



FACULTY OF LAW  
Lund University

David Rhodin

A look at the recast EC regulation on  
insolvency proceedings  
- with particular focus on corporate  
insolvencies

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program  
30 higher education credits

Supervisor: Michael Bogdan  
Semester of graduation: Spring 2016



# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 Background and policy context	4
1.2 Purpose	6
1.3 Method and material	6
1.3.1 <i>Introduction</i>	6
1.3.2 <i>The European Legal Method</i>	7
1.3.3 <i>Material</i>	9
1.4 Delimitations	10
1.5 Disposition	10
<b>2 THE SUBJECT</b>	<b>11</b>
2.1 National insolvency law	11
2.1.1 <i>Core concept of insolvency law</i>	11
2.1.2 <i>Main types of insolvency proceedings</i>	12
2.2 International insolvency law	13
2.2.1 <i>Introduction</i>	13
2.2.2 <i>Two doctrinal perspectives: universality vs territoriality</i>	13
2.2.2.1 Universality	14
2.2.2.2 Territoriality	15
<b>3 THE EUROPEAN INSOLVENCY REGIME</b>	<b>17</b>
3.1 Overview	17
3.2 Principles of EU insolvency law	17
3.3 Overall objectives of the new Regulation	19
3.4 Scope of the recast EIR	20
3.4.1 <i>Material scope of the recast EIR</i>	20
3.4.2 <i>Insolvency proceedings listed in Annex A</i>	22
3.5 International jurisdiction	23
3.5.1 <i>Overview</i>	23
3.5.2 <i>Main insolvency proceedings</i>	23
3.5.2.1 Introduction	23
3.5.2.2 Determination of Centre of Main Interest	24

<b>3.5.3</b>	<b><i>Territorial insolvency proceedings</i></b>	<b>25</b>
3.5.3.1	Establishment	25
3.5.3.2	Additional requirements	26
<b>3.5.4</b>	<b><i>'Annex proceedings' – Jurisdiction for other actions</i></b>	<b>27</b>
<b>3.6</b>	<b>Applicable Law</b>	<b>27</b>
<b>3.6.1</b>	<b><i>Introduction</i></b>	<b>27</b>
<b>3.6.2</b>	<b><i>Basic conflict rule of the Regulation (Lex concursus)</i></b>	<b>27</b>
<b>3.6.3</b>	<b><i>Exceptions from the main principle of lex concursus</i></b>	<b>29</b>
3.6.3.1	Exclusion of certain rights from the effects of insolvency proceedings	29
3.6.3.2	Special conflict rules on selected issues	30
<b>3.7</b>	<b>Recognition and Enforcement</b>	<b>31</b>
<b>3.7.1</b>	<b><i>A general principle of recognition</i></b>	<b>31</b>
<b>3.7.2</b>	<b><i>Judicial review</i></b>	<b>32</b>
<b>3.7.3</b>	<b><i>Publication and registration</i></b>	<b>33</b>
<b>3.8</b>	<b>Secondary proceedings</b>	<b>34</b>
<b>3.8.1</b>	<b><i>The purpose of secondary proceedings</i></b>	<b>34</b>
<b>3.8.2</b>	<b><i>Relationship between main and secondary proceedings (Articles 34-52)</i></b>	<b>35</b>
3.8.2.1	Synthetic secondary proceedings	35
3.8.2.2	Cooperation and coordination between main and secondary proceedings	36
<b>4</b>	<b>INSOLVENCY PROCEEDINGS OF MEMBERS OF A GROUP OF COMPANIES</b>	<b>37</b>
<b>4.1</b>	<b>Introduction</b>	<b>37</b>
<b>4.2</b>	<b>An outline of the problem</b>	<b>38</b>
<b>4.3</b>	<b>The provisions of the recast EIR</b>	<b>39</b>
<b>4.3.1</b>	<b><i>Introduction</i></b>	<b>39</b>
<b>4.3.2</b>	<b><i>General obligations to communicate and cooperate (articles 56-59)</i></b>	<b>40</b>
<b>4.3.3</b>	<b><i>Powers of the insolvency practitioners against other members of the group (art. 60)</i></b>	<b>41</b>
<b>4.3.4</b>	<b><i>The opening of group coordination proceedings</i></b>	<b>42</b>
<b>4.3.5</b>	<b><i>General provisions on group proceedings</i></b>	<b>43</b>
<b>4.4</b>	<b>Examination and evaluation</b>	<b>44</b>
<b>4.4.1</b>	<b><i>Some alternative approaches</i></b>	<b>44</b>
4.4.1.1	The approach chosen for the recast EIR	44
4.4.1.2	Substantive consolidation	45
4.4.1.3	Procedural consolidation	46
4.4.1.4	Jurisdictional tools	46
4.4.1.5	Conclusion	47
<b>4.4.2</b>	<b><i>Some comments on the recast EIR</i></b>	<b>48</b>
4.4.2.1	Articles 56-59 and 60	48

4.4.2.2 Group coordinaton proceedings (Articles 61-77)	50
<b>5 FINAL REMARKS</b>	<b>52</b>
<b>BIBLIOGRAPHY</b>	<b>53</b>
<b>TABLE OF CASES</b>	<b>57</b>

# Summary

The overall objective of the recast EIR is to make cross-border insolvency proceedings operate more efficiently and effectively. The EU legislator has identified a number of main issues that need to be addressed in order to achieve this overall objective. One of the main issues identified by the EU legislator is the shift away from the traditional liquidation approach to a 'economic rescue approach' or 'second-chance approach' in the national insolvency laws of the Member States since the original EIR's entry into force in 2002. One of the key objectives of the EIR is therefore to bring the EIR more in line with current priorities of insolvency law of the Member States, i.e. to move away from the traditional liquidation approach towards a restructuring approach. A number of the changes in the recast EIR must be seen against this background, in particular: a wider scope (it covers more types of insolvency proceedings than the original EIR), enhanced cooperation between different proceedings, various mechanism to minimise the need to open secondary proceedings, the establishment of insolvency registers, and the new provisions dealing with multi-national groups of companies. My conclusion is that the recast EIR will improve the efficiency and effectiveness of cross-border insolvency proceedings in general. However, it is questionable whether the improvements will be significant regarding insolvency proceedings relating to members of a group of companies.

# Preface

Tack alla vänner för ert stöd.

Jag vill även tacka min handledare för goda råd.

David Rhodin

Lund, 23 maj 2016.

# Abbreviations

COMI	Centre of Main Interests
EC	European Community (Communities)
ECJ	Court of Justice of the European Union (formerly Court of Justice of the European Communities)
EIR	European Insolvency Regulation
EU	European Union
IMF	International Monetary Fund
OJ	Official Journal
PIL	Private International Law
UNICITRAL	The United Nations Commission on International Trade Law
WTO	World Trade Organization



# 1 Introduction

## 1.1 Background and policy context

Council Regulation (EC) No 1346/2000 on insolvency proceedings (the *European Insolvency Regulation*; the ‘original EIR’)<sup>1</sup> was adopted on 29 May 2000 and came into force on 31 May 2002.<sup>2</sup> The original EIR establishes common EU level rules of private international law (‘PIL’) in the field of insolvency. Accordingly, the original EIR determines the Member States whose courts have international jurisdiction to open insolvency proceedings in respect of a debtor, as well as applicable law with regard to, and recognition and enforcement of, insolvency proceedings and decisions. In addition, it provides for some cooperation and coordination between insolvency proceedings opened in different Member States relating to the same debtor.

The underlying reason for common EU framework in the area of insolvency was detailed in the Virgos-Schmit report.<sup>3</sup> The situation in the field of insolvency, with conflicting national substantive insolvency laws, which in turn were subject to different national PIL rules, was considered an obstacle to the proper functioning of the internal market. In the area of insolvency, as opposed to contracts, private cooperation between the parties cannot compensate for the absence of institutional cooperation at the international level. In view of ensuring the proper functioning of the internal market, a common EU framework was necessary in order to prevent parties from transferring assets or disputes from one legal order to another, seeking to obtain a more favourable legal position (‘forum shopping’ or ‘bankruptcy tourism’), as well as to prevent creditors from enforcing their individual claims against the debtor independently of the harm this may cause to other creditors and to the going concern value of the debtor’s business. Moreover, a mandatory EU legal framework would make the legal positions of stakeholders more clearly determined, contributing to legal predictability as well as a more adequate bargaining environment in pre- and post-insolvency situations. More generally, a common EU framework was considered necessary in order to improve the efficiency and effectiveness of cross-border insolvency proceedings.<sup>4</sup> For example, an insolvency practitioner cannot efficiently and effectively administer the insolvency estate (i.e. the

---

<sup>1</sup> OJ L 160, 30.6.2000, p. 1.

<sup>2</sup> Article 47 original EIR.

<sup>3</sup> Miguel Virgos and Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, 1996, paras. 7-8 (‘Virgós/Schmit Report’); See also recitals 2-4 of the original EIR.

<sup>4</sup> Recital 2 original EIR.

debtor's assets and affairs) in cross-border cases unless his powers, as well as other legal effects of the insolvency proceedings, are recognised also in other Member States.

In this context, it should be noted that EU insolvency law builds upon that each Member State continues to have its own national insolvency law and proceedings. An alternative route would have been to harmonise or unify national substantive insolvency laws in the EU and/or to introduce truly consolidated proceedings (e.g. a European bankruptcy). However, this route was (and still is) dismissed as unrealistic due to the considerable differences in the Member States' substantive insolvency laws as well as the respective fields of substantive law on which insolvency law is based (e.g. security rights, labour law, company law).<sup>5</sup>

As follows from its Article 46, the original EIR only represented a provisional solution to the problems related to cross-border insolvencies within the EU. Accordingly, on 12 December 2012 the Commission adopted a report<sup>6</sup> on the application of the EIR that revealed a range of problems with the original EIR and subsequently proposed an amending regulation. Eventually, after a rather complicated legislative procedure<sup>7</sup>, Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (the 'recast EIR')<sup>8</sup> was approved on 20 May 2015. During the legislative procedure significant changes were made to the original proposal and finally converted into a recast. In the EU context, a 'recast' consists in 'the adoption of a new legal act which incorporates in a single text both the substantive amendments which it makes to an earlier act and the unchanged provisions of that act.'<sup>9</sup> The recast EIR came into force on 25 June 2015<sup>10</sup> but will become applicable on 26 June 2017 and thus repeals and replaces the original EIR only in regard to insolvency proceedings opened after 26 June 2017.<sup>11</sup> Therefore, the practical application of the recast EIR remains to be seen.

---

<sup>5</sup> Recital 11 original EIR; See also: Michael Bogdan, *Concise introduction to EU private international law*, 3. ed., Groningen, Europa Law Publication, 2016, p. 166.

<sup>6</sup> COM (2012) 744 final.

<sup>7</sup> The legislative process leading up to the adoption of the recast EIR is summarised in: Ian Fletcher, *The European Insolvency Regulation recast: the main features of the new law*, *Insolvency Intelligence* 2015, 28(7), pp. 97-103; Michael Weiss, *Bridge over Troubled Water: The Revised Insolvency Regulation*, *International Insolvency Review*, Winter 2015, Vol. 24, Issue 3, pp. 193-195.

<sup>8</sup> OJ L 141, 5.6.2015, p. 19.

<sup>9</sup> See paragraph 2 of the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1.

<sup>10</sup> Article 92 recast EIR.

<sup>11</sup> Article 84 (1), 84(2) and 92 recast EIR.

With its 89 recitals and 92 articles, the recast EIR is more comprehensive than its predecessor containing only 33 recitals and 47 articles, but the core principles on jurisdiction, applicable law, recognition and enforcement are the same.<sup>12</sup> The recast EIR contains clarification and improvements in respect of rules found in the original EIR. In addition, the recast EIR introduces completely new provisions which have been called ‘innovative steps forwards’.<sup>13</sup> The perhaps most interesting novelty is the set of provisions in Articles 56-77 designed to improve the insolvency process in the particular case of a ‘group of companies’ (i.e. a parent company and its subsidiaries) with companies in different Member States. Although EU insolvency law has specific legal consequences for multinational group insolvencies, the original EIR did not contain any provisions specifically tailored to such scenarios.

## 1.2 Purpose

The primary purpose of this thesis is to examine the recast EIR. In particular, the provisions contained in Articles 56-77 on insolvency proceedings of members of a group of companies will be examined and evaluated. The following questions will be addressed:

- 1) Is the overall approach in Articles 56-77 a sensible legislative answer to the issues relating to group insolvencies?
- 2) Are the provisions in Article 56-77 designed properly?
- 3) Will the recast improve the insolvency process in respect of group insolvencies?

In order to fulfil this purpose, the main features of EU insolvency will have to be described, paying attention to important changes.

## 1.3 Method and material

### 1.3.1 Introduction

The recast EIR is an EU legal instrument made under the EU Treaties. As such, its meaning and effects in national law are a matter for EU Law, which follows from the doctrine of supremacy of EU Law over national law.<sup>14</sup> Consequently, when ascribing meaning or giving effect to the recast EIR, national courts and other judicial authorities must do so in accordance with

---

<sup>12</sup> Bogdan (2016), p. 166; Fletcher (2015), p. 98.

<sup>13</sup> Weiss (2015), p. 193.

<sup>14</sup> See for example: *Costa v ENEL*, case 6/64.

legal methods developed by the Court of Justice of the European Union (the 'ECJ').<sup>15</sup> Legal methods are generally concerned with sources of law and methods of interpretation.<sup>16</sup> While there is an on-going debate as to whether there is any such thing as a coherent European legal method<sup>17</sup>, some of its key features can nevertheless be determined.

### 1.3.2 The European Legal Method

The EU legal hierarchy:

1. Primary law (TEU, TFEU and Charter of Fundamental Rights of the European Union)
2. General legal principles.
3. International agreements.
4. Binding secondary law.
5. Case law of the ECJ and the General Court.
6. Non-binding secondary law.
7. Legal history.
8. Opinions of the Advocate General.
9. Legal doctrine.
10. Economic Theories.

These sources can be divided into binding and non-binding sources. Primary law, general legal principles, international agreements, binding secondary law and case law are legally *binding*, i.e. the Member States, national courts and other authorities are obliged to comply with them. Non-binding secondary law, legal history, opinions of the Advocate General, legal doctrine and economic theories are on the other hand *non-binding* and only persuasive or confirmatory.<sup>18</sup>

---

<sup>15</sup> Gabriel Moss, Ian F. Fletcher, Stuart Isaacs (eds.), 2. ed., *The EC Regulation on insolvency proceedings – A Commentary and Annotated guide*, Oxford, Oxford University Press, 2009, no. 2.01.

<sup>16</sup> Eva Edwardsson and Helena Wockelberg, *European Legal Method in Denmark and Sweden – Using Social Science Theory and Methodology to Describe the Implementation of EU Law*, *European Law Journal*, Vol. 19, No. 3, 2013, p. 364.

<sup>17</sup> See for example the anthologies edited by Ulla Neergaard, Ruth Nielsen and Lynn Roseberry: *European legal method: paradoxes and revitalisation*, Copenhagen, DJØF, 2011; *European legal method: in the multi-level EU legal order*, Copenhagen, DJØF, 2012; *European legal method: towards a new European legal realism*, Copenhagen: DJØF Publishing, 2013.

<sup>18</sup> Moss, Fletcher, Isaacs (2009), no. 2.27; Jörgen Hettne and Ida Otken Eriksson (eds.), *EU-rättslig metod: teori och genomslag i svensk rättslämning*, Stockholm, Norstedts juridik, 2011, 2. ed., p. 40.

EU secondary law comprises the various types of legal acts which have their legal basis in the EU Treaties.<sup>19</sup> The recast EIR is a regulation, i.e. a legislative act made under EU Treaties and has a general application, is directly applicable and has direct effect in all Member States.<sup>20</sup> Accordingly, the recast EIR has to be compatible and interpreted consistently with primary law and general legal principles of the EU. ‘General legal principles of the EU’ are those legal principles which have been recognised by the ECJ and include: the principle of equal treatment or non-discrimination; respect for fundamental rights; the principle of legal certainty; the principle of proportionality.<sup>21</sup>

The recast EIR has its legal basis in Articles 81(2) (a), (c) and (f) TFEU<sup>22</sup>. These articles form part of Title V of the TFEU, which is concerned with the progressive establishment of an ‘area of freedom, security and justice’. The Articles empower the EU to adopt measures, ‘particularly when necessary for the proper functioning of the internal market’, aimed at:

- ensuring the mutual recognition and enforcement of judgements between Member States;
- the compatibility of the rules, applicable in Members States concerning conflict of laws and of jurisdiction; and
- the elimination of obstacles for proper functioning of civil proceedings.

This is not merely of background interest, as it affects the meaning and interpretation of the recast EIR. As will be described below, EU Law is to be construed purposively.<sup>23</sup> In other words, when interpreting the recast EIR, its role in a wider legal order has to be considered, and it is to be interpreted consistently not only with superior EU Law, but also with other EU measures that complement it. The most important one of these measures is the Brussels I a Regulation<sup>24</sup>, concerning civil jurisdiction and judgements in non-insolvency matters.<sup>25</sup>

The recast EIR, like other parts of EU Law, contains “autonomous concepts”, whose meaning differs from definitions of the same concept in the national law of the Member States. The ‘doctrine of autonomy’ is

---

<sup>19</sup> Hettne, Otken Eriksson (2011), p. 42.

<sup>20</sup> Other legislative acts are directives and decisions, see Articles 288-91 TFEU.

<sup>21</sup> Moss, Fletcher, Isaacs (2009), no. 2.19.

<sup>22</sup> OJ C 326, 26.10.2012, p. 1.

<sup>23</sup> Moss, Fletcher, Isaacs (2009), pp. 18-20.

<sup>24</sup> OJ L 351, 20.12.2012, p. 1.

<sup>25</sup> Gabriel Moss, Ian F. Fletcher and Stuart Isaacs (2009), no. 2.21-22.

necessary to ensure the uniform application of EU Law.<sup>26</sup> These autonomous meanings are established by the ECJ by adopting a ‘purposive’ or ‘teleological’ approach.<sup>27</sup> This essentially means that when interpreting an EU legal rule, one has to ascertain the aim of that particular provision. At the same time, however, the provision must be interpreted in light of the legal system (context) in which it exists. This so called ‘teleological method’ performs three functions in EU Law:

- To promote the purpose of the provision and the objectives of the legal framework in which it exists.
- To avoid unreasonable consequences of a literal interpretation.
- To bridge gaps left by EU Law.<sup>28</sup>

Establishing the ‘teleological’ meaning also involves adopting a systematic approach. This approach builds upon the premise that the EU legislator is a rational actor and assumes that the EU Law is consistent and complete. Consequently, a provision shall be interpreted in such a way as to guarantee that there is no conflict between it and the overall scheme and purpose of the regulation in which it is contained.<sup>29</sup> It should be noted that the ECJ’s role is not to change or create EU Law, but rather to complement and develop EU Law. Accordingly, an interpretation should not be incompatible with the explicit wording of the provision.<sup>30</sup>

### 1.3.3 Material

As the main principles on which the original EIR was based has been maintained in the recast EIR, existing ECJ case law retain most of its importance. By the same logic, also other sources may provide continued guidance. In particular, the explanatory report on the Convention written by Professor Virgós and Schmidt, which has a semi-official status and has been the source of many of the recitals of the original and recast EIR, provides guidance as to the interpretation and application of the recast EIR. The same applies to existing legal writing.<sup>31</sup>

---

<sup>26</sup> Hettne, Otken Eriksson (2011), p. 161.

<sup>27</sup> Moss, Fletcher, Isaacs (2009), pp. no. 2.25.

<sup>28</sup> Hettne, Otken Eriksson (2011), pp. 158-159, 169.

<sup>29</sup> Hettne, Otken Eriksson (2011), pp. 167-68; Koen Lenaerts and José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI AEL, 2013/09, available (2016.05.22) at: <http://hdl.handle.net/1814/28339>.

<sup>30</sup> Hettne, Otken Eriksson (2011), pp. 159-160.

<sup>31</sup> Michael Bogdan, *EU:s omarbetade insolvensförordning*, Juridisk tidskrift vid Stockholms universitet, Nr 1 2015/16, pp. 3-4; Bogdan (2016), p. 166; Fletcher (2015), p. 98; *Eurofood*, case C-341/04, Opinion of AG Jacobs.

The recast EIR has yet to become applicable. Consequently, one can only speculate on the practical application, interpretation and effects of the recast EIR, in particular in respect of the new provisions on insolvency proceedings of members of a group of companies. Although a number of periodical articles have been published, the literature on the recast EIR is so far limited.<sup>32</sup> In the examination and evaluation of the new provisions dealing with group insolvencies I rely on legal studies and reports<sup>33</sup>, soft law<sup>34</sup> and legal writing. It should be noted that, except for some periodical publications, the sources do not specifically with recast EIR, but rather concern legal approaches to and issues of group insolvencies in general.

## 1.4 Delimitations

The thesis is not an in-depth study of the entire recast EIR. The more important changes will be highlighted, but focus is put on the provisions on insolvency proceedings of members of a group of companies. The thesis does not provide an answer for what is the best way forward when dealing with corporate insolvencies, but limits itself to examining and commenting on the new provisions.

## 1.5 Disposition

The subject is introduced in Chapter 2. Chapter 3 outlines principles of EU insolvency law (3.2), the overall objectives of the recast EIR (3.3) and the overall scheme and general provisions of the recast EIR regarding scope (3.4), international jurisdiction (3.5), applicable law (3.6), recognition and enforcement (3.7) and secondary proceedings (3.8). The new provisions on insolvency proceedings of members of a group of companies are discussed in Chapter 4. Chapter 5 contains my final remarks.

---

<sup>32</sup> Bogdan (2015/16), pp. 3-4; Bogdan (2016), p. 166, see: footnote 5.

<sup>33</sup> In particular: Hess/Oberhammer/Pfeiffer: Study for an evaluation of Regulation (EC) No 1346/2000 on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4), (the 'Heidelberg/Vienna study'), available (2016.05.18) at:

[http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm) and Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al] (the 'Insol-draft').

<sup>34</sup> In particular by UNICITRAL, INSOL Europe, WTO and IMF.

# 2 The subject

## 2.1 National insolvency law

### 2.1.1 Core concept of insolvency law

In most legal systems, debtors (companies or natural persons) who find themselves in financial difficulty, making it impossible to pay debts and other liabilities as they fall due, enter into ‘insolvency’.<sup>35</sup> However, this so called ‘cash-flow’ test is just one of the tests used around the world for determining whether a debtor has become insolvent. Another test determines whether a debtor’s total outstanding debts exceed the total value of its assets (a so called ‘balance-sheet’ test).<sup>36</sup> Some legal systems are concerned also with debtors who are likely to become insolvent in the future (‘pre-insolvency’).<sup>37</sup>

An insolvency law essentially provides for various types of legal mechanisms (referred to by the generic term ‘insolvency proceedings’) that can be initiated to resolve a debtor’s insolvency.<sup>38</sup> An essential feature of insolvency proceedings is that they are ‘collective’ in the sense that they seek to settle all, or at least a significant part, of the claims against a debtor.<sup>39</sup> In fact, the primary purpose of insolvency proceedings is to ensure that similarly situated creditors are treated equally and fairly in the course of insolvency proceedings (the principle of *par conditio creditorium*). This means that creditors with the same preferential rights<sup>40</sup> (i.e. creditors with claims of the same ranking) should obtain dividends in proportion to the size of their claims. This is normally achieved by an imposition of stay on individual enforcement actions against the debtor as well as a limitation of the debtor’s legal authority to administer his assets and affairs.<sup>41</sup> However, the specific substantive and procedural effects brought by the

---

<sup>35</sup> UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004), p. 9, available (2016.05.22) at:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html).

<sup>36</sup> Bob Wessels, *International insolvency law*, 3. ed., Deventer, Kluwer, 2012, p. 7.

<sup>37</sup> Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices, TENDER NO.

JUST/2012/JCIV/CT/0194/A4, p. 6, Available (2016.05.17) at:

<[http://ec.europa.eu/justice/civil/files/insol\\_europe\\_report\\_2014\\_en.pdf](http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_en.pdf)>

<sup>38</sup> UNCITRAL (2004), p. 9.

<sup>39</sup> Article 2 (1) recast EIR.

<sup>40</sup> In Sweden: preferential rights are called ‘förmånsrätter’, regulated in Förmånsrättslag (1970:979).

<sup>41</sup> Michael Bogdan, *Sveriges och EU:s internationella insolvensrätt*, Stockholm, Norstedts juridik, 1997, p.17-18.



commencement of insolvency proceedings vary depending on the country and proceedings.

## 2.1.2 Main types of insolvency proceedings

Each State has its own national insolvency law, which materially and formally shapes a more or less distinctive ‘national insolvency regime’ with its own national insolvency proceedings.<sup>42</sup> Nevertheless, the basic elements and main types of public insolvency proceedings can be identified (confidential proceedings will not be discussed as they are not covered by the recast EIR).

An insolvency system comprises both formal and informal elements. ‘Formal’ insolvency proceedings are opened and conducted under the provisions of insolvency law and generally include two main types of proceedings: liquidation and reorganization/rescue proceedings. The traditional concept of liquidation proceedings is that of a near-term collection of debts through the sale or realisation of a debtor’s assets, normally resulting in the dissolution of a debtor company. Reorganization proceedings, on the other hand, are designed to allow a debtor to overcome its financial difficulties and to resume or continue its normal business operation and commercial activities.<sup>43</sup> Some legal systems provide for personal insolvency schemes such as ‘debt-relief’ and ‘debt-adjustment’ designed to rescue private individuals.<sup>44</sup> Reorganization proceedings are either conducted under some principle of ‘debtor-in-possession’ (the debtor remains totally or at least partially in control of his assets and affairs, albeit under the control or supervision by a court or insolvency practitioner), also referred to as ‘hybrid proceedings’, or conducted by an insolvency practitioner.<sup>45</sup> Some legal systems also provide for ‘pre-insolvency proceedings’, which give a debtor the opportunity to restructure at a pre-insolvency stage and to avoid the opening of traditional insolvency proceedings.<sup>46</sup>

‘Informal’ proceedings are different from formal proceedings in that they are not based nor directly reliant upon the provisions of insolvency law, as they involve voluntary negotiations, either outside the court or within the context of formal proceedings, and may result in that the debtor enters into agreements or arrangements with its creditors and other stakeholders to restructure/reduce its debts (‘composition’) and/or to restructure its business

---

<sup>42</sup> Wessels (2012), p. 7; Bogdan (1997), p. 1.

<sup>43</sup> UNCITRAL (2004), Part one, Chapter I, para. 2, 4, 23, 28 and 35.

<sup>44</sup> (COM (2012) 743 final), p. 7.

<sup>45</sup> Article 2 (3) recast EIR; COM (2012) 743 final, pp. 4-5.

<sup>46</sup> COM (2012) 743 final, p. 4.

(‘voluntary reorganization’). The success of formal proceedings normally depends on that voluntary agreements and arrangements are made (such as compositions and/or the acceptance of a rescue plan). Similarly, voluntary negotiations largely depend for their success upon the existence of insolvency law and supporting institutional framework to provide strong incentives or sanctions (such as voting rules or court confirmation) that assist in negotiations and ensures implementation of voluntary agreements or arrangements.<sup>47</sup>

## **2.2 International insolvency law**

### **2.2.1 Introduction**

The recast EIR belongs to the legal domain commonly referred to as ‘international insolvency law’ or ‘international bankruptcy law’, which has been described as:

*‘a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable national insolvency law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.’<sup>48</sup>*

Instances of international (‘cross-border’) insolvencies include cases where a debtor has assets in more than one State, or that creditors are not from the State where the insolvency proceedings are carried out.<sup>49</sup> The international aspects of insolvencies give rise to rather difficult legal questions of both principle and practical nature. Primarily, it entails PIL issues relating to the international jurisdiction of a court to open insolvency proceedings, the law applicable to the insolvency proceedings and the effects (both substantive and procedural) of the proceedings on for example assets abroad or on the legal position of foreign creditors, recognition of insolvency proceedings taking place abroad and the powers of foreign liquidators etc.<sup>50</sup>

### **2.2.2 Two doctrinal perspectives: universality vs territoriality**

The issues to be resolved in cases of cross-border insolvencies have traditionally been approached from two opposite principles or perspectives:

---

<sup>47</sup> UNCITRAL (2004), Chapter I, para. 2, 4, 23, 28 and 35.

<sup>48</sup> Wessels (2012), p. 1; See also Bogdan (1997), p. 13.

<sup>49</sup> This is the general definition of ‘instances of cross-border insolvency’ in the Guide to Enactment (1997) accompanying the UNCITRAL Model Law on Cross-border Estates, p. 19.

<sup>50</sup> Wessels (2012), pp. 6-7; Bogdan (1997), p. 13.

‘universalism’ (or universality) and ‘territorialism’ (or territoriality).<sup>51</sup> Neither of the principles exist in their purest form. However, as they express two groups of conflicting, but legitimate, considerations and interests in the area of insolvency, they are useful in the discussion and assessment of international insolvency law (including the recast EIR). In doctrine, the principle of universality is normally favoured.<sup>52</sup>

### 2.2.2.1 Universality

Universality is a system under which all aspects of a debtor’s insolvency are conducted in one central insolvency proceeding and under one insolvency law. The universality of insolvency proceedings entails that: (a) all creditors may participate, (b) all assets of a debtor, regardless of their location, are included in the proceedings, (c) all legal issues – both substantive and procedural – are determined by the law of State where the proceedings are taking place (*lex concursus*) and (d) all decisions and measures taken in the proceedings will be effective in all States. In principle this system means that *lex concursus* is ‘extended’ or ‘exported’ to other States and is therefore said to have a ‘universal reach’.<sup>53</sup> It is clear that the implementation of a universal system in practice requires a high level of mutual trust between the involved States.<sup>54</sup>

The principal arguments given in favour of universality include: (a) the equitable treatment of similarly situated creditors irrespective of origin, (b) the rapid and efficient administration of the insolvency estate, (c) the cost-effectiveness of avoiding several proceedings relating to same debtor with assets and creditors in more than one State, (d) better economic results by keeping the debtor’s assets together in one insolvency estate, for example where a debtor’s business is spread around several countries, the sale of it as a ‘going concern’ would likely generate higher value than if the business was to be broken up and sold in fragments.<sup>55</sup>

A number of arguments can be given against a system of universality. Firstly, the economic benefits of universality can be disputed. Moreover, the application of the law from one State to creditors and assets in another State may be incompatible or harmful to the broader legal and commercial

---

<sup>51</sup> Wessels (2012), p. 7, Bogdan (1997), p. 16.

<sup>52</sup> Bogdan, 1997), p. 17; There is a broad international consensus that insolvency systems should aspire to achieve objectives and adhere to principles that are mentioned below, see: The World Bank Principles for effective insolvency and creditor/debtor rights (Revised 2015), p. 5; UNCITRAL (2004), Part one, Chapter I, para. 4-14; IMF Orderly and Effective Insolvency Procedure – key issues, 1999, available (2016.05.17) at: <<http://www.imf.org/external/pubs/ft/orderly/index.htm>>

<sup>53</sup> Bob Wessels (2012), p. 8; Bogdan (1997), p. 16.

<sup>54</sup> Recital 65 recast EIR: Bogdan (1997), p. 21.

<sup>55</sup> Wessels (2012), p. 8.

systems and values in that other State. For example, the extension of *lex concursus* could produce results that fundamentally conflict with or depart from the law in the other State (such as contract law, labour law, security rights, preferential rights, company law) or the premises on which those laws are built. In addition, creditors may be unaware of insolvency proceedings commenced in other States, or suddenly be confronted with foreign rules unknown to them, or in some other way be put in a position where it is difficult for them to participate and exercise their rights on equal and fair terms. This argument would lose some of their strength if it was to be clarified in advance which *lex concursus* would govern which insolvency measures.<sup>56</sup>

### **2.2.2.2 Territoriality**

The principle of territoriality is the opposite system under which insolvency proceedings and measures will only have legal effects or consequences within the jurisdiction of the State in which proceedings have been opened. The territoriality of insolvency proceedings therefore entails, *inter alia*, that the limitation insolvency proceedings brings to a debtor's legal authority to administer his assets and affairs will not apply to assets abroad, and that assets located in other jurisdictions will not be included nor affected in any way by the opening of insolvency proceedings and subsequent decisions and orders taken in the proceedings.<sup>57</sup>

A number of arguments in favour of territoriality can be given. Firstly, it results in a system where the local law is applied with the aim or effect of excluding foreign insolvency law, rendering its application relatively simple. Another advantage is that territoriality does not entail any infringement or influence on local legal and commercial systems and values in other States. Moreover, the notion of territoriality is more in line with the legitimate expectations of creditors. Furthermore, the principle of territoriality is in line with the fact that large businesses are often organized as a group of companies (separate legal entities) located on a country by country basis.

A number of important arguments can be given against the principle of territoriality, which explains why universality is favoured in the doctrine. A major drawback is that the debtor is free to administer and dispose of assets located in (and prior to an imminent insolvency proceeding move them to)

---

<sup>56</sup> Wessels, (2012), p. 10-11; Bogdan (1997), p. 19-25; For a discussion of the conflict between the objective of efficiency and the legal and commercial values of Member States, see: Federico M. Mucciarelli, *Not just efficiency: insolvency law in the EU and its political dimension*, European Business Organization Law Review, 2013, 14(2), 175-200.

<sup>57</sup> Wessels (2012), p. 8; Bogdan (1997), p. 17.

other jurisdictions than where insolvency proceedings may be or have been opened. Moreover, creditors may rush to enforce their individual rights against assets not included by the proceedings (the so called ‘grab rule’). In other words, territoriality encourages ‘forum shopping’ and other opportunistic behaviour. Moreover, territorial insolvency proceeding is not in line with the practical reality in the sense that it disregards the actual organization of companies as it focuses exclusively on the portion of the company that holds assets in its jurisdiction and administers them according to domestic *lex concursus* (often to benefit of local creditors).

Moreover, territoriality will normally preclude efficient cross-border reorganization of companies. Another major drawback is that creditors will be unaware of their position, as they cannot know in advance where the debtor’s assets will be located in the event of a debtor’s insolvency (detrimental to ‘legal certainty’). It has also been pointed out that territoriality conflicts with the principle that a legal person owns the undivided entirety of property.<sup>58</sup>

---

<sup>58</sup> Wessels (2012), p. 12-13.

# 3 The European insolvency regime

## 3.1 Overview

This chapter outlines principles of EU insolvency law (3.2), the of the overall objectives of the new Regulation (3.3) and the overall scheme and general provisions of the recast EIR regarding scope (3.4), international jurisdiction (3.5), applicable law (3.6), recognition and enforcement (3.7) and secondary proceedings (3.8).

## 3.2 Principles of EU insolvency law

From reading the recitals and provisions it is clear that the recast EIR draws upon conclusions discussed in Chapter 2.2.2. The overall scheme of the recast EIR favours the principle of universality and its implications, but not in an all-embracing manner.<sup>59</sup> It acknowledges some of the drawbacks of universality and some of the benefits of territoriality, and thus provides for a kind of ‘modified universality’ reflecting compromises made by the EU legislator.<sup>60</sup> This will become evident in the further outline of the recast EIR.

The reason that EU insolvency law favours universality is closely connected to other objectives of the recast EIR, in particular the objective of improving efficiency and effectiveness of cross-border proceedings. Recital 8 declares:

*‘In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross- border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States.’*

EU insolvency law thus aspires to achieve efficiency and effectiveness of insolvency proceedings in the EU by establishing common PIL statutory provisions. However, it has been pointed out in legal writing that EU insolvency law cannot simply be described as consisting of the statutory provisions to be applied in an automatic fashion.<sup>61</sup> According to this

---

<sup>59</sup> See below.

<sup>60</sup> See Chapter 3.

<sup>61</sup> See for example: Gabriel Moss, *Principles of EU insolvency law*, Insolvency Intelligence, 2015, 28(3), pp. 40-44.

thought, the ECJ derives principles from the text and recitals of the recast EIR, enabling the Court to determine the purpose of the legislation and give effect to that purpose by choosing an interpretation of the statutory provisions that promotes the purpose.<sup>62</sup> For example, the ECJ has in its decisions taken into account the objective of improving the effectiveness and efficiency when establishing the meaning of jurisdictional and conflict rules of the original EIR.<sup>63</sup> In other words, the objective of efficiency and effectiveness is more than an underlying reason for EU insolvency law, as it has been elevated to a principle of *effectiveness* and *efficiency* that may play a critical role when interpreting the recast EIR and deciding cases. Similarly, also other principles of EU insolvency law have been established by the ECJ. These principles are generally closely connected and complementary. The ECJ has pointed out that EU insolvency law is based on the general principle that there should be one insolvency proceeding in one State for all of a debtor's assets and affairs (the principle of *unity*).<sup>64</sup> *Unity* and *universality* are often mentioned together as general principles of EU insolvency law, since there can be no guarantee of unity if insolvency proceedings do not have universal effects and are recognised and enforced in all other State.<sup>65</sup> As mentioned, EU insolvency law contains provisions that deviate from the principles of unity and universality. It has been established by the ECJ that as exceptions from the general principles of unity and universality, those provisions shall be interpreted narrowly.<sup>66</sup> Moreover, the principles of *foreseeability* and *legal certainty* have been taken into account by the ECJ when deciding cases, because of the importance for creditors to be able to determine their legal position in advance and assess the risks of future insolvency when entering into legal relationships.<sup>67</sup> Furthermore, the ECJ has referred to the principle of *sincere cooperation* when considering the relationship between parallel universal proceedings and territorial proceedings conducted in different Member States relating to the same debtor. The ECJ has stated that the obligation of sincere cooperation, laid down in Article 4 (3) TFEU, means that a court must have regard to the objectives in the universal proceedings and take account of the overall Scheme of the original EIR when opening territorial proceedings.<sup>68</sup> It has been suggested in legal writing that this means, *inter alia*, that a court should not open territorial proceedings if this will wreck a

---

<sup>62</sup> Moss (2015), pp. 1 and 6-7.

<sup>63</sup> *Seagon v Deko Marty*, case C-339/07, paras. 22-23; *ERSTE v Állam*, case C-527/10, para. 45.

<sup>64</sup> For an illustration of the significance of unity and universality, see: *LBI v. Kepler*, case C-85/12; Moss (2015), p. 1;

<sup>65</sup> Moss (2015), p. 2.

<sup>66</sup> *LBI v. Kepler*, case C-85/12.

<sup>67</sup> See for example: *Staubitz-Schreiber*, case C-1/04, para. 27.

<sup>68</sup> *Bank Handlowy v Christianapol*, case C-116/11, para 63; *Burgo Group*, case C-327/13, para. 63, 64 and 66.

rescue plan in the universal proceedings.<sup>69</sup> These are all examples that ECJ applies a teleological method (see Chapter 1.3.2) in its interpretation of EU insolvency law.

### **3.3 Overall objectives of the new Regulation**

The overall objective of the recast EIR is to make cross-border insolvency proceedings operate more efficiently and effectively.<sup>70</sup> The EU legislator has identified a number of main issues that need to be addressed in order to achieve this overall objective. One of the main issues identified by the EU legislator is the shift away from the traditional liquidation approach to a ‘economic rescue approach’ or ‘second-chance approach’ in the national insolvency laws of the Member States since the original EIR’s entry into force in 2002. One of the key objectives of the EIR is therefore to bring the EIR more in line with current priorities of insolvency law of the Member States, i.e. to move away from the traditional liquidation approach towards a restructuring approach. A number of the changes in the recast EIR must be seen against this background, in particular: a wider scope (it covers more types of insolvency proceedings than the original EIR)<sup>71</sup>, enhanced cooperation between different proceedings<sup>72</sup>, various mechanism to minimise the need to open secondary proceedings<sup>73</sup>, the establishment of insolvency registers, and the new provisions dealing with multi-national groups of companies.<sup>74</sup> Another key objective of the recast EIR is to improve legal certainty and prevent fraudulent or abusive forum shopping, which is achieved by clarifications, improvements and safeguards in the procedural framework for determining jurisdiction of insolvency proceedings.<sup>75</sup>

---

<sup>69</sup> Moss (2015), p. 6.

<sup>70</sup> Recitals 1-4; Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), OJ C 141, 28.4.2015.

<sup>71</sup> Recital 10.

<sup>72</sup> Recitals 48-50.

<sup>73</sup> Recital 24, 41-43, 45, 48, 49, 50.

<sup>74</sup> Recitals 42-44.

<sup>75</sup> Recitals 27-34.



## 3.4 Scope of the recast EIR

### 3.4.1 Material scope of the recast EIR

The original EIR defines its scope in Article 1 (1)<sup>76</sup> in terms of the types of proceedings to which it applies by declaring that:

*‘1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.’*

This Article has been amended by the recast EIR, which defines the scope in Article 1 (1) in terms of the types of proceedings to which it applies by declaring that:

*‘1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:*

- a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; or*
- b) the assets and affairs of a debtor are subject to control or supervision by a court; or*
- c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).*

*Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.’*

Article 1 (1) recast EIR clarifies the scope of the Regulation. The recast EIR clarifies that the collective proceedings must be ‘public’ (as opposed to

---

<sup>76</sup> When using ‘Article’, I refer to an Article of the recast EIR unless otherwise is expressly stated.

confidential proceedings, such as arbitration)<sup>77</sup>, based on law relating to insolvency, and directed towards rescue, adjustment of debt, reorganisation or liquidation. Moreover, Article 1 (1) now explicitly covers certain ‘interim’ processes. By ‘interim’, the recast EIR refers to those proceedings that are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis.<sup>78</sup> Typical examples of ‘interim’ processes would be preservation and protective measures pending the opening decision.<sup>79</sup> Naturally, interim processes must meet all other requirements of the Regulation in order to be covered.<sup>80</sup>

More importantly, the changes have the consequence that the material scope of the recast EIR is broader than the scope of the original EIR in the following way.

Firstly, Article 1 (1) subparagraph (2) of the recast EIR now states that proceedings that may be opened where insolvency has not yet been established, but there is a likelihood of future insolvency, are covered where the purpose of the proceedings is to avert insolvency or prevent the cessation of the business. In other words, the recast EIR allow so called pre-insolvency restructuring processes to fall within its scope. The meaning of ‘pre-insolvency’ is further clarified in recitals 10 and 17 of the recast EIR, stating that it also covers proceedings that are triggered by situations where the debtor faces non-financial difficulties, such as the loss of a contract of major importance to the debtor, provided that these difficulties give rise to a real and serious threat of financial difficulties and insolvency in the future.

Secondly, Article 1 (1) (b) and (c) of the recast EIR now states that proceedings are covered where the assets and affairs of the debtor are subject to control or supervision by a court, or where under certain circumstances, a temporary stay of individual enforcement proceedings is granted in order to allow for negotiations between the debtor and his creditors.<sup>81</sup> This means that the Regulation no longer excludes the type of proceedings which leave the debtor in control of its assets or business under some variety of ‘debtor-in-possession’ principle.<sup>82</sup> Since such proceedings do not necessarily entail the appointment of a liquidator, they are now covered by

---

<sup>77</sup> See recital 12 on the definition of ‘public’, which excludes proceedings such as arbitration.

<sup>78</sup> Recital 15.

<sup>79</sup> Recital 36.

<sup>80</sup> Recital 15.

<sup>81</sup> Recital 11.

<sup>82</sup> Recital 10.

the recast EIR if they take place under the control or supervision by a court. In this context ‘control’ includes situations where the court only intervenes on appeal by a creditor or other interested parties.<sup>83</sup>

In summary, the changes of Article 1 (1) mean that the material scope of the recast EIR is broader than the scope of the original EIR, as it extends to so called hybrid/debtor-in-possession proceedings, pre-insolvency restructuring proceedings, as well as to proceedings granting debt-relief or debt-adjustment for consumers or self-employees.<sup>84</sup>

It should be noted that Article 1 (2) excludes certain insolvency proceedings from the scope of the recast EIR. The recast EIR does not cover insolvency proceedings that concern insurance undertakings or credit institutions (these are covered by Directive 2001/24/EC<sup>85</sup> or Directive 2009/138/EC<sup>86</sup>). Furthermore, the recast EIR does not cover insolvency proceedings that concern: investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or collective investment undertakings.

### **3.4.2 Insolvency proceedings listed in Annex A**

It should be noted that Article 1 of the recast EIR only lay down the material criteria for inclusion. The national proceedings of the Member States contemplated by the recast EIR are exhaustively listed in Annex A of the recast EIR. In other words, only those national proceedings formally included in Annex A, and no others, can benefit from the provisions of the recast EIR. Courts of the Member States are not permitted to examine whether the proceedings listed in Annex A actually meet the material criteria laid down in Article 1 as this would run contrary to the principle of legal certainty.<sup>87</sup>

Many Member States have refrained from listing certain national proceedings in Annex A in spite of the fact that they meet the material criteria for inclusion in Article 1. As an example, a pre-insolvency proceeding such as ‘scheme of arrangement’ in the UK is still not included in Annex A. Furthermore, many of the national proceedings granting debt discharge or debt adjustment are still omitted from the Annex A of the recast EIR. For example, the UK ‘debt relief order’ is still missing, while

---

<sup>83</sup> Recital 10.

<sup>84</sup> Recital 10.

<sup>85</sup> OJ L 125, 5.5.2001, p. 15,

<sup>86</sup> OJ L 335, 17.12.2009, p. 1.

<sup>87</sup> Recital 9; *Bank Handlowy*, case C-116/11.

the Swedish ‘Skuldsanering’ has now been included in Annex A following the adoption of the recast EIR.<sup>88</sup>

## 3.5 International jurisdiction

### 3.5.1 Overview

Article 3 of the recast EIR establishes uniform jurisdictional rules, i.e. procedural rules that specify which connection (‘connecting factor’) between a debtor’s insolvency and a Member State is sufficient to make the courts of that Member State competent to open insolvency proceedings.<sup>89</sup> In this context, the recast EIR distinguishes between jurisdiction to open ‘main insolvency proceedings’ and ‘territorial insolvency proceedings’. The recast EIR requires that main proceedings shall have a universal scope and aim at encompassing all of the debtor’s assets.<sup>90</sup> Territorial proceedings, on the other hand, only covers assets situated in the Member State in which the proceedings have been opened, Article 3 (2) second sentence and Article 34.

In addition to regulating jurisdiction, Article 3 of the recast EIR also regulates the relationship between main proceedings and territorial proceedings, and also specifies additional requirements pursuant to which proceedings may be opened.

### 3.5.2 Main insolvency proceedings

#### 3.5.2.1 Introduction

Pursuant to Article 3 (1) of the recast EIR, the courts of the Member State in which the debtor has its centre of main interests (‘COMI’) shall have jurisdiction to open main proceedings. Each debtor constituting a separate legal entity is a debtor in its own right for the purposes of the recast EIR, commonly referred to as the principle of *insolvency by individual legal entity* (i.e. the recast EIR applies to individual legal entities). This means that COMI is individually determined for each separate legal entity (and not for a group of companies).<sup>91</sup>

The basic concept of a debtor’s COMI as the ‘connecting factor’ establishing a Member State’s international jurisdiction to open main

---

<sup>88</sup> Michael Weiss, *Bridge over Troubled Water: The Revised Insolvency Regulation*, International Insolvency Review, Winter 2015, Vol. 24 Issue 3, pp. 196-97.

<sup>89</sup> Moss, Fletcher, Isaacs (2009), no. 3.09; Bogdan (2016), p. 3.

<sup>90</sup> Recital 23.

<sup>91</sup> *Eurofood*, case C-341/04, para. 30; *Eurofood*, Opinion by AG Jacobs, para. 118; *Rastelli v Hidoux*, case C-191/10, para. 25; *Interedil v Fallimento*, case C-396/09, para. 53 and 59.

proceedings is left unchanged from the original EIR. However, there has been modifications in Article 3 in alignment with the ECJ case law dealing with COMI-issues. The role courts play in determining COMI has been clarified, and the criteria for the determination as well as the scope of COMI have been altered.<sup>92</sup>

### **3.5.2.2 Determination of Centre of Main Interest**

The concept of COMI has an autonomous meaning and must therefore be interpreted uniformly, independent of national rules of the Member States.<sup>93</sup> The recast EIR defines a debtor's COMI as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties', Article 3 (1) subparagraph 1 sentence 2.

In absence of proof to the contrary, the COMI of a company or legal person is presumed to be located in the Member State in which its 'registered office' is situated, Article 3 (1) and its sub-paragraph 2. For individuals exercising an independent business or professional activity, the COMI is presumed to be the 'place of principal business', and for other individuals the COMI is presumed to be the 'place of habitual residence', in the absence of proof to the contrary of these presumptions, Article 3 (1) sub-paragraphs 3 and 4.

By the same provisions, the presumptions in favour of the registered office or the place of principal business apply only where the registered office or the place of principal business has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings. For individuals not carrying out any professional activity, the non-application time limit of the presumption in favour of his or her habitual residence is 6 months.

If the presumption does not apply, the general rule in Article 3 prevails: jurisdiction is the location of COMI, and COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. Where the presumptions on the other hand do apply, they can nevertheless be rebutted ('in absence of proof to the contrary'). The non-application time limits and possibility to rebut the presumptions are intended to work as safeguards against fraudulent forum shopping (or 'bankruptcy tourism'), which is a general regulatory objective of the recast EIR.<sup>94</sup>

---

<sup>92</sup> Weiss (2015), p. 199.

<sup>93</sup> *Eurofood*, para. 31.

<sup>94</sup> Recitals 29 and 31.

In this thesis I will only discuss the possibility to rebut the presumption of ‘registered office’. Recital 30 of the recast EIR, which codifies ECJ case law<sup>95</sup>, states that it should be possible to rebut the presumption in favour of the registered office ‘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.’ In other words, the presumption in favour of the company’s registered office can only be rebutted if factors which are objective and ascertainable by third parties enable it to establish that the location of the company’s actual COMI is different from the Member State where its registered office is situated. The most extreme example of such a case would be that of a so called ‘letterbox’ company not carrying out any genuine activities at all in the territory of the Member State in which it has its registered office.<sup>96</sup> By contrast, where a subsidiary conducts its administration within the territory of a Member State in which it has its registered office situated, the fact that its economic choices are controlled by a parent company in another state is not sufficient to rebut the presumption, as this fact normally lacks the attributes of transparency and objective ascertainability.<sup>97</sup> As pointed out by the Advocate General in connection to the *Eurofood* case, a test where attributes of transparency and objective ascertainability are dominant is essential in the context of insolvency, where it is of fundamental importance that potential creditors are able to determine in advance which legal system would resolve any insolvency affecting their interests.<sup>98</sup> This objective of ensuring legal certainty and foreseeability is a general regulatory objective of the Regulation.<sup>99</sup>

### **3.5.3 Territorial insolvency proceedings**

#### **3.5.3.1 Establishment**

Where a debtor’s COMI is located in a Member State, the courts of another Member State have jurisdiction to open insolvency proceedings relating to the same debtor only if it possesses an establishment in that other Member State, Article 3 (2) sentence 1 and of the recast EIR. Such proceedings are called ‘territorial insolvency proceedings’ and only comprises assets

---

<sup>95</sup> *Eurofood*, para. 34; *Interdil*, para. 59.

<sup>96</sup> *Eurofood*, para. 35.

<sup>97</sup> *Eurofood*, para. 36.

<sup>98</sup> *Eurofood*, Opinion of AG Jacobs, para. 118.

<sup>99</sup> *Eurofood*, para. 33; *Interdil*.

situated within the territory of the Member State where such proceedings are opened, Article 3 (2) sentence 2 and (4).<sup>100</sup>

The connecting factor ‘establishment’ is defined in Article 2(10) as ‘any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceeding.’<sup>101</sup> The ECJ has stated that the existence of an establishment presupposes the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity, so to that the mere presence of isolated assets is not sufficient.<sup>102</sup>

### **3.5.3.2 Additional requirements**

In line with the original EIR, the recast EIR distinguishes between two cases of territorial insolvency proceedings: those opened prior to main proceedings (normally referred to as ‘independent territorial proceedings’)<sup>103</sup> and those opened subsequently to main proceedings (‘secondary proceedings’), Article 3 (3).<sup>104</sup>

That main proceedings have been opened does therefore not preclude the opening of subsequent territorial proceedings in other Member States where the debtor has an establishment. On the contrary, the opening of main proceedings facilitates the opening of territorial proceedings in two ways. Firstly, it follows from Article 34 that a debtor’s insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened.<sup>105</sup> This provision effectively sets aside insolvency tests for the opening of insolvency proceedings laid down in national law.<sup>106</sup> Secondly, the requirements for the opening of territorial insolvency proceedings set out in Article 4 (4) subparagraph 1 do not apply where main proceedings have already been opened. Pursuant to this provision, independent territorial proceedings may only be opened where: (a) main proceedings cannot be opened because of conditions laid down in the national legislation of the Member State of the debtor’s COMI; or (b) the opening of the proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment located in jurisdiction of the seised court or (ii) a public authority which, under the law of the Member State within the territory of which the establishment is

---

<sup>100</sup> Recital 23.

<sup>101</sup> *Interdil*, para. 64.

<sup>102</sup> *Burgo Group*, case, C-327/13; *Interdil*.

<sup>103</sup> *Bogdan* (2016), p. 170; *Virgos/Schmidt*, p. 89.

<sup>104</sup> Recitals 37 and 38.

<sup>105</sup> See also: *Bank Handlowy*.

<sup>106</sup> *Bogdan* (2016), p. 177.

situated, has the right to request the opening of insolvency proceedings.<sup>107</sup> If main proceedings are subsequently opened, independent territorial proceedings running shall be converted into secondary proceedings, Article 3 (4) subparagraph 2.

### **3.5.4 ‘Annex proceedings’ – Jurisdiction for other actions**

The ECJ decision in *Gourdain*<sup>108</sup>, later confirmed in *DekoMarty*<sup>109</sup>, have now been codified in Article 6 of the EIR recast. By Article 6 (1), courts with international jurisdiction to open insolvency proceedings also have jurisdiction for actions or disputes deriving directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. Moreover, such an action may be brought together with closely connected actions in civil and commercial matters against the same defendant before the courts of the Member State of the defendant’s domicile, provided that those courts have jurisdiction pursuant to the Brussels I a Regulation, Article 6 (2).<sup>110</sup>

## **3.6 Applicable Law**

### **3.6.1 Introduction**

The legal provisions determining which national legal system is to be applied to persons or legal relations are commonly referred to as ‘choice of law provisions’ or ‘conflict rules’.<sup>111</sup> The recast EIR imposes uniform EU conflict rules which replace, within their scope of application, the national PIL rules of the Member States.<sup>112</sup> The term ‘applicable law’ in the recast EIR’s conflict rules refer to the internal law of the Member State designated by the conflict rule, excluding its rules of private international law.<sup>113</sup>

### **3.6.2 Basic conflict rule of the Regulation (*Lex concursus*)**

Article 7 and 35 of the recast EIR lay down the basic conflict rule of the Regulation: the law applicable to insolvency proceedings and their effects shall be, unless otherwise stated in the Regulation, the law of the Member

---

<sup>107</sup> Recitals 37 and 38.

<sup>108</sup> *Gourdain v Nadler*, Case C-133/78, para. 4.

<sup>109</sup> *Seagon v Deko Marty*, Case C-339/07, para. 21.

<sup>110</sup> Recitals 35 and 36.

<sup>111</sup> Bogdan (2016), p. 2.

<sup>112</sup> Recital 66.

<sup>113</sup> Virgós/Schmit, point 87.



State in which such proceedings have been opened (*lex concursus*).<sup>114</sup> As the general conflict rule of the recast EIR it is valid for both main and territorial insolvency proceedings.<sup>115</sup>

The law of the Member State opening the insolvency proceedings (*lex concursus*) determines all effects of the proceedings, both substantive and procedural, on the persons and legal relations concerned.<sup>116</sup> To facilitate the interpretation, Article 7 (2) contains a non-exhaustive list of issues that are governed by *lex concursus*.<sup>117</sup> *Lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings and its consequences, in particular: the nature of the insolvency proceedings, whether a debtor by virtue of his status may be subject to insolvency proceedings, which assets form the estate, the treatment of assets acquired by the debtor after the opening of the insolvency proceedings, the rights and duties of the debtor, the powers of the insolvency practitioner, the conditions under which set-offs may be invoked, the effects of insolvency proceedings on current contracts to which the debtor is party, the effects of the insolvency proceedings on proceedings brought by individual creditors, the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings, the lodging and admissibility of claims, the rules on distribution of proceeds, the ranking of claims, the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off, the conditions for and the effects of closure of insolvency proceedings (in particular by composition), creditors' rights after the closure of insolvency proceedings, who is to bear the costs and expenses incurred in the insolvency proceedings and the rules relating to the voidness, voidability or or unenforceability of legal acts detrimental to the general body of creditors.

The issues enumerated above are all examples of substantive and procedural effects typical of insolvency law, i.e. *effects which are necessary for the insolvency proceedings to fulfil its aims*. It is such issues that are governed by the law of the State opening the proceedings (*lex concursus*).<sup>118</sup> More general legal questions of private law nature may also arise within the context of insolvency proceedings, for example questions of obligation law such as whether the debtor actually has any legal duties vis-à-vis an alleged creditor under a contract between them, or questions concerning the validity

---

<sup>114</sup> Virgós/Schmit, point 88.

<sup>115</sup> Recital 66.

<sup>116</sup> Recital 66 of the recast EIR.

<sup>117</sup> Virgós/Schmit, point 91.

<sup>118</sup> Virgós/Schmit, point 90, paragraph 3; Bogdan (2016), s. 172.

of a suretyship or guarantee because it was not created in writing, or whether a creditor's claim is barred by a time limitation.<sup>119</sup> As it would normally be illogical to treat such general legal questions differently just because the debtor later has become insolvent, the law applicable to such general questions is determined by more general conflict rules in the forum state, such as the Rome I Regulation on the Law Applicable to Contractual Obligations.<sup>120</sup> It should be noted, however, that *lex concursus* may displace, unless the recast EIR provides otherwise, the law normally applicable to a legal act (e.g. a contract) under more general conflict rules (e.g. Rome I), to the extent such displacement is necessary for the insolvency proceedings to fulfil its purpose. This happens, for example, when *lex concursus* invalidates a contract detrimental to the whole collective of creditors, for example if the insolvent debtor has sold assets cheaply to someone related shortly before the opening of insolvency proceedings (see Article 16 (2)).<sup>121</sup>

### **3.6.3 Exceptions from the main principle of *lex concursus***

The application of *lex concursus* in insolvency proceedings and its extended effects on all the other Member States may interfere with the rules under which transactions are carried out in these other States.<sup>122</sup> To protect legitimate expectations and ensure legal certainty of transactions in States other than where the proceedings have been opened, the recast EIR provides for a number of important exceptions from the main principle of *lex concursus* (Articles 8-18).<sup>123</sup>

#### **3.6.3.1 Exclusion of certain rights from the effects of insolvency proceedings**

Some provision of the recast EIR give specific rights over assets located abroad 'immunity' from the effects of the insolvency proceedings (as in Article 8, 9 and 10).<sup>124</sup> In order to understand these rules, account shall be taken of the fact that main proceedings opened on the basis of Article 3 (1) have a universal reach, i.e. all assets and legal relations of the debtor subject to main proceedings are covered irrespective of their location or origin.<sup>125</sup>

---

<sup>119</sup> Bogdan (2016), s. 172.

<sup>120</sup> OJ L 177, 4.7.2008, p. 6; Bogdan (2016), s. 172.

<sup>121</sup> Virgós/Schmit, point 90, paragraph 3.

<sup>122</sup> Virgós/Schmit, point. 92, paragraph 1.

<sup>123</sup> Virgós/Schmit, point. 92, paragraph 2.

<sup>124</sup> Bogdan (2016), p.172.

<sup>125</sup> Virgós/Schmit, point. 95.

Article 8 excludes from the effects of insolvency proceedings the rights *in rem* (e.g. security in immovable property, liens) enjoyed by third parties or creditors in respects of assets belonging to the debtor and which are situated in other Member States at the time of the opening of the insolvency proceedings.<sup>126</sup> The creation, validity and scope of rights *in rem* are governed by their own applicable law, which is determined by normal pre-insolvency conflict rules governing rights in rem. Normally, such conflict rules will designate *lex rei sitae* as the applicable law, i.e. the law of the State where those assets are located at the relevant time.<sup>127</sup> Consequently, the holder of rights in rem retains all his rights in respect of the assets even if they were to be included in insolvency proceedings. This means that the holder may for example exercise his right to separate his security from the insolvency estate. It also means that the insolvency practitioner cannot take any decision that affects rights in rem without the holder consent.<sup>128</sup> The underlying rationale for excluding rights in rem is that they have a very important function to ensure legal and economic stability, in particular in respect of the credit market as they insulate their holder against the risk of insolvency and interference of third parties, which allow credit to be obtained under conditions otherwise not possible.<sup>129</sup>

The recast EIR contains similar types of rules stipulating ‘immunity’ from the effects of insolvency proceedings with regard to the right of creditors to demand the set-off of their claims against the claims of the debtor, if such a set-off is allowed under the law applicable to the insolvent debtor’s claim (Article 9 (1)), and with regard to the seller’s rights based on a reservation of title, and to the buyer’s right to acquire title (Article 10). Article 8, 9 and 10 do not extend to actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors, for example where security in immovable property was obtained shortly before the opening of insolvency proceedings.

### **3.6.3.2 Special conflict rules on selected issues**

The main principle is that *lex concursus* governs the effect of insolvency proceedings on current contracts, i.e. mutual obligations pending fulfilment, Article 7 (2) (e). *Lex concursus* normally empowers the appointed insolvency practitioner to decide either on the performance of the obligations under a current contract, or the termination of the contract. The purpose of such empowerment is to protect the insolvency estate from

---

<sup>126</sup> Virgós/Schmit, point. 95.

<sup>127</sup> Virgós/Schmit, point. 95, subparagraph 3 and point. 100, subparagraph 3. How to determine the location? See recital. 39.

<sup>128</sup> Virgós/Schmit, point. 95, subparagraph 4.

<sup>129</sup> Virgós/Schmit, point. 97.

having to perform contracts which may be disadvantageous in the new context of insolvency.<sup>130</sup> In general, such interference by *lex concursus* is necessary in the context of insolvency and positive for the general interests of the insolvency estate. However, specific interest justifies an exception from interference from *lex concursus* on current contracts of the debtor.<sup>131</sup>

Contracts concerning immovable property is such a specific interest. In all Member States, these contracts are governed by special PIL-rules that take into account the interest of the parties to the contract and general interests protected by the Member State in which the immovable property is situated.<sup>132</sup> Therefore, Article 11 stipulates that the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property shall be governed solely by the law (including insolvency law) of the Member State within the territory of which the immovable property is situated, and not by *lex concursus*.

Special conflict rules with a similar underlying rationale also exist for the protection of other specific interests (Articles 11-15 and 17-18). Pursuant to Article 12, the rights and obligations of the parties to payment or settlement systems or financial market are governed solely by the law applicable to that system or market. The effects of insolvency proceedings on employment contracts are governed solely by the law of the Member State applicable to the contract of employment, Article 13. Pursuant to Article 18, the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

## **3.7 Recognition and Enforcement**

### **3.7.1 A general principle of recognition**

Article 19 (1) establishes a 'general principle of recognition' by declaring that any insolvency proceedings opened in a Member State which has international jurisdiction under Article 3 will be automatically recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings. The recognition of foreign main proceedings does not, however, preclude the opening of subsequent secondary proceedings in the recognising State, Article 19 (2). The general principle of recognition is valid for both main and territorial insolvency

---

<sup>130</sup> Virgós/Schmit, point. 116.

<sup>131</sup> Virgós/Schmit, point. 118.

<sup>132</sup> Virgós/Schmit, point. 118.

proceedings. Naturally, the recognition of territorial proceedings is limited to assets situated and legal situations in the Member State where such proceedings are opened and does not affect the debtor's situation in other Member States.<sup>133</sup>

To 'recognise' foreign insolvency proceedings and decisions means that they will produce, with no further formalities, the same effects (both substantive and procedural) in the recognising State as under the law of the opening State, Article 20.<sup>134</sup> This system reinforces the universality of main proceedings as their opening will, inter alia, with an immediate and equal force limit the debtor's legal authority to administer his assets irrespective of their location and put an end to individual enforcement actions against the debtor in all the Member States.<sup>135</sup> Furthermore, the insolvency practitioner may exercise his powers in all the Member States, although he has comply with procedures laid down in local law, and his authority must be confirmed by an authenticated copy of the decision appointing him or a certificate issued by the court having jurisdiction, Article 21 and 22.

In this context, it should be noted that the recognition of main proceedings is limited by the opening of territorial proceedings, Article 20. This means that main insolvency proceedings will not produce extra-territorial effects in respects of assets and legal situations which come within the jurisdiction of territorial proceedings opened.<sup>136</sup>

The general principle of recognition also covers certain 'other judgements' handed down in the Member State where insolvency proceedings have been opened, Article 32. These 'other judgements' include decisions concerning the course and closure of insolvency proceedings, preservation measures, voluntary compositions approved by the court and judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

### **3.7.2 Judicial review**

The general principle of recognition outlined above is based on the principle of mutual trust and the general legal presumption that foreign insolvency judgments and decisions are valid.<sup>137</sup> It follows that Member States cannot oppose recognition of a foreign judgements or decision with reference to its substance (e.g. an objection that *lex concursus* in some way has been

---

<sup>133</sup> Virgós/Schmit, point. 146 and point. 148, subparagraph 6.

<sup>134</sup> Recital 65.

<sup>135</sup> Bogdan (2016), p. 175; Virgós/Schmit, point. 154.

<sup>136</sup> Virgós/Schmit, point. 155.

<sup>137</sup> Recital 65; Virgós/Schmit, point. 202, paragraph 1.

applied incorrectly). Such matters can only be discussed in the courts of the opening State.<sup>138</sup> The courts of the recognising State can only consider whether a foreign judgment or decision will have effects manifestly contrary to its public policy, in particular to its fundamental principles or the constitutional rights and liberties of the individual, Article 33. Only where that would be the case, can a Member State refuse to recognise insolvency proceedings or to enforce judgments or decisions handed down in the context of such proceedings.

Furthermore, the recast EIR does not allow the courts of other Member States to review the jurisdiction of the court of the Member State opening main or territorial proceedings<sup>139</sup>, for example in connection with the recognition of their extra-territorial effects.<sup>140</sup> However, the recast EIR has introduced the possibility for the debtor or creditors to request a judicial review of decision opening main proceedings. The decision opening main insolvency proceedings may be challenged by the debtor or creditors on the grounds of international jurisdiction, as well as on other grounds if the national law so permits, Article 5 (1) and (2). The results of a challenge shall follow national law.<sup>141</sup>

### **3.7.3 Publication and registration**

By Article 4 (1) and 4 (2), the court seised of a request to open insolvency proceedings shall of its own motion ('ex officio') examine whether it has jurisdiction pursuant to Article 3 recast EIR.<sup>142</sup> This means that before opening proceedings, the court must examine the actual location of a debtor's COMI and, in the case of a request for territorial proceedings, that an actual establishment is located within its jurisdiction.<sup>143</sup> Furthermore, the opening decision must specify the grounds on which the jurisdiction is based, and in particular, whether its jurisdiction is based on Article 3(1) or (2), Article 4.

In view of ensuring due process, a fair trial and an equal treatment of creditors it is important that a decision opening insolvency proceedings is brought to the debtor's and creditors' knowledge. Article 24-28 provide rules on publication and registration.<sup>144</sup> For instance, the insolvency

---

<sup>138</sup> Virgós/Schmit, point. 202, paragraph 1, subparagraph 1.

<sup>139</sup> *Eurofood*.

<sup>140</sup> Bogdan (2016), p. 175.

<sup>141</sup> Recital 34.

<sup>142</sup> Where insolvency proceedings are opened without involvement of a court, the insolvency practitioner

<sup>143</sup> Recital 27.

<sup>144</sup> Recitals 74-81.

practitioner or the debtor in possession shall request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing the insolvency practitioner be published in any other Member State where an establishment of the debtor is located. However, publication shall never be a precondition for recognition of insolvency proceedings, Recital 75, but has an impact on the assessment of whether a creditor has acted in good faith or not where he has honoured his obligation to the debtor directly and not to the insolvency practitioner, Article 31.

Furthermore, Article 24 calls for the establishment of interconnected insolvency registers in which Member States are required to publish certain mandatory information about insolvency proceedings opened. These insolvency registers are yet to be established by the Member States.

## **3.8 Secondary proceedings**

### **3.8.1 The purpose of secondary proceedings**

As already mentioned, the recast EIR permits secondary insolvency proceedings to run in parallel with a main insolvency proceeding. The possibility to open secondary proceedings deviates from the ideals of a truly unified and universal insolvency proceeding governed by a single *lex concursus*, as advocated by many legal scholars.<sup>145</sup> Although secondary proceedings may hamper the efficient administration of the insolvency estate, they may serve important purposes in certain cases. The possibility to open secondary proceedings may be necessary for the protection of the diversity of interest among creditors, normally of local ones in the Member States where secondary proceedings are opened.<sup>146</sup> This could be the case, for instance, where in a Member State in which the debtor has an establishment there are many small creditors who would find it difficult to fully and fairly participate in a foreign and distant main insolvency proceedings.<sup>147</sup> Furthermore, the ranking of claims in the law applicable to the main proceedings may differ considerably from the law of a Member State where the debtor has an establishment, potentially rendering a local creditors' claims worthless.<sup>148</sup> Another reason for allowing secondary proceedings, formulated in recital 40, is that 'cases may arise where the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the

---

<sup>145</sup> Bogdan (2016), p. 177.

<sup>146</sup> Recitals 23, 40, 41, and 46.

<sup>147</sup> Bogdan (2016), p. 177.

<sup>148</sup> Bogdan (2016), p. 177.

opening of proceedings to the other Member States where the assets are located.’<sup>149</sup> For that reason, also the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires, Article 37 (1).

## **3.8.2 Relationship between main and secondary proceedings (Articles 34-52)**

### **3.8.2.1 Synthetic secondary proceedings**

The recast EIR now grants the insolvency practitioner in the main proceedings the possibility to give a unilateral undertaking in order to prevent the opening of unnecessary secondary proceedings, Article 36 (1). Such an undertaking covers assets situated in Member States where potential secondary proceedings could be opened, and involves a commitment to distribute such assets in accordance with the rules on distribution and priority rights that the local creditors would have enjoyed under the law where secondary proceedings could be opened (‘synthetic secondary proceedings’).<sup>150</sup> The insolvency practitioner shall inform known local creditors of a given undertaking, who may in their turn approve it in accordance with the rules on voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened, Article 36 (5). It should be noted that the EIR distinguishes between a given undertaking and a given undertaking which has been approved. From the moment at which an undertaking is given, the law applicable to the distribution of proceeds, the ranking of creditors' claims, and to the rights of creditors in relation to local assets, shall be the law of the Member State in which secondary insolvency proceedings could have been opened, Article 36 (2). Once a given undertaking is approved by known local creditors, it is legally binding, Article 36 (6), and the insolvency practitioner is liable for damages in cases of non-compliance with the undertaking, Article 36 (10). The local creditors also have the right to take certain measures to ensure full compliance with the undertaking, Article 36 (8) and (9). It should be noted that even after an undertaking has been approved, secondary proceedings can still be opened if the request for the opening is lodged within 30 days after the notice of approval has been received by the insolvency practitioner, Article 37 (2). If such subsequent secondary proceedings would be open, the insolvency practitioner in the main proceedings must return assets removed to the insolvency practitioner in the secondary proceedings, Article 36 (6). Lastly,

---

<sup>149</sup> Recital 40.

<sup>150</sup> Fletcher (2015), p. 101.



it should be noted that where an undertaking is given, the insolvency practitioner in the main proceedings may ask the court to refuse a request for the opening of secondary proceedings, and the court shall refuse the opening if it considers the general interest of local creditors to be adequately protected by the undertaking, Article 38 (2).

### **3.8.2.2 Cooperation and coordination between main and secondary proceedings**

In the absence of an undertaking, the rights to open secondary proceedings remain unchanged in the Regulation. The opening of secondary proceedings in a Member State may be requested by the insolvency practitioner in the main proceedings or any other person or authority empowered with such a right under the law of that State, Article 37 (1). The court seised of such a request must immediately inform the insolvency practitioner in the main proceedings or the debtor in possession and give him or it an opportunity to be heard, Article 38 (1).

Where several insolvency proceedings concerning the same debtor are running, the recast EIR provides for duties for the different insolvency practitioners and courts involved to cooperate and communicate in various ways, stipulated in particular Articles 41-43, which have been updated and enhanced in the Regulation. In particular, insolvency practitioners are obliged to as soon as possible communicate to each other information in order to explore the possibility of restructuring the debtor, and if such a possibility exists, coordinate the elaboration and implementation of a restructuring plan, as well as coordinate the administration of the realisation or use of the debtor's assets and affairs, Article 41 (2). The insolvency practitioners shall also communicate all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings. Article 42 seeks to enhance the coordination between main, territorial and secondary insolvency proceedings concerning the same debtor, by declaring that the courts involved shall cooperate by any appropriate means, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. Article 43 imposes a similar kind of obligation to cooperate between the courts and insolvency practitioners.

# 4 Insolvency proceedings of members of a group of companies

## 4.1 Introduction

The new provisions in the recast EIR on insolvency proceedings of members of a group of companies are contained in Articles 56-77. In this context, the term ‘group of companies’ shall be understood as meaning a parent company and all its subsidiary companies, Article 2 (13), and a ‘parent company’ as meaning an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings, Article 2 (14). Each undertaking (both parent and subsidiaries) is a ‘member’ of the group. The definition provided in Article 2 (13) and (14) limits the applicability of the provisions of Articles 56-77 to so called ‘vertically integrated groups’, and excludes groups that are made up by companies on the same level (‘horizontally integrated groups’).<sup>151</sup>

The aim of the provisions in Articles 56-77 is to improve cooperation and communication between the separate insolvency practitioners and courts in various Member States in which one or more of the members of the group happens to have their COMI.<sup>152</sup> The recast EIR does not, however, alter the principle of separation of members in their insolvencies. Therefore, EU insolvency law continues to apply to each individual legal entity of a group. By contrast, some national insolvency laws in the EU allow for the possibility to join a member company into insolvency proceedings opened in respect of another member of the same group.<sup>153</sup> Irrespective of the approach to group insolvencies in national insolvency law, EU insolvency law has specific legal consequences for group insolvencies with cross-border dimensions. This is illustrated by the ECJ case *Rastelli*<sup>154</sup>, in which the ECJ pointed out that the possibility in national insolvency law to join a legal entity into insolvency proceedings opened in respect of another legal entity of the group without individually determining the location of the

---

<sup>151</sup> Christoph Thole and Manuel Dueñas, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, International Insolvency Review, Winter 2015, Vol. 24 Issue 3, pp. 221-22.

<sup>152</sup> Fletcher (2015), p. 104.

<sup>153</sup> For example, French insolvency law to some extent allows for the extension of a parent company’s insolvency proceedings to subsidiaries, Heidelberg/Vienna study, pp. 224-25.

<sup>154</sup> *Rastelli v Hidoux*, Case C-191/10, para. 28.

included legal entity's COMI would circumvent the system established by the EIR.

## 4.2 An outline of the problem

A 'group of companies', also commonly referred to as an 'enterprise group', is the most typical structure of modern business corporations. It is based on two notions of company law: (i) the idea of a company's distinct legal personality, which is separate from identities of its shareholding members and, (ii) the benefits of limiting the holding company's liabilities for subsidiaries' debts.<sup>155</sup>

Although an enterprise group maintains separate legal identities, its components are often interdependent, particularly in cases where the group carries out a more or less integrated business. 'An integrated business' means that a coherent business is carried out by the member companies, which have divided certain tasks between themselves. Many different scenarios are conceivable, but a straight-forward example is that of a parent company producing goods, while subsidiaries located in different Member States are distributing these goods. This happens on the basis of relevant company law, under which a parent company is ensured dominant influence over its subsidiaries. However, where one or several members of a group enter into insolvency, the framework provided by company law no longer functions, as the opening of insolvency proceedings normally terminates or significantly reduces the influence of the shareholders and the management in the insolvent member company. In their place, the appointed insolvency practitioner takes charge of the company's assets and affairs (along with other effects of insolvency proceedings). The insolvency practitioner has no legal responsibilities in relation to the other members of the group, but rather obligations under the law applicable to the proceedings (*lex concursus*), which in a number of ways can create a situation detrimental to the business as a whole. For example, a parent company may wish to stay in the market where the insolvent subsidiary distributed its goods, whereas the appointed insolvency practitioner may be inclined to opt for a rapid realisation of stock and dissolution of the subsidiary in order to obtain proceeds as soon as possible in the interest of the subsidiary's creditors.<sup>156</sup> Naturally, the situation becomes even more aggravated where several

---

<sup>155</sup> Irit Mevorach, *Appropriate treatment of corporate groups in insolvency: a universal view*, European Business Organization Law Review, 2007, 8(2), pp. 179-194, p. 180; UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency, 2012, pp. 5-6.

<sup>156</sup> Heidelberg/Vienna study, pp. 221-23. Also to example is from the Heidelberg/Vienna study, same pages.

members or all of the group become insolvent, resulting in the opening of several separate insolvency proceedings in different Member States, administered by independent insolvency practitioners.

In conclusion, treating members of a group separately in the course of insolvency proceedings may lead to the disintegration of the business, to the detriment of the creditors of all the companies. In particular, problems arise where assets owned by the member companies or the activities carried out in the member companies are closely connected. Splitting up the sales process could result in significant loss of value to the assets as a whole. In addition, an uncoordinated approach reduces the chances of a successful reconstruction.<sup>157</sup> An efficient insolvency process should therefore treat, or at least acknowledge, group of companies as one unit. The approach chosen in EU insolvency law will be outlined in the following section.

## **4.3 The provisions of the recast EIR**

### **4.3.1 Introduction**

It has been described as a notorious failing that the original EIR did not contain any provisions for a coordinated approach to the administration of insolvency proceedings relating to members of a group of companies.<sup>158</sup> The objective of the recast EIR is to ensure efficient administration of insolvency proceedings relating to companies forming a part of a group of companies.<sup>159</sup> The recast EIR seeks to achieve this by introducing a set of general obligations of communication and cooperation between insolvency practitioners, courts and insolvency practitioners, and courts involved in insolvency proceedings related to members of a group of companies (Articles 56-60). By recital 52, such cooperation should be ‘aimed at finding a solution that leverage synergies across the group’, but must not run counter to interests of any of the groups of creditors in each of the proceedings. In addition to these general obligations to communicate and cooperate, the recast EIR introduces possibility to open ‘group coordination proceedings’, regulated in Articles 61-77. By recital 54, such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality. By recital 58, the advantages of group coordination proceedings should not be outweighed by the costs of those proceedings. By recital 58, group proceedings should always strive to facilitate the effective administration of

---

<sup>157</sup> UNICITRAL (2012), p. 83; "Insol-Draft", p. 91; Mevorach (2007), p. 180.

<sup>158</sup> Fletcher (2015), p. 104.

<sup>159</sup> Recital 51.

the insolvency proceedings of the group members, and to have a generally positive impact for the creditors.

The rules on cooperation, communication and coordination provided for the recast EIR (Articles 56-77) applies only to the extent that proceedings relating to different members of the same group of companies have been opened in more than one Member State.<sup>160</sup>

### **4.3.2 General obligations to communicate and cooperate (articles 56-59)**

Where insolvency proceedings have been opened in different Member States in relation to at least two members of a group of companies, the appointed insolvency practitioners are to cooperate, by any appropriate means, in order to facilitate the effective administration of the proceedings, to the extent that such cooperation is compatible with *lex concursus* and does not entail any conflict of interests, Article 56 (1). In particular, they have to share relevant information and explore the possibilities of coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if such possibilities exist, coordinate such administration and supervision, Article 56 (2) (a) and (b). Furthermore, they must consider whether the possibilities exist to reconstruct the companies, and if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan, Article 56 (2) (c). In this context, insolvency practitioners may grant additional powers to an insolvency practitioner appointed in one of the other proceedings, or allocate certain tasks among themselves, in order to facilitate coordination and reconstruction, Article 56 (3).

The court cooperation rules for group insolvencies, as formulated in Article 57, declares that the courts involved shall communication with each other as well as cooperate by any appropriate means, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings and does not entail any conflict of interests. In particular, such cooperation may concern the coordination of the administration and supervision of the assets and affairs of the members of the group. The same applies in the relation between insolvency practitioners and courts, Article 58.

---

<sup>160</sup> Recital 62.

### **4.3.3 Powers of the insolvency practitioners against other members of the group (art. 60)**

The recast EIR introduces new provisions laid down in Article 60, outlining certain rights and powers of insolvency practitioners in proceedings against other members of a corporate group. To the extent appropriate to facilitate the effective administration of the proceedings, an insolvency practitioner may be heard in any proceeding brought against any other member of the group, Article 60 (1) (a). Furthermore, in cases where a coordinated restructuring plan has been proposed under Article 56 (2) (c), and it has reasonable chances of success, an insolvency practitioner has the right to request a stay of realisation measures in respect of assets in other proceedings, provided that the plan ‘would be to the benefit of the creditors in the proceedings for which the stay is requested’ and such a stay is necessary to ensure the proper implementation of the plan, Article 60 (b) (i-iii). Finally, such a stay can only be requested where neither the insolvency proceedings for which the requesting insolvency practitioners has been appointed, nor the insolvency proceedings in respect of which the stay is requested, have been included in group coordination proceedings, Article 60 (1) (b) (iv). It seems as though a coordinated restructuring plan under Articles 56 (2) (c) is an alternative to the group coordination proceedings (Article 61-72), and they cannot be pursued in parallel.<sup>161</sup>

The court having opened the insolvency proceedings for which a stay is requested, shall grant the request if it is satisfied that the conditions outlined above are fulfilled, Article 60 (2). By the same provision, the stay must not exceed a period of 3 months, but it may be extended to up to 6 months. Furthermore, the court ordering the stay may require the requesting insolvency practitioner to take appropriate measures to guarantee the interests of the creditors in the proceedings. As have been pointed out in legal writing, it is unclear whether the court can review conditions laid down outside of Article 60 (1) (b), in particular the ‘appropriateness’ of the proposed coordinated restructuring plan as a way to facilitate the effective administration of the proceedings, which is a condition laid down in Article 60 (1) subparagraph 1. Systematically, it seems as though the court is not

---

<sup>161</sup> Weiss (2015), p. 209.

allowed to scrutinize other conditions, as Article 60 (2) specifically refers to the conditions laid down in Article 60 (1) (b).<sup>162</sup>

#### **4.3.4 The opening of group coordination proceedings**

If appropriate for facilitating the insolvency proceedings, any involved insolvency practitioner, or any debtor in possession, has the right to request opening of group coordination proceedings before any court having jurisdiction over the insolvency proceedings of a member of the group, Articles 60 (1) (c), 61 (1) and 76. Such a request shall be made in accordance with the law applicable to the insolvency proceedings in which the requesting insolvency practitioner has been appointed, Article 61 (2). Furthermore, the request has to be accompanied by (a) a proposal for a group coordinator, (b) an outline of the proposed group coordination, (c) a list of other insolvency practitioners involved and (d) an outline of the estimated costs and their distribution among the different estate, Article 61 (3) (a-d).<sup>163</sup>

Article 62 addresses the situation of competing requests, i.e. where the opening of group coordination proceedings has been requested before courts of different Member States having jurisdiction. According to a so called ‘priority rule’, any court other than the court first seised shall decline jurisdiction in favour of that court. As have been pointed out in legal writing that, the priority rule could constitute an incentive for ‘a race to the courts’, in order to obtain a more favourable position in the group proceedings by keeping the insolvency proceedings on ‘home turf’ (forum shopping).<sup>164</sup> Such an incentive is to some extent countered by that the recast EIR allows for ‘party autonomy’ in the choice of court. Where two thirds of the insolvency practitioners involved have agreed that another court eligible than the first one seised is a more appropriate forum, that other court shall have exclusive jurisdiction to open group coordination proceedings, Article 66 (1). Such a ‘choice of court’ agreement remains possible up until the decision opening of group coordination proceedings, Articles 66 (2).

Before opening group coordination proceedings, the court needs to make a preliminary assessment and be satisfied that (a) such proceedings are appropriate to facilitate the effective administration of the different proceedings, (b) no creditor of any group member is likely to be financially

---

<sup>162</sup> Weiss (2015), p. 209.

<sup>163</sup> See also recital 55.

<sup>164</sup> Thole, Dueñas (2015), p. 216.

disadvantaged by the inclusion in such proceedings and (c) the proposed coordinator meets the requirements, Article 63 (1). If the result of this assessment is positive, the court shall inform the insolvency practitioners and give them an opportunity to be heard, Article 63 (1) and (4).<sup>165</sup> Within 30 days, any of the insolvency practitioners involved may object to the inclusion within group proceedings, Article 64 (1) (a). An objection will result in that member's exclusion ('opt-out') from the group proceedings, which will have no power nor effects against the excluded member, Article 65 and 72 (4). The decision to be excluded from group proceedings is not final, as there is a possibility to later request an opt-in, Article 69. A subsequent opt-in request can be acceded to if the group coordinator is satisfied that the conditions 63 (3) (a) and (b) are met, or, if all the insolvency practitioners give their consent, Article 69 (2). The decision to grant, or not to grant, a subsequent opt-in request may be challenged in accordance with the legal remedies available under the law of the State where the group procedure has been opened, Article 69 (4).<sup>166</sup>

### **4.3.5 General provisions on group proceedings**

The group procedure coordinator must be an authorized insolvency practitioner, Article 71 (1), but not be one of the insolvency practitioners appointed for any of the group members, Article 71 (2). The coordinator must be impartial in relation to the respective group members, their creditors and the insolvency practitioners concerned, Articles 71 (2) and 72 (5). His main task is to propose a 'group coordination plan' that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies, Article 72 (1) (b). The group coordination plan may contain agreements between the insolvency practitioners on various issues, settlement of intra-group disputes, and recommendations on how to resolve the insolvencies and re-establish the financial soundness of the group or any part of it, Article 72 (1) (b) (i-iii).

An interesting provision is contained in Article 72(3), stipulating that the group coordination plan shall not entail any 'consolidation of the insolvency estates'. In legal writing this type of consolidation is also referred to as 'substantive consolidation', which means that the assets in each member company ('insolvency estate') are combined to a single 'group estate', from which all of creditors obtain their proceeds. Moreover, Article 72 (3) stipulates that the group coordination plan shall not entail any 'consolidation

---

<sup>165</sup> Recitals 56-57.

<sup>166</sup> Recital 56.



of insolvency proceedings’, Article 72 (3). Such a consolidation is also referred to as ‘procedural consolidation’, which means that insolvencies of members of a group are brought together under one court and a single proceeding (although respecting the different estates).<sup>167</sup> Both substantive and procedural consolidation are thus prohibited pursuant to Article 72 (3).

In addition to the proposal of a coordination plan, the group coordinator has quite extensive rights to participate and be informed, Articles 72 (a) – (e) and Article 74. The coordinator shall be given the opportunity to be heard and participate in the different insolvency proceedings, in particular creditors’ meetings, and may function as a mediator between disputes arising and shall be given the opportunity to persuade the companies and creditors to adhere to a restructuring approach. Furthermore, the coordinator may even request a stay for a period up to 6 months in respect of any members of the proceedings opened in respect of any member of the group, provided that such 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. Such a request shall be made to the court having opened the proceedings for which a stay is requested.

As mentioned, the group coordination plan identifies and recommends a comprehensive set of measures appropriate to an integrated approach to resolve corporate insolvencies. All this happens on a voluntary basis and nothing is legally binding, Article 70 (2). Even if an insolvency practitioner acceded to the proposed plan, he is free to diverge from it. However, a ‘comply-or-explain principle’ has been laid down in Article 70(1) and (2), meaning that the insolvency practitioner must provide reasons for not complying with the plan.<sup>168</sup>

## **4.4 Examination and evaluation**

### **4.4.1 Some alternative approaches**

#### **4.4.1.1 The approach chosen for the recast EIR**

The Articles (56-72) on group insolvencies provide for ‘procedural coordination’, i.e. coordination with respect to the conduct and administration of proceedings opened with respect to two or more members of a group in different Member States. Accordingly, the provisions are limited to administrative aspects of the proceedings and do not regulate any

---

<sup>167</sup> Thole, Dueñas (2015), p. 215.

<sup>168</sup> Thole, Dueñas (2015), p. 218.

substantive issues.<sup>169</sup> The procedural coordination provided for in the recast EIR is more or less of a voluntary nature. In order to say whether this ‘soft’ procedural coordination approach in the recast EIR is a sensible legislative answer to cross-border group insolvencies in the EU, it is necessary first assess alternative approaches, paying attention to legal and circumstantial factors.

#### **4.4.1.2 Substantive consolidation**

As touched upon, substantive consolidation permits the court in insolvency proceedings to disregard the individual legal personality of each group member and combine their assets and liabilities to a single insolvency estate, from which all the creditors of the consolidated members receive their payments.<sup>170</sup> There is a consensus in legal studies and soft law that substantive consolidation at a court’s order in general is inappropriate for handling group insolvencies.<sup>171</sup> The principal objection from a legal perspective has to do with the relationship between international insolvency law and national company and liability rules. Substantive consolidation at the level of EU insolvency law would override the principle that a company is an individual legal entity with its own assets and liabilities, which are the key notions used to structure groups of companies as a response to various business and legal considerations. In addition, the principle of separate legal entities is normally the basis for legitimate expectations of creditors that they are entitled to insolvency measures against the specific legal entity which they have entered into legal relations with and obtain proceeds from that debtor to discharge their claims (and that the proceeds should not be used to aid other members companies in their insolvencies).<sup>172</sup> In this context, the ECJ has also pointed out that EU insolvency law have to respect the existence of different legal entities under the national legislation of the Member States.<sup>173</sup>

One has to differentiate between substantive consolidation at a court’s order, on the one hand, and substantive consolidation by agreement of the insolvency practitioners or by consensus of the creditors, on the other hand. The recast EIR explicitly express that cooperation cannot result in that insolvency estates are consolidated, Article 72 (3). It is generally accepted that the same prohibition applies to cooperation under Articles 41-43 between main and secondary proceedings.<sup>174</sup> In my opinion the prohibition in Article 72 (3) is not entirely uncontroversial. In some cases, substantive

---

<sup>169</sup> UNCITRAL (2012), pp. 27-28.

<sup>170</sup> Thole, Dueñas (2015), p. 219; ‘Insol-Draft’, p. 91; UNCITRAL (2012), p. 59.

<sup>171</sup> See for example: UNCITRAL (2012), pp. 59-60; Heidelberg/Vienna study, pp. 225-26.

<sup>172</sup> Thole, Dueñas (2015), p. 219; Heidelberg/Vienna study, p. 231.

<sup>173</sup> *Eurofood*, para 30; *Eurofood*, Opinion of AG Jacobs, para. 117, *Rastelli*, para. 25.

<sup>174</sup> Heidelberg/Vienna study, p. 227.

consolidation may assist or have to be used by necessity in the insolvency processes, in particular where it is difficult, or perhaps impossible, to determine which assets, liabilities and/or contracts belong to which company of a group.<sup>175</sup> Moreover, it has been reported that substantive consolidation occurs frequently, for example by way of a restructuring plan that the insolvency practitioners accede to.<sup>176</sup>

#### **4.4.1.3 Procedural consolidation**

Another approach to group insolvencies is ‘procedural consolidation’, which implies that only the procedural aspects of the insolvency proceedings are consolidated, thus respecting the separate assets and liabilities of the member companies. Repayments to the creditors are therefore carried out on an estate-by-estate basis.<sup>177</sup> As have been pointed out in legal writing, that while procedural consolidation is a suitable approach in theory, it has significant practical drawbacks. Bringing the group insolvencies together in one court and running them under one insolvency proceeding with one insolvency practitioner, while respecting the substantive division between the estates, would most likely be very difficult. When deciding upon the best management and realisation of assets, it would probably be necessary to initiate at least virtual sub-proceedings. In addition, the court would have to apply a number, sometimes a very large number, of foreign substantive rules applicable to the different estates. As have been pointed out in legal writing, it is generally a good idea that the court is close to the legislator to avoid legal discrepancies.<sup>178</sup>

#### **4.4.1.4 Jurisdictional tools**

Another possible tool of coordination is the use of jurisdictional requirements for the opening of insolvency proceedings.<sup>179</sup> The ‘group COMI’ approach is based on the idea that a subsidiary’s COMI should be located in the Member State of the parent company’s COMI in cases where the management of the subsidiary is executed at the level of the parent company (and not in the Member State of a subsidiary’s registered office).<sup>180</sup> Consequently, the insolvency proceedings against a parent company and such subsidiaries will be opened in the Member State of the parent company’s COMI, which for obvious reasons facilitates coordination in a number of ways (e.g. same *lex concursus* applies to all the

---

<sup>175</sup> “Insol-Draft”, p. 91.

<sup>176</sup> See for example: UNICITRAL, chapter II, para. 107.

<sup>177</sup> Mevorach (2007), p. 183; Thole, Dueñas (2015), p. 215.

<sup>178</sup> Thole, Dueñas (2015), p. 215.

<sup>179</sup> “Insol-Draft”, p. 29.

<sup>180</sup> This was discussed under 3.4.2; See also *Interdil* and *Eurofood*.

proceedings).<sup>181</sup> During the revision of the recast EIR, there were various proposals in favour of this approach.<sup>182</sup>

As outlined under Chapter 3.5.2, the recast EIR already allows for a certain degree of a group COMI approach, namely where all relevant factors establishes, in a manner ascertainable by third parties, that a subsidiary's actual centre of management and supervision and of the management of its interests is located in the Member States where the parent company is located.<sup>183</sup> That a subsidiary's actual management is identical to that of a parent company's is therefore not sufficient to rebut the presumptions in favour of a subsidiary's registered office.

ECJ case law, legal studies and doctrine shows that a different and less strict approach to group COMI than the present one is problematic due to the following.<sup>184</sup> Firstly, a group COMI (single forum) would often in various ways conflict with the interests of foreign creditors in the state of the registered office of the subsidiaries (e.g. detrimental to legal certainty and in other ways be to the prejudice of foreign creditors). But perhaps more importantly, the variety and complexity of group structures makes it difficult, perhaps impossible, to provide clear criteria ('connecting factor') in the recast EIR for whether a single (exclusive) forum is justified or not. In some cases, the management in the parent company is identical to the management in a subsidiary, but in other cases the companies are more loosely connected and there may be intermediate shareholding members on different levels. For example, a group may be decentralised with independent profit centres (although with one ultimate shareholder).<sup>185</sup> In any event, it has been pointed out that an exclusive forum at the seat of the parent company has become outdated as the choice of seat of modern holding companies is usually based on regulatory and financial benefits.<sup>186</sup>

#### **4.4.1.5 Conclusion**

It seems sensible the recast EIR preserves the identity of group members and the substantive rights of claimants and that the assets and liabilities of each member remain separate and distinct. Furthermore, it seems sensible that the recast EIR does not adopt 'procedural consolidation', due to the practical difficulties it entails. Moreover, a group COMI provision is not a suitable answer as it would be too formalistic given the variety of group

---

<sup>181</sup> Heidelberg/Vienna study, p. 235.

<sup>182</sup> Fletcher (2015), p. 104.

<sup>183</sup> Recital 30, *Interdil*, para. 59, *Eurofood*, para 34.

<sup>184</sup> *Interdil*; *Eurofood*; Heidelberg, p. 237; Thole, Dueñas, p. 224.

<sup>185</sup> UNICITRAL (2012), para. 6-16; Mevorach (2007), p. 182; Heidelberg/Vienna, p. 222-24.

<sup>186</sup> Thole, Dueñas (2015), p. 224.

structures, as well as detrimental to the rights of foreign creditors. Therefore, the absence of a group-COMI in the recast EIR is sensible.

## **4.4.2 Some comments on the recast EIR**

### **4.4.2.1 Articles 56-59 and 60**

As mentioned, insolvency practitioners and courts are obliged to cooperate and communicate (Article 56-59) insofar as it is compatible with the respective *lex concursus* in the proceedings and does not entail any conflict of interest. However, as the recast EIR does not provide for any legal remedies, it seems as cooperation is more or less voluntary. During the revision process of the EIR, it was suggested that a procedural coordination approach to group insolvencies should draw upon the model of main and secondary proceedings. The general obligations introduced 56-59 are indeed similar to those for main and secondary proceedings in Articles 41-43. In this context, one has to differentiate between soft measures (general obligation to communicate and cooperate, right to be heard, right to participate on meetings etc.) on the one hand, and specific powers over others proceedings even in cases where those affected (the practitioner and/or creditors in the other proceedings) do not agree, on the other hand. In respect of the latter, it has been discussed whether the legal mechanisms (in particular Articles 33 and 34 original EIR, now located in Articles 46 and 47 recast EIR) developed for main and secondary proceedings, should be extended to insolvency proceedings of members of a group.<sup>187</sup> Articles 46 and 47 give the insolvency practitioner in the main proceedings a dominant role, and the idea is that by extending these rules to group insolvencies the insolvency practitioners of a parent or other ‘leading’ company would be given a dominant role in group insolvencies. By Article 46, the insolvency practitioner in the main proceedings has the right to request a stay of realisation of assets in secondary proceedings, which can be refused ‘only if it is manifestly of no interest to the creditors in the main insolvency proceedings.’ Article 47 of the recast EIR gives the insolvency practitioner in the main proceedings the right to propose measures available under local law (such restructuring plan or composition) that put an end to secondary liquidation proceedings.

In this context the new Article 60 is interesting. The provision in Article 46 is different from the right to request a stay introduced in Article 60 (1) (b) (i-iii), as the latter gives all insolvency practitioners involved (not only of a parent or other ‘leading’ company) the right to request a stay. However, in

---

<sup>187</sup> For a detailed discussion, see: Heidelberg/Vienna study, pp. 228-34.

order for the request to be granted the court seised must be satisfied that a number of conditions are fulfilled, most importantly that the restructuring plan proposed under 56 (2) ‘would be to the benefit of the creditors in the proceedings for which the stay is requested’. In my opinion, however, it is not entirely clear from the wording whether a restructuring plan under 56 (2) (c) may be proposed on the initiative of only one or a few of the insolvency practitioners (e.g. of a parent or other leading companies) or if a proposal made under 56 (2) (c) must stem from a cooperation between all the insolvency practitioners involved.

If the former interpretation is the correct one, it means that 56 (2) (c) in combination with Article 60 (1) (b) (i-iii) entitle insolvency practitioners to take measures (a proposal) and impose them (in form of a stay on realisation processes) on practitioners of other groups, provided that the court seised is satisfied with that the requirements listed in (i-iii) are fulfilled. This is most likely an accurate interpretation of Article 56 (2) (c), as the right to request a stay provided for in Article 60 (b) (i-iii) would not make sense if its application required that a restructuring plan under Article 56 (2) (c) were made collectively (i.e. been previously accepted by the member for which a stay is requested).

It has been pointed out that specific powers over other insolvency practitioners (such as a request to stay or take measures that end a liquidation in Article 46 and 47) in the context of group insolvencies are likely to improve coordination and the chances of a group recovery.<sup>188</sup> The main concern raised with introducing these kinds of powers is that the relation between group members is different from the relation between main and secondary proceedings. The creditors in the main and secondary proceedings have claims against the same debtor company. It is a decision by EU insolvency law to protect legitimate interests of local creditors whom from a purely factual perspective have entered into legal relations with an establishment of the company subject to main proceedings. Consequently, the EU legislator may confer specific powers to the insolvency practitioner in the main proceedings over the secondary proceedings. By contrast, the existence of several proceedings of members of a group is not a choice made by EU insolvency law, but is caused by that the members are separate legal entities according to company law. Creditors of a group have claims against different debtors, and should be entitled to insolvency measures against the specific member company which is their debtor and that the proceeds are used in order to discharge such creditors.<sup>189</sup>

---

<sup>188</sup> Heidelberg/Vienna study, p. 230.

<sup>189</sup> Heidelberg/Vienna study, p. 230-34.

The provisions in 56 (2) (c) and Article 60 (b) (i-iii) will affect creditors rights to obtain proceeds as soon as possible where a request of stay is granted. However, the safeguards offer a rigorous protection to the creditors affected. In my opinion, the right to request a stay is welcome, especially as any insolvency practitioner may take initiative to request a stay under the recast EIR. That all the insolvency practitioners are entitled to specific powers have been promoted in legal writing, as it reflects a ‘market oriented approach to group insolvencies, where private initiative prevails and the best solution succeed.’<sup>190</sup> It has been pointed out that there is no need for formalistic provisions which decide who shall be the ‘leading’ insolvency practitioner with specific powers.<sup>191</sup> However, the various safeguards set out in Article 60 (b) (i-iii) show that the EU legislator has been very cautious. As evident from the discussion above, some kind of safeguard will always be necessary in EU insolvency law, since creditors should not be obliged to have their rights effectively curtailed or suffer losses just because other members of a group have become insolvent (which is not even accepted with regard to local creditors in the context of main and secondary proceedings). Specific powers without any safeguards would also have serious economic consequences, as it would lead to legal uncertainty and profoundly alter risk assessment when entering into legal relations with a member of a group of companies.<sup>192</sup> However, one wonders if the intricate conditions set out in Article 60 (b) (i-iii) will render the right to request a stay a ‘blunt sword’. The judicial review by the court of the various conditions may become quite complicated, take time and turn out costly. Such a formalistic procedure may be detrimental to the efficiency in the insolvency process.

#### **4.4.2.2 Group coordinaton proceedings (Articles 61-77)**

As mentioned, it seems as though a coordinated restructuring plan under Articles 56 (2) (c) is an alternative to the group coordination proceedings (Article 61-72), and they cannot be pursued in parallel, Article 60 (1) (b) (iv).<sup>193</sup> The main difference from the Articles in 56-60 is that the group coordination proceedings put a major emphasis on the role of the ‘group coordinator’, whose main task is to propose a ‘group coordination plan’ that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group

---

<sup>190</sup> Heidelberg/Vienna study, p. 234.

<sup>191</sup> Heidelberg/Vienna study, p. 234.

<sup>192</sup> Thole, Dueñas, p. 215.

<sup>193</sup> Weiss (2015), p. 209.

members' insolvencies, Article 72 (1) (b). He may also request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such 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, Article 72 (2) (e).

The emphasis of the group coordinator seems to suggest that the introduction of 'group coordination proceedings' primarily addresses situations where the individual insolvency practitioners are unable to reach an agreement on their own.<sup>194</sup> As mentioned, a group coordination procedure (Articles 61-77) happens on a more or less voluntary basis and not even the accession to a group coordination plan has any actual binding.<sup>195</sup> The idea behind the group coordination procedure seems to be that the group coordinator by way of persuasion shall influence the course of the insolvency proceedings of the different members. It is debatable whether the group coordination proceedings actually can achieve anything that cannot be achieved by the provisions in Articles 56-60. It has been pointed out in legal writing that the only advantage seems to be that a group coordination plan can be proposed by an impartial group coordinator.<sup>196</sup> The group coordination plan may contain agreements between the insolvency practitioners on various issues, settlement of intra-group disputes, and recommendations on how to resolve the insolvencies and re-establish the financial soundness of the group or any part of it, Article 72 (1) (b) (i-iii). By Article 56 (2) (c), the insolvency practitioners involved are obliged to consider such a plan. The group coordinator may exercise his quite extensive rights to participate, be informed and right to request a stay, pursuant to Articles 72 (a) – (e) and Article 74, to put pressure on insolvency practitioner to consider and participate in further negotiations of the proposed plan. However, as has been pointed in legal writing, the complex and formalistic structure of the procedure as well as its voluntary nature make one wonder whether the procedure will work in practice. The insolvency practitioner may be deterred by the potential extra costs and delays in the insolvency process.<sup>197</sup>

---

<sup>194</sup> Thole, Dueñas, p. 215, 220.

<sup>195</sup> Recital 56.

<sup>196</sup> Thole, Dueñas, p. 221.

<sup>197</sup> Fletcher (2015), p. 104.



## 5 Final remarks

Many of the changes in the recast EIR are likely to improve the efficiency of cross-border insolvency proceedings, including those relating to members of a group of companies. The extension of the material scope to debtor-in-possession and pre-insolvency restructuring proceedings may facilitate group recovery. The possibility of synthetic secondary proceedings by the giving of an undertaking may also facilitate the coordination of insolvency proceedings relating to members of a group, as it may prevent the opening of multiple proceedings in respect of each member. The establishment of insolvency registers may also increase transparency in group insolvency processes.

The ‘procedural coordination approach’ of the provisions contained (Articles 56-77) seems sensible, given the difficult legal and circumstantial factors related to group insolvencies, which make solutions such as substantive or procedural (at least at the level of EU law) and group COMI approaches inappropriate. However, it is more difficult to determine whether the provisions will be workable in practice, due to their formalistic and voluntary nature. They might have a psychological or political effect and in other ways put pressure on courts and insolvency practitioner to find coordinated solutions to group insolvencies. On the other hand, increased communication and cooperation, and the complexity of group coordination proceedings, may entail extra costs and delays detrimental to the insolvency process and/or creditors in the separate insolvency proceedings. Altogether, the legislative answer by the EU legislator seems like a reasonable compromise between the conflicting interests of improving efficiency, on the one hand, and the respecting the independency of insolvency proceedings and the rights of the creditors, on the other hand.

# Bibliography

## Legislation

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, p. 1.

Council Regulation (EC) No 1346/2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions, OJ L 125, 5.5.2001, p. 15.

Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (Text with EEA relevance), OJ L 335, 17.12.2009, p. 1.

Förmånsrättslag (1970:979).

Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1.

Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings, OJ L 141, 5.6.2015, p. 19.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1.

Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

## EU documents

COM (2012) 743 final: 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) 744 final: Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings.

Hess/Oberhammer/Pfeiffer: Study for an evaluation of Regulation (EC) No 1346/2000 on Insolvency Proceedings ('the Heidelberg/Vienna study') (JUST/2011/JCIV/PR/0049/A4).

"Insol-Draft", Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al].

Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), OJ C 141, 28.4.2015, p. 55–57.

Virgós/Schmit Report on the Convention on Insolvency Proceedings, 1996.

## **Soft law**

Guide to Enactment (1997) accompanying the UNCITRAL Model Law on Cross-border Estates.

IMF Orderly and Effective Insolvency Procedure – key issues, 1999, available (2016.05.17) at:

<http://www.imf.org/external/pubs/ft/orderly/index.htm>

The World Bank Principles for effective insolvency and creditor/debtor rights (Revised 2015).

UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004).

UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency (2012).

## **Literature**

### **Books**

Bogdan, M., *Concise introduction to EU private international law*, 3. ed., Groningen, Europa Law Publication, 2016.

Bogdan, M., *Sveriges och EU:s internationella insolvensrätt*, Stockholm, Norstedts juridik, 1997

Hettne, J., & Otken Eriksson, I. (eds.), *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, Stockholm, 2. ed., Norstedts juridik, 2011.

Moss, G. & Fletcher, I. & Isaacs, S. (eds.), 2. ed., *The EC Regulation on insolvency proceedings – A Commentary and Annotated guide*, Oxford,

Oxford University Press, 2009.

Neergaard, U. & Nielsen, R. & Roseberry, L., *European legal method: paradoxes and revitalisation*, Copenhagen, DJØF, 2011.

Neergaard, U. & Nielsen, R. & Roseberry, L., Lynn, *European legal method: in the multi-level EU legal order*, Copenhagen, DJØF, 2012.

Neergaard, U. & Nielsen, R. & Roseberry, L., Lynn, *European legal method: towards a new European legal realism*, Copenhagen: DJØF Publishing, 2013.

Wessels, B., *International insolvency law*, 3. ed., Deventer, Kluwer, 2012.

### **Periodicals**

Bogdan, M., *EU:s omarbetade insolvensförordning*, Juridisk tidskrift vid Stockholms universitet, Nr 1 2015/16, pp. 3-14.

Edwardsson, E. & Wockelberg, H., *European Legal Method in Denmark and Sweden – Using Social Science Theory and Methodology to Describe the Implementation of EU Law*, European Law Journal, Vol. 19, No. 3, May 2013, pp. 364–381.

Fletcher, I., *The European Insolvency Regulation recast: the main features of the new law*, Insolvency Intelligence, 28(7), 2015, pp. 97-103.

Moss, G., *Principles of EU insolvency law*, Insolvency Intelligence. 2015, 28(3), 40-44.

Mevorach, I., *Appropriate treatment of corporate groups in insolvency: a universal view*, European Business Organization Law Review, 2007, 8(2), pp. 179-194.

Thole, C. & Dueñas, M., *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, International Insolvency Review, Winter 2015, Vol. 24 Issue 3, pp. 214-227.

Weiss, M., *Bridge over Troubled Water: The Revised Insolvency Regulation*, International Insolvency Review, Winter 2015, Vol. 24 Issue 3, pp. 192-213.

### **Electronical sources**

IMF Orderly and Effective Insolvency Procedure – key issues, 1999, available (2016.05.17) at:

<http://www.imf.org/external/pubs/ft/orderly/index.htm>

Lenaerts, K. & Gutiérrez-Fons, J., *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI AEL, 2013/09, available (2016.05.22) at: <http://hdl.handle.net/1814/28339>

Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices, TENDER NO. JUST/2012/JCIV/CT/0194/A4, p. 6, Available (2016.05.17) at: [http://ec.europa.eu/justice/civil/files/insol\\_europe\\_report\\_2014\\_en.pdf](http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_en.pdf)

# Table of Cases

## ECJ

*Bank Handlowy v Christianapol*, case C-116/11, ECLI:EU:C:2012:739

*Burgo v Illochroma*, case C-327/13, ECLI:EU:C:2014:2158

*Costa v E.N.E.L.*, case 6/64 [1964] ECR 585, ECLI:EU:C:1964:66

*ERSTE v Állam*, case C-527/10, ECLI:EU:C:2012:417

*Eurofood*, case C-341/04, [2006], ECR I-3813

*Gourdain v Nadler*, case C-133/78, ECLI:EU:C:1979:49

*LBI v Kepler*, case C-85/12, ECLI:EU:C:2013:697

*Rastelli v Hidoux*, case C-191/10, [2011], ECR I-13209

*Seagon v Deko Marty*, case C-339/07, ECLI:EU:C:2009:83

*Staubitz-Schreiber*, case C-1/04, ECLI:EU:C:2006:39

*Interedil v Fallimento*, case C-396/09, [2011] ECR I-9915.