>394</sup> Similarly *Bork and Mangano*, European Cross-Border Insolvency Law (2016) margin no. 8.51.

in which a level playing field exists among the insolvency practitioners, it is more likely that the best solution for the whole group prevails. However, the effectiveness of this approach seems to be significantly reduced by the fact that the insolvency practitioner of one group member is only granted very little influence in the proceedings concerning other group members. This becomes particularly evident when comparing the powers the main insolvency practitioner has in secondary proceedings with those the insolvency practitioner of one group member has in main proceedings concerning another group member. Such insolvency practitioner may, for instance, not propose a restructuring plan in the respective other proceedings or request their conversion into a more appropriate type of proceedings. Considering the requirements for a stay of the realisation of assets in insolvency proceedings concerning a group member (under Article 60[1] lit. b EIR-R), it seems unlikely that the insolvency practitioner's power to request such stay will provide an effective tool for coordination.

Against this background, there will be a strong incentive for corporate groups to follow the practice that has already been applied under the old regime. In these cases, main proceedings against the parent company (or another group company) and against all (or at least some) subsidiary companies are opened at the COMI of the parent company and, if necessary, secondary proceedings at the registered office of the respective subsidiary company. This group COMI approach (see *supra* Part 3 B. 1.2.1) does, of course, require that the COMI of the parent and the subsidiary company coincide. Recital 53 explicitly acknowledges that the introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State. In such a scenario, it will also be easier to appoint a single insolvency practitioner for all members of the group, provided that conflict of interests can be avoided. Consequently, this approach which was developed by practice under the old EIR goes far beyond both the group coordination tools under Articles 56 et seq and 61 et seq EIR-R.

### 3.2 Guidelines

#### *Guideline 6: National provisions on cooperation and communication*

Member States are advised to adopt rules on cooperation and communication with regard to domestic group insolvency proceedings corresponding to Articles 56–60 EIR-R. These rules should be interpreted in accordance with the provisions of the EIR-R.

#### *Guideline 7: Limits on cooperation and communication*

The limits on cooperation and communication, such as the requirement of compatibility with “*the rules applicable to such proceedings*” included in Article 56 EIR-R, are to be interpreted in a very restrictive manner. In particular, national provisions may not be construed as incompatible



with the duties of cooperation and communication, as these uniform law obligations override such national rules in general. Conflicts between said obligations and national provisions should always be resolved on the basis of an objective-oriented interpretation. In this context, national insolvency law can only prevent the application of cooperation obligations under the EIR-R where such cooperation is incompatible with achieving main objectives of these national proceedings.

*Guideline 8: Costs of cooperation and communication in proceedings concerning members of a group of companies*

Article 59 EIR-R should not be interpreted as a mandatory provision on the apportionment of costs. Insolvency practitioners should be allowed to deviate from this rule in insolvency protocols or agreements.

*Guideline 9: Interpretation of Article 60 EIR-R*

1. Courts are advised to interpret powers and rights conferred on insolvency practitioners by Article 60 EIR-R in a broad fashion, consistent with the purpose of facilitating the efficient administration of group insolvency proceedings. In particular, there should be no disproportionate requirements as to the four conditions which must be fulfilled pursuant to Article 60(1) lit. b EIR-R for the exercise of the right to request a stay of any measure related to the realisation of the assets.

2. When exercising their discretionary powers under Article 60(2), the courts should be guided by the objective of achieving the restructuring or an efficient sale of the group business as a whole. In particular, they should consider:

- the chance of success for the implementation of the restructuring plan;
- the chance of selling the group business as a whole;
- the interests of the creditors in the proceedings;
- the costs resulting from their decisions;
- the positions of the insolvency practitioners involved.

## D. The New Group Coordination Proceedings

### 1. Legal Framework

It is said to be the purpose of the newly introduced group coordination proceedings to improve the coordination of (parallel) insolvency proceedings relating to different group members, to allow for a coordinated restructuring of the group and, more generally, to ensure the efficiency of the coordination.<sup>395</sup> In achieving these goals, the impartial<sup>396</sup> group coordinator (cf. Article 71 EIR-R) plays a key role. The procedure<sup>397</sup> consists of four parts: first, the opening stage following a request for the opening of group coordination proceedings filed by an insolvency practitioner appointed in insolvency proceedings related to a group member;<sup>398</sup> second, the decision opening group coordination proceedings which entails the appointment of a group coordinator (Article 68 EIR-R); third, coordination activities taken by the group coordinator, in particular the proposal of a group coordination plan setting out an integrated approach to the resolution of the group members' insolvencies (cf. Article 72[1] lit. b EIR-R) and fourth, the confirmation of (or decision on) the group coordinator's remuneration (Article 77 EIR-R).

Any court having jurisdiction over the insolvency of a member of the group has jurisdiction to decide on a request to open group coordination proceedings (Article 61[1] EIR-R).<sup>399</sup> In case of parallel requests, Article 62 EIR-R provides for a priority rule in favour of the court first seised. The court will then have to inform the insolvency practitioners of the group companies on the request and the proposed coordinator, but only if it is satisfied that the conditions of Article 63(1) EIR-R are met. Article 63(1) EIR-R requires the court to be satisfied that (a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; and (b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings.

The insolvency practitioners may, within thirty days after receipt of the court's notice, opt out of the group coordination proceedings (i.e. object to the inclusion of the respective proceedings) or object (only) to the person proposed as a coordinator (Article 64 EIR-R). If the insolvency practitioner of a group company opts out, the insolvency proceedings relating to that

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<sup>395</sup> Cf. Recital 54. The group coordination procedure should always strive to have a generally positive impact for the creditors (see Recital 57).

<sup>396</sup> Pursuant to Article 72(5) EIR-R, the group coordinator shall perform his/her duties impartially and with due care; for a thorough discussion see *Eble*, ZIP 2016, 1619, 1621.

<sup>397</sup> Chapter V Section 2, on the one hand, contains uniform procedural rules, and on the other, refers to the *lex fori concursus* of the court before which a request to open group coordination proceedings is brought (see, e.g., Articles 61[2]; 69[1],[2] lit. b, and [4]; 71[1]; 72[2] lit. c; 74[1]; and 77[5] EIR-R).

<sup>398</sup> Such request shall, *inter alia*, propose a person to be nominated as group coordinator and an outline of the proposed group coordination (cf. Article 61[3] EIR-R).

<sup>399</sup> Until group coordination proceedings have been opened, two-thirds of all insolvency practitioners appointed in insolvency proceedings concerning a group member can, however, agree on a court that shall have exclusive jurisdiction (see Article 66 EIR-R).

group member shall not be affected by the court's decision to open group coordination proceedings and by the group coordinator's powers (cf. Article 65[2] EIR-R). This does, however, not exclude the possibility to opt in at a later point in time (pursuant to Article 69[1] lit. b EIR-R). The group coordinator has the power to decide on the admissibility of such request to opt in. He/she has to consult all insolvency practitioners of group companies involved (cf. Article 69[2] EIR-R) and grant the request if the criteria in Article 63(1) lit. a and b EIR-R mentioned above are fulfilled<sup>400</sup> or all insolvency practitioners agree.

The participating insolvency practitioners of group companies shall consider the group coordinator's recommendations and the group coordination plan. However, they are not obliged to follow them. If they decide against following them, they shall give reasons for not doing so to the group coordinator and, if applicable, to the competent body under the applicable *lex fori concursus* (cf. Article 70[2] EIR-R).

The group coordinator has to be qualified to act as an insolvency practitioner "*under the law of a Member State*" and shall not be one of the insolvency practitioners of a group company (Article 71 EIR-R). It is the group coordinator's duty to identify and outline recommendations for the coordinated conduct of the insolvency proceedings and to propose a group coordination plan (Article 72[1] EIR-R).<sup>401</sup> Additionally, Article 72(2) EIR-R lists the group coordinator's powers. These powers, however, only extend to group members participating in the group coordination proceedings. The group coordinator's powers and rights under Article 72(2) EIR-R include: (a) the right to be heard and participate, in particular by attending creditors' meeting, in any of the proceedings in respect of any group member, (d) request information from any insolvency practitioner in respect of any member of the group,<sup>402</sup> and (e) the right to request a stay for a period of up to six months of *the proceedings* opened in respect of any member of the group.

Note that the group coordinator may not only request a suspension of the realisation of assets but a stay of the proceedings up to six month. Such request may, however, only be granted if a stay is "*necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested*". Additionally, the group coordinator may mediate any dispute arising between two or more insolvency practitioners of group members (Article 72[2] lit. b EIR-R)

There is an obvious risk that the advantages, which group coordination proceedings could have in theory, might not only be frustrated by the bureaucratic approach of the provisions outlined above, but also by the costs of those proceedings. The EIR-R contains provisions aiming at

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<sup>400</sup> The coordinator's decision might be challenged before the court which has opened group coordination proceedings (Article 69[4] and Recital 56 EIR-R).

<sup>401</sup> Article 72(1) lit. b EIR-R provides a list of what a coordination plan might contain, e.g. a proposal for (i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it; (ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions; (iii) agreements between the insolvency practitioners of the insolvent group members.

<sup>402</sup> Provided that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings. In this regard, it is important to note that the respective insolvency practitioner does not have to provide information if it is incompatible with the applicable *lex fori concursus* (which can be derived from Article 74[1] EIR-R).

lowering that risk.<sup>403</sup> According to Recital 58, the costs of the coordination and the share of those costs that each group member will bear are determined in accordance with the law of the Member State in which group proceedings have been opened. A decision on costs by the court is only required if one of the participating insolvency practitioners objects to the final statement of costs and the share to be paid established by the group coordinator (Article 77[2] EIR-R). In addition, Article 77(3) EIR-R requires a request for a decision on costs by the objecting insolvency practitioner or the group coordinator. Article 77(5) EIR-R only refers to the following criteria for the court's cost decision: the share of costs each group member will bear should be "*adequate, proportionate and reasonable*".<sup>404</sup> The cost decision may be challenged in accordance with the procedure set out under the law of the Member State where group coordination proceedings have been opened.

All this, however, does not change the fact that the new group coordination proceedings will actually cost time and money without having convincing advantages. They obviously have been created not on basis of a thorough analysis of what could work in practice, but rather for political reasons: The legislator rather wanted to create something "new and great" with respect to groups of companies, and this was done on the basis of a very bureaucratic mindset. One can, however, not exclude that there will be future cases where clever lawyers will be able to use or abuse this new legal monstrosity in ways which are not foreseeable today.

## 2. Evaluation

In the light of the foregoing, question 37 was included in the study's questionnaire.<sup>405</sup> Its last point, which referred to the newly introduced group coordination proceedings, also provided for a possibility to express individual thoughts and comments. The general impression appears to be rather sceptical towards the new coordination procedure. In summary, the concerns brought forward by the participants were that

- it was a too complex and time-consuming mechanism;
- it was too formalistic and over-regulated;
- it was too expensive to be attractive;
- there were too many different conflicting interests, laws, judges and practitioners involved;

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<sup>403</sup> See Article 61(3) lit. d EIR-R requiring the requesting party to submit an outline of the estimated costs; Article 72(6) EIR-R according to which the group coordinator has to inform all participating insolvency practitioners and seek approval of the court opening coordination proceedings where the costs exceed 10 % of the estimated costs; cf. Recital 58.

<sup>404</sup> Cf. Recital 58 and Article 77(4) EIR-R which refers to these criteria set out in Article 77(1) EIR-R.

<sup>405</sup> *Does the adoption of group coordination proceedings, in your view, improve the coordination of (parallel) insolvency proceedings relating to different group members and the restructuring of corporate groups and, if so, why or why not?*

- the mere voluntary basis of the proceedings on the one hand but also the opt-out procedure on the other hand might lead to the participation of a very passive insolvency practitioner that has no incentive to contribute;
- due to the considerably low level of actual powers of the group coordinator, the effectiveness of the new group coordination system could be questioned.

Several views expressed that

- the proceedings, if used, would only be suitable for big groups of companies, where actual coordination is needed;
- it would highly depend on the capacity and professionalism of the stakeholders involved;
- it will be decisive how it will be dealt with in practice.

### 3. Recommendations and Guidelines

#### 3.1 Recommendations

The reform adds group coordination proceedings as an additional instrument to the EIR's tool box for coordinating insolvency proceedings relating to different members of a corporate group. In light of their voluntary nature, group coordination proceedings, however, create a need for (additional) coordination, e.g. between group coordination proceedings and coordination measures taken by insolvency practitioners of group members not participating in group coordination proceedings. There is an obvious risk that group coordination proceedings will rather complicate than facilitate the coordination of (parallel) insolvency proceedings relating to different group members and restructuring efforts. The coordinator's recommendations are not binding; they merely have to be considered by the insolvency practitioners of group companies.<sup>406</sup> Consequently, coordination and restructuring efforts proposed by the group coordinator can easily be blocked by insolvency practitioners of group companies. The right to request a stay according to Article 72(2) lit. e EIR-R is the group coordinator's most powerful tool vis-à-vis the insolvency practitioners of group companies taking part in the coordination process. The success of such requests, however, depends on whether the court finds that the respective insolvency proceeding's creditors would benefit from a stay. If local creditors and stakeholders oppose the stay of the proceedings, the court might be inclined to dismiss the request.

In order to open group insolvency proceedings, the court has to be satisfied that no creditor of any group member expected to participate in the proceedings is likely to be financially disad-

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<sup>406</sup> Cf. *Bornemann* in Wimmer/Bornemann/Lienau, Die Neufassung der EuInsVO (2016) margin no. 525; *Vallender*, ZIP 2015, 1513, 1521.

vantaged by the inclusion (Article 63[1] lit. b EIR-R).<sup>407</sup> This threshold seems rather high. In addition, it is questionable on the basis of which comparison it has to be evaluated whether a creditor is likely to be financially disadvantaged. The fact that the value of the respective insolvency estate is reduced by the costs necessary for the coordination proceedings will, arguably, not as such suffice to deny the opening of group coordination proceedings. A different result might follow where the costs outweigh the advantages of group coordination proceedings. In general, the rule on costs and the question on how these costs are shared by the participating group members are likely to give rise to controversies in practice.

The reform does not explicitly deal with the recognition of decisions rendered in group coordination proceedings. This may raise intricate questions in case parallel requests for opening group insolvency proceedings are filed before courts of different Member States and one of them opens group coordination proceedings in violation of the priority rule laid down in Article 62 EIR-R. Arguably, Article 19 EIR-R applies by analogy. This question is also relevant for determining the effects a decision dismissing a request for opening group coordination proceedings might have on requests before courts of other Member States.

We are not at all convinced that the new group coordination proceedings will turn out to be a significant success. This view is shared by a large number of academics who have already expressed concerns in this respect.<sup>408</sup> Moreover, such concerns have been echoed by the majority of the answers to the questionnaire of the project, highlighting that the group coordination proceedings only trigger additional costs, provide for complex bureaucratic procedures and will most likely not be successful due to their non-binding nature.

We, therefore, suggest that future legislation should provide for additional measures in order to strengthen the coordination between insolvencies of group companies by improving tools of coordination between the respective insolvency practitioners in charge of the respective group companies. In this context, we refer to the initial draft by the European Commission on the subject which already included much more far-reaching tools in this respect. We suggest that future amendments of the EIR should return to this concept. On this basis, measures such as the ones already drafted by the European Commission in the course of the revision of the EIR should be contemplated. Most importantly, the approach according to which all relevant insolvency practitioners should, in principle, have the right to be heard, to request a stay of any measure related to the realisation of assets in proceedings concerning other group members and to propose a reorganisation plan in a way which would enable the respective creditors' committee or court to take a decision on it. Accordingly, future legislation in this field should aim at developing the rules laid down in Articles 56 et seq EIR-R, while the group coordination proceedings under Article 61 et seq EIR-R are simply a legislative dead end.

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<sup>407</sup> See *Moss, Fletcher and Isaacs*, The EU Regulation on Insolvency Proceedings (2016) Art. 63 margin no. 8.777.

<sup>408</sup> See, *inter alia*, *Bewick*, ILLR 2015, 172, 187 et seq; *Kindler/Sakka*, EuZW 2015, 460, 466; *McCormack*, (2016) 79(1) Modern Law Review 121, 143 et seq; *Thole/Dueñas*, International Insolvency Review (2015), Volume 24, Issue 3, 214, 218 et seqq; *Van Galen*, ERA Forum (2015) 16:241, 251 et seqq; *Weiss*, ILLR 2015, 192, 212.

In addition, we believe that the effects of the very narrow prerequisites for “*undertakings*” according to Article 36 EIR-R and their effects in practice should be closely examined after the coming into force of the revised EIR. In case it turns out that these requirements are too strict and, therefore, have the effect that such undertakings have no sufficient actual effect in practice, the wording of said provision should be reconsidered.

Finally, the expectation that the new group coordination proceedings might turn out to be a failure in practice leads us to the conclusion that courts and practitioners should engage in the further development of other coordination mechanisms, including, but not limited to the ones outlined above.

### 3.2 Guidelines

#### *Guideline 10: Recommendation of ex ante arrangements between insolvency practitioners*

In light of the voluntary nature of group coordination proceedings, the insolvency practitioners involved are advised to seek agreement on the general course of the proceedings, the allocation of the proposed costs and, most importantly, on the question who the coordinator should be before initiating coordination proceedings. They should treat the coordination proceedings as just one option of cooperation, they should reflect whether the costs of the coordination proceedings are justified in the light of their limited advantages and they should examine whether a cooperation without such proceedings is more appropriate in the specific case.

#### *Guideline 11: Eligibility requirements for the coordinator*

Courts should only appoint very well-respected insolvency practitioners with broad international experience who, in particular, enjoy the trust of all practitioners involved.

## E. Conflict of Laws

### 1. Legal Framework

Insolvencies of groups of companies can also raise intricate conflict of laws issues regarding the the scope of application of the *lex fori concursus* and the *lex societatis*. The question becomes, for instance, relevant where the presumption under Article 3 EIR-R is rebutted and, therefore, the COMI of a (group) company is not located at the respective company's registered office. This could lead to a divergence between the applicable company law and the applicable insolvency law (under Article 7 EIR-R). In insolvency proceedings relating to members of a group of companies, the relationship between company and insolvency law is, for example, relevant for the following issues: the liability of managing directors<sup>409</sup> or shareholders<sup>410</sup> of a (group) company, the subordination of shareholder loans, the piercing of the corporate veil, the automatic extension of the company's insolvency to its shareholders (as provided in some legal systems) and the effects a restructuring (or reorganisation) plan might have on the legal regime of the legal person, e.g. by modifying its organisational, financial or capital structure.

The reform does not specifically address the *lex fori concursus/lex societatis*-delineation issue. From a jurisdictional perspective Article 6(2) EIR-R, however, aims to safeguard procedural economy by avoiding split-jurisdiction caused by the jurisdictional characterisation of actions at the "intersection" of company, insolvency, and general civil law.<sup>411</sup>

## 2. Recommendations and Guidelines

### 2.1 Recommendations

Both the corporate law relating to insolvency and the insolvency law relating to corporations are diverse to a very large extent in Europe today. Therefore, it seems almost impossible to achieve an approximation of laws or even uniform law in the near future. Presently, the EIR does not even contain provisions on conflicts of law issues relating to claims under corporate law. It would be very helpful if future legislation were to create such uniform rules.

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<sup>409</sup> E.g. for the violation of the duty to timely request the opening of insolvency proceedings; see, e.g., the question whether the claim under Section 64 GmbHG filed against the director of a private company limited by shares registered in the UK against which insolvency proceedings were opened in Germany falls under Article 4 of Regulation No 1346/2000 in CJEU, C-594/14, *Kornhaas*, judgment of 10 December 2015, ECLI:EU:C:2015:806; cf. *infra* Part 3 E. 2.1.

<sup>410</sup> For instance in veil-piercing cases or with respect to claims for the reimbursement of payments made on shareholders' loans.

<sup>411</sup> For a detailed discussion see *Laukemann* in Hess/Oberhammer/Pfeiffer, Heidelberg-Luxembourg-Vienna Report (2013) margin no. 542 et seq and margin no. 564.



We do, however, believe that such rules should not be drafted “out of the blue”. Since the enactment of the original EIR, the CJEU has rendered a wealth of case-law relating to the delineation between the Brussels Regulation and the EIR. After the CJEU’s judgment in the *Sea-gon/Deko Marty Belgium* case, this case-law does not only serve as the basis for said delineation, but is also the basis for the cases where the courts in the Member State where insolvency proceedings were opened have exclusive jurisdiction for insolvency-related matters according to Article 6 of the EIR-R. We have reviewed the case-law relating to said delineation, that is, the definition of the wording “*action which derived directly from the insolvency proceedings and is closely linked with them*” (see Article 6[1] and Article 32[1] subpara. 2 EIR-R). We believe that the principles developed by the CJEU in all these cases (with the exception of the infamous *Alpenblume* case) could also serve as the basis of a conflict of laws rule.

In its recent *Kornbaas* decision<sup>412</sup> the CJEU has adopted a similar approach. The court referred to its earlier judgment in *H v. H.K.*<sup>413</sup> where it had held that a national provision, such as the first sentence of Paragraph 64(2) of the German Law on limited liability companies (“GmbHG”), under which the managing director of an insolvent company must reimburse the payments which he made on behalf of that company after it had become insolvent, derogates from the common rules of civil and commercial law, because of the insolvency of that company. The Court inferred therefrom that an action based on that provision, brought in the context of insolvency proceedings, is an action deriving directly from insolvency proceedings and closely connected with them. Following up on this characterisation of Paragraph 64(2) of the GmbHG as being covered by insolvency law, the Court held in the *Kornbaas* decision that Paragraph 64(2) of the GmbHG must be regarded as being covered by the law applicable to insolvency proceedings and their effects, within the meaning of Article 4(1) of Regulation No 1346/2000. In other words, the CJEU applied a test to delineate the scope of application of the *lex fori concursus* and the *lex societatis* which resembles the *Gourdain/Nadler* formula. This is reinforced by the Court’s argument that Paragraph 64(2) of the GmbHG falls within the scope of Article 4 of Regulation No 1346/2000 because it “*contributes to the attainment of an objective which is intrinsically linked, mutatis mutandis, to all insolvency proceedings, namely the prevention of any reduction of the assets of the insolvent estate before the insolvency proceedings are opened, so that the claims of all the company’s creditors may be satisfied on equal terms.*”<sup>414</sup>. We believe that this approach to this conflicts of law issue would not only dramatically clarify the legal situation, but could also improve coordination.

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<sup>412</sup> See judgment in CJEU, C-594/14, *Kornbaas*, ECLI:EU:C:2015:806.

<sup>413</sup> See judgment in CJEU, C 295/13, *H v. H.K.*, judgment of 4 December 2014, EU:C:2014:2410, para. 23.

<sup>414</sup> CJEU, C-594/14, *Kornbaas*, ECLI:EU:C:2015:806, para. 20.

## 2.2 Guideline

### *Guideline 12: Applicable Law*

Courts are advised to apply the *lex fori concursus* to all claims which derive directly from the insolvency proceedings and are closely linked with them. In this context, the interpretation of this notion should be based on the CJEU's case law with respect to the “*Gourdain/Nadler*-formula”.

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