FACULTY OF LAW
Lund University

Arina Tšekanina

The role of Preventive Restructuring Directive for cross-border companies in financial distress: rescue for efficiency?

JAEM03 Master Thesis

European Business Law
30 higher education credits

Supervisor: Julian Nowag

Term: Spring 2021

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Summary

This study focuses on the recent Directive (EU) 2019/1023 on preventive restructuring frameworks ('Preventive Restructuring Directive') that was adopted by the European Parliament and the Council on 20 June 2019.

The purpose of this thesis is to examine and assess the EU legislator's intentions in harmonisation of national laws on restructuring and to clarify the rationale behind business rescue. The study focuses on the position of cross-border companies in preventive restructuring proceedings, as well as the impact of legislative choices made by Member States on the convenience of restructuring processes. It will show that, while the legislator strives for minimal harmonisation, the legal act is necessary in the insolvency law regime to guarantee the efficiency of cross-border restructuring proceedings.

The study will demonstrate that the connection between the Directive and the legislative acts that establish the European insolvency regime has a significant impact on cross-border enterprises' legal certainty. It will examine the scope of Recast Insolvency Regulation and question the role of Annex A in respect of preventive restructuring frameworks. It will demonstrate that, while the Regulation allows restructuring frameworks to fall under its scope, it takes a somewhat limited approach to the concept of corporate restructuring, placing it rather close to the concept of liquidation.

The thesis will further address the difficulties that cross-border companies may face during the process of restructuring in terms of recognition and enforcement of the national proceedings in other Member States. It holds that the feasibility of recognition and enforcement will be determined on the case-by-case basis, based on substantive laws and interpretation of the restructuring frameworks' position under this set of rules.

Finally, the study indicates that the Directive is an important tool that was previously missing from the EU's insolvency system. The pre-insolvency mechanisms that it introduces, on the other hand, may be problematic due to significant differences in the national laws of the Member States, as well as the fact that the legal acts that precede the adoption of the Directive were not drafted in such a way as to include the range of restructuring frameworks in its scope.

Acknowledgments

I would like to express my gratitude to my supervisor, Julian Nowag, for his valuable comments on my work and for always cheering me up during the process of writing this thesis. On one of our thesis sessions Julian said, ‘Law is art!’. And I think that is beautiful.

I am thankful for Lund University for this experience, the challenges and, of course, the people it has brought to my life.

I am grateful to my family and my partner, Oleksandra, who celebrated my every little step on this journey. Thank you.

Abbreviations

CJEU	Court of Justice of the European Union
COMI	Centre of Main Interests
COVID-19	Coronavrus Disease 2019
EC	European Community
EIR	European Insolvency Regulation
EU	European Union
SMEs	Small and medium enterprises
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America

1. Introduction

1.1. Background

The market is always dynamic: it is natural that while new businesses emerge, some companies exit the market. A support framework which accompanies businesses through the process of exiting the market has been vital for ensuring the proper functioning of the internal market.[1] Not only does it help to coordinate the actions of debtors and creditors, but it has a direct impact on the overall development of financial market, influencing lending rates and investment decisions across the EU.[2]

Nonetheless, no matter how effective successful insolvency procedures may be, not every company deserves to be liquidated. Quite the contrary, liquidation of financially viable companies amounts to even greater adverse effects. These effects include, for example, direct negative impact on job growth, creditor recovery rates and the entrepreneurial climate across the Union.[3] It was recognised by the EU legislator that the companies which are facing financial distress but nevertheless remain financially viable must be given a second chance.[4] Second chance means that the businesses which experience financial difficulties are given the chance to avoid insolvency by restructuring the debts.

This thesis will look into the recent Directive (EU) 2019/1023 on preventive restructuring frameworks ('Preventive Restructuring Directive') that was adopted by the European

[1] See Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160 ('Insolvency Regulation'), recital 2.
[2] See Diego Valiante, 'Study: Harmonising insolvency laws in the Euro Area: rationale, stock-taking and challenges. What role for the Eurogroup?', Directorate-General for Internal Policies, Economic Governance Support Unit (2016, Economic and Monetary Affairs Committee), <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/574428/IPOL_STU(2016)574428_EN.pdf> accessed 14 May 2021.
[3] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM/2016/0723 final [2016] 2016/0359 (COD) ('Proposal for a Restructuring Directive'). See also Věra Jourová, 'Early restructuring and a second chance for entrepreneurs. A modern and streamlined approach to business insolvency', (2019) Fact sheet, Directorate-General for Justice and Consumers <https://ec.europa.eu/info/sites/default/files/factsheet_-_a_modern_and_streamlined_approach_to_business_insolvency.pdf> accessed 15 May 2021.
[4] See European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 'A new European approach to business failure and insolvency' [2012] COM(2012) 742 final, < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52012DC0742> accessed 15 May 2021.

Parliament and the Council on 20 June 2019.[5] The deadline for transposition of the Directive is July 17, 2021, which has not yet passed at the time of writing this thesis. The Directive is a part of the insolvency law regime created by the Regulation (EU) 2015/848 ('Recast Insolvency Regulation')[6]. The Regulation 'deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers'.[7] In its turn, the Directive 'should be without prejudice to the scope of Regulation' and 'aims to be fully compatible with and complimentary to the Regulation'.[8]

In order to properly introduce the Directive and its objectives, the notion of restructuring should be briefly explained. As opposed to insolvency laws, the restructuring mechanism that the Directive aims at introducing is usually compared to initiating negotiations to safeguard the interests of affected parties 'by means of a moratorium-like mechanism'.[9] The possibility of harmonised restructuring framework would allow cross-border companies to have access to early warning mechanisms and ensure efficiency and cost-effectiveness of cross-border restructuring proceedings.[10] Restructuring proceedings are sometimes referred as to pre-insolvency proceedings.[11] Although this instrument is part of general insolvency instruments available for debtors during financial difficulties, it comes prior the liquidation. The framework of restructuring would therefore entail the proceedings, both formal (in-court) and informal (out-of-court), that essentially precede the classical insolvency proceedings, such as liquidation or bankruptcy.[12] The policy, or better said, the ideology behind the introduction of the EU restructuring framework had a significant objective of de-stigmatising the notion of

[5] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172 (Preventive Restructuring Directive).
[6] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141 ('Recast Insolvency Regulation').
[7] Preventive Restructuring Directive, recital 12.
[8] ibid, recital 13.
[9] Christoph G.Paulus 'Introduction' in Christoph G.Paulus, Reinhard Dammann (eds.) *European Preventive Restructuring, Directive (EU) 2019/1023, Article-by-Article Commentary* (Beck 2021) [4] 2.
[10] ibid.
[11] Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (OUP 2019) 4 [1.21], 'Pre- insolvency proceedings are typically not used unless there is a financial reason to do so — that is, the company is in financial difficulties. To this extent, pre-insolvency proceedings can be regarded as insolvency proceedings.'.
[12] See Reinhard Dammann, Article 1. Subject matter and scope' in Christoph G.Paulus, Reinhard Dammann (eds.) *European Preventive Restructuring, Directive (EU) 2019/1023, Article-by-Article Commentary* (Beck 2021) [14] 40: 'Hence, insolvency proceedings have the objective of organizing the liquidation of the assets of the debtors whereas debt restructuring has the objective of agreeing on the (re-)allocation of the assets and future cash flows of the debtor.'.

insolvency.[13] Such stigmatisation has historically surrounded bankrupt businesses, deteriorating investor relations and impairing credibility of national economies. Second chance approach can take the pressure off the distressed companies and allow them to continue operations.

The Proposal for a Directive did not receive an anticipated reaction from the Member States.[14] The underpinning factor for such reluctance was the difference in substantive laws on restructuring proceedings in the Member States. On one hand, the development of pre-insolvency across the EU was going various ways with some of the Member States taking the lead and the others being way behind.[15] On the other hand, the national laws on restructuring encompassed a variety of choices for the debtors which essentially led to jurisdictional competition in the EU.[16] Therefore, the objective behind the EU restructuring framework is rather complex. It aims at encompassing different approaches for tackling financial distress and, at the same time, seeking harmonisation of the laws on restructuring in the EU.[17]

That being said, the timing was perfect for the Directive. In the light of COVID-19 crisis the Directive serves a special significance for businesses that faced difficulties during the pandemic.[18] As highlighted by the Commission's Annual Single Market Report 2021, the COVID-19 crisis has affected small and medium enterprises (SMEs) the most.[19] In addition, between 7% firms in construction and 27% of in the accommodation and food services sector are expected, by the means of estimations, to exit the market by the end of 2021.[20] Since the

[13] See Proposal for a Restructuring Directive; Paulus (n 9) [5]-[6] 2-3.
[14] ibid., [13] 5.
[15] See Horst Eidenmüller, 'Contracting for a European Insolvency Regime', European Business Organization Law Review (2017) 285 < https://link.springer.com/content/pdf/10.1007/s40804-017-0067-1.pdf> accessed 17 May 2021: 'Similar to Germany, the UK, France, Spain and Italy belong to the European jurisdictions with the most elaborated restructuring codes and practices.'.
[16] ibid.; See also Horst Eidenmüller, 'The transnational law market, regulatory competition, and transnational Corporations' [2011] 18 Indiana Journal of Global Legal Studies 707 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1460&context=ijgls> accessed 17 May 2021.
[17] Preventive Restructuring Directive, recital 8, Article 1(1)(b); Paulus (n 9) [5] 2.
[18] See Commission Staff Working Document, Annual Single Market Report 2021 Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery' (2021) SWD/2021/351 final ('Annual Single Market Report 2021') < https://ec.europa.eu/info/sites/default/files/annual-single-market-report-2021.pdf> accessed 17 May 2021; Gunnar Gerig, Richard Koch 'How new restructuring frameworks could help companies in distress' (Ernst & Young, 28 August 2020) < https://www.ey.com/en_gl/strategy-transactions/how-new-restructuring-frameworks-could-help-companies-in-distress> accessed 17 May 2021: 'The new framework could therefore be particularly suitable for companies whose increased level of debt is no longer covered by sustainable EBIT, but who do not have an acute liquidity problem and therefore do not qualify for an in-court restructuring procedure.'.
[19] Annual Single Market Report 2021 (n 18): 'Preliminary estimates show that the number of small and medium-sized enterprises (SMEs) fell by 1.3% with over 90% of SMEs reporting a fall in turnover.'.
[20] ibid.

Directive specifically targets SMEs[21], these firms will be able to access the restructuring mechanisms and benefit from the early warning mechanisms introduced by the Directive which are essential to support the businesses in the times of crisis.

1.2. Purpose and Research Questions

The aim of this thesis is to examine and evaluate the EU preventive restructuring framework that the Preventive Restructuring Directive has introduced. More specifically, the thesis will focus on the position of cross-border companies and the influence of the Member States' legislative choices on the convenience of restructuring proceedings. It seeks to understand the relationship between the Preventive Restructuring Directive and the Recast Insolvency Regulation, as well as the impact of the insolvency regime the Directive enters into.

Therefore, the central question of this thesis is the following:

What is the rationale of Preventive Restructuring Directive in the framework of EU insolvency law and how does it impact the expediency of financial restructuring of distressed cross-border companies?

To answer the central question, the following sub-questions will be examined:

1. How the EU regulator justifies restructuring proceedings in the context of business rescue?
2. How is the Preventive Restructuring Directive connected with the framework built by the Recast Insolvency Regulation?
3. How successful is the Preventive Restructuring Directive in tackling the regulatory competition in the EU?
4. What challenges cross-border companies face in restructuring proceedings?

[21] See Proposal for a Restructuring Directive, recital 13: '[…] small and medium sized enterprises should benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures in some Member States. Small and medium enterprises, especially when facing financial difficulties, often do not have the resources to hire professional advice, therefore early warning tools should be put in place to alert debtors to the urgency to act.'.

1.3. Methodology and Materials

This thesis will follow legal doctrinal research method and concentrate on evaluative research in particular.[22]

First, it will present and discuss the normative and authoritative sources.[23] It will present and describe applicable EU legal acts with an emphasis on the general principles of EU law and the practice of the Court of Justice of the European Union. It will also address scholarly works on the subject in order to arrive at a fair understanding of the law's provisions and the intentions of the European legislator.

Second, the study will assess and evaluate the impacts of the law on the position of companies and creditors. It will examine whether the legislator's objectives in drafting the Directive were met, as well as whether the goal of harmonisation is appropriate.

1.4. Deliminations

Although the Directive's outcomes will be primarily determined by how it is implemented in the Member States, this thesis will not go into detail about the Member States' restructuring laws and practices. It will focus on the objectives of the Preventive Restructuring Directive and the role of the Recast Insolvency Regulation, encompassing the EU legislator's intentions and the practice of the Court of Justice. However, some examples of national restructuring frameworks will be presented to give a realistic perspective on the topic. Such examples would not favour a particular national framework but would instead concentrate on the ones that are relevant to the topic at hand.

In addition, it must be noted that although the Preventive Restructuring Directive is inspired by US Chapter 11 and English Scheme of Arrangement, this thesis will not describe them in depth nor compare it to the Directive.

Despite the fact that insolvency law and practice necessitate economic observations, the study will only touch on them briefly. It will only have the requisite economic background to comprehend the idea of restructuring.

[22] Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011).
[23] ibid.

Finally, rather than the Recast Insolvency Regulation, the study focuses on the Directive. While the analysis of the complexity of the Regulation will be a large part of the study, the thesis will attempt to analyse its requirements from the standpoint of preventive restructuring frameworks. As a result, it will examine the Regulation to determine its role in the Directive's status and the potential impact on restructuring frameworks.

1.5. Outline

The thesis consists of five chapters. Following the introduction chapter, the second chapter will examine the development of the EU legislative initiative on preventive restructuring and the legislator's intention and goals with the Directive will be explained. It will also clarify the debtor-creditor relationship in a restructuring proceeding and provide insight into the economic rationale for restructuring.

The relationship between the Recast Insolvency Regulation and the Preventive Restructuring Directive will be the subject of the third chapter. In a nutshell, it will attempt to explain the insolvency regime that the Directive enters into. It will begin by contrasting the legislative acts' scopes. A lot of attention will be given to the notion of COMI and the role of Annex A for restructuring frameworks. It will demonstrate how the provisions of the Regulation affect the complexity of restructuring proceedings in Member States.

The fourth chapter of this thesis will examine the recognition challenge that the companies are facing during the restructuring proceedings. In this chapter, the possibility of recognition under the Recast Insolvency Regulation, Recast Brussels Regulation and Rome I will be analysed. It will first explain the automatic recognition under Recast Insolvency Regulation, and it will discuss which frameworks will be able to benefit from it. The distinction made between Annex-frameworks and non-Annex frameworks, with each being discussed separately. The chapter will further present the frameworks that could come under the scope of Recast Brussels Regulation. Finally, the enforcement of the private restructuring agreements will be addressed, with a focus on the scope of Rome I Regulation.

2. Preventive Restructuring Directive in the frame of European insolvency framework

2.1. Legislative developments

A common insolvency framework across the EU has been the matter that gave rise to diverging opinions across the Member States. It was widely discussed during the time when the first Brussels Convention[24] was drafted.[25] The Brussels Convention did not include bankruptcy matters and for the purposes of defining the jurisdiction and recognition of judgements the insolvency framework was proposed in 1976 in a form of the draft to the Convention.[26] The draft was, however, set aside after almost 10 years of negotiations due to major disagreements between the Member States.[27]

The attempts to coordinate the insolvency continued, failing numerous times before the first version of European Insolvency Regulation was introduced.[28] This was a big step forward in respect of coordination and efficiency of cross-border insolvency proceedings. However, the first version of European Insolvency Regulation did not include the concept of pre-insolvency in its scope. The scope focused more generally on 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.[29] According to the Heidelberg-Luxembourg-Vienna Report, by this the legislator had in mind traditional insolvency definition – a situation when the debtor's assets are lacking liquidity or

[24] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 25 September 1968 [1972] OJ L 299/ 32 ('Brussels Convention').
[25] See Bulletin of the European Communities Supplement 2/82, Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings <https://op.europa.eu/en/publication-detail/-/publication/bdfe47f1-678d-45f3-94cb-6aff207d4fc1> accessed 1 April 2021.
[26] Draft Convention E Comm Doc 3.327/1/XIV/70-F on bankruptcy, winding-up, arrangements, compositions and similar proceedings [1976] ('Preliminary Draft Insolvency Convention').
[27] Judicial Co-operation Supporting Economic Recovery in Europe (JCOERE) Consortium, 'Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations' (2019) University College Cork 34 <https://www.ucc.ie/en/jcoere/research/report1/> accessed 1 of April 2021.
[28] Insolvency Regulation [2000] (n 1).
[29] ibid, Article 1.

the debtor is unable to pay his debts due to the negative balance sheet.[30] Since the appointment of liquidator was one of the key elements of Article 1(1) European Insolvency Regulation, it was obvious that restructurings stayed out of its scope.

It was not until the last decade that the European Union began promoting alternatives to traditional in-court insolvency proceedings. During the time the first version of the Insolvency Regulation was in force, some Member States began drafting their own laws on restructuring and the gap between Recast Insolvency Regulation and national laws on pre-insolvency proceedings grew bigger.[31] Due to differences in substantial laws of the Member States, the efficiency of such proceedings remained low and choosing traditional insolvency (e.g., liquidation) was more common than rescuing business by restructuring it.

The European Commission later recognised in the Communication 'A new European approach to business failure and insolvency' that the companies in financial difficulties which could be practically viable were instead liquidated.[32] The number of such companies cannot be adequately estimated, however it is presumed that a considerable amount from 200,000 companies going bankrupt each year could, instead, be provided with a legislative possibility for a coordinated second chance.[33] The Commission also described that the laws on insolvency and pre-insolvency proceedings were highly varying across the Member States and the differences could be seen already on the stage of opening the insolvency proceedings.[34] This is sometimes referred to as the differences in the 'insolvency test' performed by the competent authorities.[35] Where some Member States required the proceedings to be opened when the company was distressed, others required only the mere risk of insolvency to go to court. In other words, the insolvency test lacked an interpretation across the EU due to which there was a higher likelihood of liquidation proceedings being opened. In addition, cross-border companies benefited the least out of this situation since they were subject to even higher uncertainty.

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[30] Burkhard Hess, Paul Oberhammer, Thomas Pfeiffer, Andreas Piekenbrock, and Christopher Seagon, 'European insolvency law: the Heidelberg-Luxembourg-Vienna Report on the application of Regulation No. 1346/2000/EC on Insolvency Proceedings' [2014] External Evaluation JUST/2011/JCIV/PR/0049/A4 37 <https://www.mpi.lu/uploads/media/evaluation_insolvency_en.pdf> accessed 26 May 2021.

[31] ibid. 37-38; See Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive, 2012/30/EU, SWD(2016) 357 final 7 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2016:0357:FIN:EN:PDF> accessed 26 May 2021. According to the Commission report, preventive restructurings were possible in most of the Member States but were performed in a very inconsistent manner. Denmark, Czech Republic, Bulgaria, Hungary, Slovakia and Lithuania did not provide the companies with the possibility to restructure business before insolvency.

[32] See A new European approach to business failure and insolvency (n 4).

[33] ibid. 2.

[34] ibid. 6.

[35] ibid.

Such legislative imbalance in insolvency laws impaired the efficiency of the restructuring proceedings but became a stimulus to create the EU restructuring framework. Building a framework for efficient early rescue proceedings was included in the Action Plan on Building a Capital Markets Union as the tool to take down barriers to the free flow of capital.[36] During the same year, Recast Insolvency Regulation was adopted which was the first major action of change. It focused specifically on the efficiency of resolving cross-border insolvency cases and enabling pre-insolvency proceedings to be within its scope. Notably, Recast Insolvency Regulation is based on Article 81 TFEU which means it does not have as its objective the harmonisation of substantive law of the Member States – it rather coordinates the national systems instead.[37] As Horst Eidenmüller puts it, coordination means that the legislator provides the framework that regulates 'where and according to which rules insolvency proceedings are to be conducted and what their cross-border effects will be'.[38]

The Preventive Restructuring Directive, adopted in 2019, is based on Article 114 TFEU and, in its turn, focuses on harmonisation.[39] Compared to Recast Insolvency Regulation, this is an important difference. One could claim perhaps that if the legislator's intention was the harmonisation, another legislative tool could be chosen. The EU legislator chose directive and not the regulation in part because the differences between substantive laws were way too high, and in part because the criticism around the proposal for the Preventive Restructuring Directive was too broad.[40]

What is also being debated is the actual usefulness of the legislative instrument. First, willing to smooth the edges of inconsistency of substantive laws in the EU, the Preventive Restructuring Directive provides a very extensive playing field for the Member States and it is prognosed that Member States will continue to engage in a regulatory competition for their own benefit.[41] Second, it suggested that the harmonisation attempts are rather unsuccessful since by

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[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30 September 2015 <https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX%3A52015DC0468> accessed 26 May 2021.
[37] See Recast Insolvency Regulation, preamble and recital 3; Heidelberg-Luxembourg-Vienna Report (n 30) 35, 102 '[...] Article 3 is mainly aimed at coordinating the autonomous insolvency laws of the Member States in cross-border situations. The provision therefore fully corresponds to the present state of affairs of the European law of cross-border insolvency, which is characterized by coordination, not by harmonisation of the national systems'.
[38] Eidenmüller, 'Contracting for a European Insolvency Regime' (n 15) 275.
[39] See Proposal for a Restructuring Directive.
[40] Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union', European Business Organization Law Review (2019) 20, 558-560 <https://link.springer.com/article/10.1007/s40804-019-00160-0> accessed 26 May 2021.
[41] ibid., 560.

'one-size fits all' approach the Directive risks making a regulatory damage to the restructuring system, creating greater inefficiency instead.[42]

It should be noted that while European legislator's ultimate goal is indeed the harmonisation of law[43], it does not attempt in achieving full harmonisation of restructuring law in the EU. The Preventive Restructuring Directive acknowledged that the problem of disparities between substantial law still existed and provided serious obstacles.[44] The legislator chose partial harmonisation instead. As the Commission states in the Proposal for a Restructuring Directive,

> '[t]he proposal does not harmonise core aspects of insolvency such as rules on conditions for opening insolvency proceedings, a common definition of insolvency, ranking of claims and avoidance actions broadly speaking. Although such rules would be useful for achieving full cross-border legal certainty, as confirmed by many stakeholders in the public consultation, the current diversity in Member States' legal systems over insolvency proceedings seems too large to bridge given the numerous links between insolvency law and connected areas of national law, such as tax, employment and social security law. Prescriptive harmonisation could require far-reaching changes to commercial law, civil law and company law, whereas flexible provisions risk not bringing about desired changes.'[45]

The Directive therefore focuses on the most crucial aspects of restructuring framework, which is, first and foremost, early restructuring. Introduction of the minimal requirements that enable businesses the access to the restructuring proceedings should not be undervalued. The reason for this would be the fact that the Member States that do not have restructuring frameworks in place would otherwise paralyze cross-border restructuring proceedings. Moreover, minimal harmonisation[46] includes 'lifting the obligation to file for insolvency while the debtor is still in

[42] Eidenmüller, 'Contracting for a European Insolvency Regime' (n 15) 277: '[…] if the Member States' pre-insolvency restructuring laws were harmonised according to the Commission's proposal, regulatory damage would be done on a grand scale—an inefficient procedure would be forced upon all Member States without market forces operating as a potential corrective'.
[43] Preventive Restructuring Directive, recital 8: '[a] higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs'.
[44] ibid., recital 12.
[45] Proposal for a Restructuring Directive.
[46] ibid.

a formal restructuring process as otherwise such filing might prevent the restructuring from attaining its goals'.[47]

Based on the fact that the EU legislator's wish to fast-track the enforcement of the Directive[48], it is unlikely that the process of harmonisation of laws on restructuring has come to an end. It is being said that the EU is engaged in a 'long-term project'[49] (that is, essentially, the project harmonisation) which would obviously play in hand of development of the internal market, but which is being implemented rather slowly.[50]

2.2. The rise of rescue-culture: restructuring proceedings as an alternative to traditional insolvency proceedings

2.2.1. Feasibility of restructuring on economic level

As mentioned before, the Commission sometimes calls early restructuring a 'second chance' to companies. But what, essentially, is a second chance? In the world where capitalist structure is prevailing and the ultimate goal seems to be the maximisation of wealth[51], why should the legislator bother striking life into businesses that experience severe financial distress? The priority of legal harmonisation that the EU is aiming for has been already discussed. However, a much-debated question on whether to rescue financially distressed businesses or liquidate them instead seems to never have a clear-cut answer. Understanding the aspects which lay the ground for the modernisation of the EU insolvency law will also explain the incentives behind it and the interests that appear to be on the weights for the choice of policy path.

It is indeed that the notion of restructuring, seen from the creditor's perspective, can be less viable compared to liquidation. From the outset, liquidation, or the sale of available liquid assets of the debtor on the market, means the possibility for creditors to enforce their material rights to recover debts.[52] Unlike liquidation, the restructuring does not require the business to

[47] ibid.
[48] Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (n 40), 559.
[49] ibid., 550.
[50] ibid., 551.
[51] See Robert K Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy ' (1992) 71 Tex L Rev 67.
[52] Tollenaar, (n 11) [1.20].

be sold to a third party and rather coordinates the reorganisation of debt which can be performed through various models.[53]

One of the leading bankruptcy theories, the creditors' bargain theory[54], claims that every insolvency framework should be questioned from the creditors' *ex ante* perspective. This involves questioning whether the system at hand is this the system that the creditors would agree to from the very beginning.[55] Based on this theory, creditors can only agree to the system that allows them to efficiently enforce and realise their rights.

Creditors' bargain theory explains why liquidation has traditionally been creditors' first choice[56] – liquidation happens within a certain period of time, and assets are converted into cash according to the highest bid received during the sale and the cash is then allocated between the entitled creditors. This procedure is efficient and predictable, whether it is the case of forced or voluntary liquidation. However, economically speaking, there is one reason which would encourage the creditors to opt for restructuring instead. In liquidation, the company loses a considerable amount on the difference between the perceived value of the business (fair market value) and the actual price paid for its assets during the liquidation (liquidation value).[57] Fair market value is used as a standard for valuation and is defined as the highest price that the market is ready to pay for the assets when there are no conditions limiting such sale (e.g. time, compulsion to sale).[58] Liquidation price is usually much lower than the fair market value because the market is limited. By restructuring, the creditors can avoid the liquidation discount and preserve the value of the business.

As stated by Tollenaar, "[t]he objective [of a restructuring] is to avoid a 'forced sale discount' accruing to a third-party buyer and to retain the attendant value for the benefit of the creditors as a whole, to be distributed in accordance with the applicable, pre-existing priority rules".[59] Although the Preventive Restructuring Directive does not require the business to be sold, it nevertheless permits the sale of business as a going concern.[60] Sale as a going concern is the mechanism often used in the US and means that 'the business would not get dissolved

[53] ibid., [1.07].
[54] Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' [1982] 91 Yale L.J. 857 < https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6733&context=ylj> accessed 19 May 2021.
[55] ibid., 860; Tollenaar (n 11) [2.05].
[56] Tollenaar (n 11), [2.15].
[57] ibid., [3.50].
[58] ibid., [3.22]-[3.29].
[59] ibid., [3.144].
[60] See Article 2(1)(1) of Preventive Restructuring Directive. It allows the sale of the business as a going concern where the national law so provides.

and the corporate debtor's business would remain functional' despite the sale during restructuring or liquidation.[61] Restructuring can be therefore enforced through a restructuring plan which provides a sale as a going concern where national law allows.

Interestingly, although allowed under the Directive, the text of the Proposal for a Restructuring Directive didn't consider a sale as a going concern as a possible restructuring mechanism. This was heavily criticised by some.[62] It is believed that the sale as a going concern (i.e., without interruption of the business) is a viable mechanism since it is faster and since there is a room for value maximisation.[63] Moreover, it corresponds to the initial goal of restructuring, i.e., preserving the business and its operations. Such mechanism is, by its nature, rather close to liquidation proceedings and can therefore face the same challenges that are attributable to liquidation such as a limited market which calls for a compulsive sale. However, those are rare, and the benefits of the sale are perceived to be outweighing the downsides.[64]

2.2.2. Viability test

While the Directive encourages the rescue of the business, it specifies that 'non-viable businesses with no prospect of survival should be liquidated as quickly as possible'.[65] Indeed, there is a big risk that the restructuring proceedings can be misused by failing businesses which will result in even more dangerous consequences with losses accumulating and growing.[66] Before the Proposal for a Restructuring Directive was announced, this was a point of particular collision between the Member States because the line between assessment of whether the company is genuinely failing and whether it can be rescued is quite thin.[67]

To tackle this, the Preventive Restructuring Directive has introduced two tests: the viability test and best-interest-of-creditors test. The viability test has its objective to set the bar which

[61] Ashmika Agrawal, 'Liquidation as Going Concern Under Insolvency and Bankruptcy Law' (2020) 3, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527389> accessed 19 May 2021.
[62] Eidenmüller, 'Contracting for a European Insolvency Regime' (n 15) 288.
[63] ibid.
[64] ibid., 289.
[65] Preventive Restructuring Directive, recital 3.
[66] ibid.
[67] Even in the Member States which permitted the access to restructuring proceedings before the introduction of the Preventive Restructuring Directive, preventive restructuring was used only to a very small percent. For example, only 2% of businesses in Germany used restructuring-like proceedings during the period between 1999 and 2012 . See Guido Birkner, Ronja Erb, *Insolvency and Restructuring in Germany - Yearbook 2014* (2014) 37-38 <https://www.schultze-braun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch-2014/Yearbook2014.pdf?_=1404467382> accessed on 27 March 2021; Eidenmüller, 'Contracting for a European Insolvency Regime' (n 15) 285.

would exclude debtors that do not have the prospect of viability.[68] The best-interest-of-creditors test implies that no dissenting creditor should be worse-off than in liquidation proceedings[69].

In contrast to the best-interest-of-creditors test, the Directive is quite ambiguous in defining how the viability test should be performed. It does differ between financial and economic distress of the business claiming that businesses in financial difficulties should not be rescued if they are not *economically* viable or cannot be readily restored to economic viability.[70] This means that financial distress is generally tolerable and deserves a rescue, whereas economic distress does not. It is hard to distinguish between the two in empirical economics, let alone legal terms. Economic viability can be better explained through markers of economic distress. In their entirety, they encompass the general inability to operate business, for instance, the business should be regarded as economically non-viable if it ignores procedural requirements or suspends payment for ongoing expenses.[71] The Directive repeats the Recast Insolvency Regulation in describing the markers of economic distress in its recitals which are explained as follows:

> 'Member States should be able to extend the scope [...] to situations in which debtors face *non-financial difficulties*, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.'[72]

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[68] Preventive Restructuring Directive, recital 26, Article 4(3).
[69] ibid., recital 52, Article 2(1)(6). The Directive also permits the best-interest-of-creditors test to be performed on the basis of comparison with the event of the next-best-alternative scenario if the restructuring plan were not confirmed. Such scenario can be performed, for instance, on the basis of a different restructuring plan with adequate support or the continuation of the debtor's business without any restructuring plan. See Tuula Linna, Business Sustainability and Insolvency Proceedings —The EU Perspective, J Sustain Res. 2020 2(2):e200019 6 <https://doi.org/10.20900/jsr20200019> accessed 17 March 2021.
[70] Preventive Restructuring Directive, recital 3. According to Eidenmüller in 'Contracting for a European Insolvency Regime' (n 15), a viable firm is a firm that does not suffer both financial and economic distress at the same time.
[71] Edward R. Morrison, 'Bankruptcy Decisionmaking: An Empirical Study of Continuation Bias in Small-Business Bankruptcies' (2007) 50 Columbia Law School Journal of Law & Economics 381; Center For Law & Economic Studies Working Paper No.239 (2006) 19 <https://scholarship.law.columbia.edu/faculty_scholarship/2422> accessed 28 March 2021.
[72] See Preventive Restructuring Directive, recital 28; Recast Insolvency Regulation, recital 17 (emphasis added).

Notably, the viability test, unlike best-interest-of-creditors test, is to be performed first by the management of the firm and only then it can be assessed in the court.[73] Since the burden of such analysis is transferred to the debtor and its creditors, the Directive has no need to explicitly define it. Therefore, the viability test could include comparison of the current state of the business with its profitability prognoses and analysis whether the business is able to maintain viable ongoing business operations.[74]

It is also recognised that efficient restructuring frameworks increases recovery rates. Recovery rate can be described as the value recovered by creditors through restructuring proceedings.[75] It is calculated on the basis of time, cost and outcome of such proceedings against the debtor company.[76] High recovery rates indicate a creditor-friendly environment where creditors are likely to return a larger share of their material claims which consequently implies a safer, healthier environment for businesses. Recitals of Preventive Restructuring Directive mention on several occasions that low recovery rates deter investors from maintaining activity in the territories where the procedures are unfavourably costly.[77] Based on the World Bank Doing Business Report 2016 the data of which was also cited in the Proposal for the Directive, the Member States with effective national restructuring frameworks like Belgium or Finland had considerably higher recovery rates (90% on average) than the economies with limited access to restructuring such as Croatia or Romania (30% on average).[78] Having restructuring frameworks available for debtors and its creditors has a positive effect on recovery rates in general: 83% of return in comparison to an average of 57 % in countries where traditional liquidation procedures prevail.[79]

2.2.3. The world outside the bubble of creditors' bargain theory

As it has been shown, financial incentives remain to be the ones driving the EU insolvency framework with the interest of the creditors and economic viability being in the spotlight. Many economists claim, however, that, for a setting that involves multiple society members, the

[73] Linna (n 69) 6; Lydia Tsioli, 'Viability Assessment: Models and filtering mechanisms from U.S. Chapter 11 to the European Directive' (INSOL Europe Academic Forum Conference 2020, 30 September 2020) <https://www.insol-europe.org/download/documents/1898> accessed 26 May 2021.
[74] Linna (n 69) 5.
[75] A World Bank Group Flagship Report, Doing Business Report 2016, 157 <https://www.doingbusiness.org/en/reports/global-reports/doing-business-2016> accessed 4 April 2021.
[76] ibid.
[77] Preventive Restructuring Directive, recitals 6-8, 16.
[78] See Proposal for a Restructuring Directive 3; Doing Business Report 2016.
[79] ibid.

creditors' bargain theory which premiers solely creditor's interests is too narrow and exclusive to be fully implemented.[80] For example, while focusing mostly on financial outcomes of insolvency the theory does not take into consideration topical societal issues such as job loss and employee's rights. It is instead claimed that the insolvency regime will be much more just if it would be viewed from the perspective that would allow all parties, including the legislator, to stand behind 'the veil of ignorance' where they are mindful only about the status of other parties and not of its own.[81] The parties will then be likely to find themselves not only in the position of the creditor, but in the position of other stakeholders.[82]

It seems that this approach is also favoured by the EU legislator. A part that strikes the eye stands right in the middle of Recital 1 of the Preventive Restructuring Directive which provides that the Directive focuses on restructuring the viable businesses

> '[w]ithout affecting workers' fundamental rights and freedoms'.[83] Indeed, according to European Restructuring Monitor data, the EU has lost approximately 2.8 million jobs due to restructurings during 2008 and 2015.[84] The Directive would therefore contribute to 'minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy'.[85]

Economic and financial incentives surrounding the agenda of building a well-functioning internal market and Capital Markets Union are driving the positive change in the social context.[86] The EU legislator underlines the importance of maintaining viable businesses for prevention of job losses and establishing the save environment for employees of the debtor. In particular, the Preventive Restructuring Directive stipulates that, in the event of restructuring, the appropriate involvement of the employees and their representatives, as well as the right of

[80] Tollenaar (n 11), [2.34].
[81] The concept of the veil of ignorance was introduced by John Rawls and considered balancing different interests possible only when the liberties are recognised and the least advantaged parties are identified. See John Rawls, *Theory of Justice* (Harvard University Press 1971); Robert K. Rasmussen, 'An essay on optimal bankruptcy rules and social justice' [1994] University of Illinois Law Review 1,12.
[82] Tollenaar (n 11) [2.36]-[2.46].
[83] Preventive Restructuring Directive, recital 1.
[84] Eckhard Voss, 'Revisiting Restructuring, Anticipation of Change and Workers Participation in a Digitalised World', Report to the ETUC (2016) 5 <https://www.etuc.org/sites/default/files/publication/files/revisiting-restructuring-en_new2.pdf> accessed 4 April 2021.
[85] Preventive Restructuring Directive, recital 16.
[86] Impact Assessment (n 31): 'The inefficiency and divergence of insolvency laws make it both harder for investors to assess credit risk in general and particularly as regards cross-border investments. More cross-border risk-sharing, deeper and more liquid capital markets and diversified sources of funding for EU businesses will deepen financial integration, lower costs and increase the EU's competitiveness. This in turn will contribute to job creation and sustainable growth.'

employees to receive up-to-date information of the availability of early warning tools and protection of individual claims of workers against the debtor has to be guaranteed.[87] The Directive ensures that the claims of workers are taken into consideration when the restructuring plan is being drafted and even makes it possible that the workers can even be viewed as a separate class in the class formation.[88] In general, the restructuring plans are now subjected to higher scrutiny with regards to protection of workers, for instance where the company bears a loss of more than 25% of workforce due to restructuring, the restructuring plan that is drafted by the parties must be reviewed and confirmed by the judicial or administrative authority.[89]

The agenda of the EU legislator tends to be all-encompassing, and it definitely provides space for positive changes in favour of protection of workers. However, the Directive also contains some 'may' clauses which presents a leeway for the Member States to introduce substantial laws which would only guarantee the bare minimum in terms of employee's protection.[90] For instance, under Article 1(5)(a) the Directive makes it possible to exclude the claims of the workers from the scope of preventive restructuring frameworks. Again, such inconsistency flows from the fact that substantial laws of the Member States tend to differ greatly - both general insolvency frameworks and the level of worker's protection in insolvency. Therefore, providing the Member States with a pre-insolvency framework with little chance to navigate it would be met with great resistance.

2.3. Interim Conclusion to Chapter 2

It took about 30 years to incorporate the concept of restructuring into the context of insolvency law. The explanation for the lengthy process is that the EU encompasses a wide range of legal traditions and perspectives on insolvency and business rescue.

The Directive contained many points of debate between the Member States and the EU legislator. The concept of insolvency, for example, is by far the most contentious issue. This definition must be defined in order to determine when a company must file for insolvency and when it is still possible to restructure. However, the connection point is difficult to find since

[87] Preventive Restructuring Directive, recital 10, 23, 60, 61, Article 3, 6 and 13.
[88] ibid., Recital 44, Article 9.
[89] ibid., Article 11(1)(c).
[90] ibid., Article 1(5)(a), Article 6 on the stay of individual enforcement actions. See also European Trade Union Confederation, 'Strengthening Workers' Voices in Cases of Insolvencies Guidelines and Recommendations: More Democracy at Work Still Needed' (2019) < https://www.etuc.org/sites/default/files/publication/file/2019-10/Brochure%20Insolvency%20Guideline_EN.pdf> accessed 19 May 2021.

the Member States conduct insolvency tests differently. The introduction of the Directive therefore necessitated constant compromise from EU legislators, resulting in a more generalized and impartial approach to restructuring proceedings and offering a wide playing field for the Directive's implementation.

Such a legislative compromise is understandable. The Directive's statutory basis is Article 114 TFEU which suggests that the Directive's aim is to harmonize national restructuring laws. Given the current situation, however, complete harmonization is difficult to foresee. According to the Directive's legislative procedure, the further the legislator aims for harmonisation, the more resistance the Member States may show.

For this reason, the implementation of minimum standards for restructuring frameworks should not be underestimated. Instead, the study shows that the implementation of minimum standards has a positive impact on the efficacy of EU restructurings. Furthermore, the legislator's goals are consistent with the overall growth of the EU market.

First, it acknowledges that pre-insolvency economic conditions have a direct effect on the EU's business environment. As a result, it seeks to save economically viable businesses that can continue to operate while their debt is restructured. Unlike liquidation, restructuring proceedings allow creditors to avoid losing money on a forced sale of the company and retain the value of the company.

Second, by defining the difference between financial and economic feasibility, the legislator seeks to increase the number of financially viable companies on the market. This contrasts with the situation prior to the adoption of the Directive, where any business that was financially viable could risk being liquidated. Saving economically viable businesses boosts the Union's recovery rates and ensures that workers' rights are better protected in the event of a company's financial distress.

3. The relationship between Preventive Restructuring Directive and Recast Insolvency Regulation

When the Directive was passed, it became part of the complicated structure of EU insolvency law, which is largely defined by the Recast Insolvency Regulation. As mentioned previously, the Regulation allows the preventive restructuring frameworks to fall within its scope. While there might be undeniable benefits to this, the connection with the Regulation may impede the effectiveness of restructuring proceedings. The aim of this Chapter is to analyse the relationship between the Preventive Restructuring Directive and the Recast Insolvency Regulation. It will attempt to address the questions of what implications the system built by the Regulation's has on the Directive and how it affects regulatory competition between Member States.

3.1. Understanding the scopes: effects of interconnectivity

Preventive Restructuring Directive and Recast Insolvency Regulation are different in their nature and have different legislative aims but the scopes of these two legislative instruments are extremely interconnected.[91]

The objective of Recast Insolvency Regulation is to set the rules on jurisdiction, applicable law and to strengthen the recognition and enforcement of national proceedings in other Member States. It introduces the term 'automatic recognition' which means that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States.[92] Based on Article 1(1), the material scope of Recast Insolvency Regulation applies to 'public collective proceedings, including interim proceedings, which are based on laws relating to insolvency' and which satisfy the conditions

[91] Francisco Garcimartin Alferez, 'Cross-border Restructuring Proceedings within the EU: the Insolvency Regulation and the Future Directive on Restructuring Frameworks' (LUISS School of Law Conference 'Cross-Border Business Crisis: International and European Horizons', Rome, November 2017). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205217> accessed 20 May 2021.
[92] Recast Insolvency Regulation, recital 65.

(a) to (b) of Article 1.[93] Second paragraph of Article 1 specifically includes pre-insolvency and hybrid proceedings in its scope if those have been added to Annex A accompanying the Regulation.[94] The recitals specify that pre-insolvency proceedings should fall in the scope of the Regulation only if they take place under the control or supervision of a court.[95] This requirement highlights that to fall under the scope of the Regulation, the proceedings have to be public as opposed to private, confidential or out-of-court proceedings. Additionally, the Regulation specifies that 'laws related to insolvency' are such laws that have 'the purpose of rescue, adjustment of debt, reorganisation or liquidation'.[96]

It's important to remember that before the recast version of the Regulation was adopted, pre-insolvency frameworks were not explicitly addressed by the Regulation. It is reasonable to assume that the importance of restructuring in the EU developed during the drafting of the Recast Insolvency Regulation. As a result, the legislator has intentionally left room for restructuring frameworks in the Regulation. The inclusion of restructuring frameworks within the scope of the Regulation, in the legislator's opinion, would imply faster and smoother restructuring proceedings. But has the legislator reached this result? What is the relationship between the scope of the Recast Regulation and the Directive (which was drafted in a way to be complementary to the new European Insolvency Regulation[97])?

In Article 1(1) the Directive lists the procedures that have to be introduced by the Member States in implementation of the Directive. These are the following:

'(a) preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;

(b) procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and

(c) measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.'[98]

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[93] Recast Insolvency Regulation, Article 1.

[94] ibid. In total, Recast Insolvency Regulation includes eight pre-insolvency proceedings in its scope. For the list of proceedings, see Bob Wessels, 'The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries' European Company Law 13, no. 4 (2016) 131 <https://kluwerlawonline.com/journalarticle/European+Company+Law/13.4/EUCL2016019> accessed 20 May 2021.

[95] Recast Insolvency Regulation, Recital 10.

[96] ibid., Article 1.

[97] Preventive Restructuring Directive, recital 13.

[98] ibid., Article 1(1); See Dammann (n 12) 38 [5]: 'These provisions must be read in context with Chapter 1, Article 4 of the Directive regarding the availability of the preventive restructuring frameworks, Article 2 par.1 no.1 4, 24, 25, 27, 28 and 29.'

It would be helpful to compare and contrast the mechanisms that the Directive seeks to provide with the Regulation's scope. It must be noted from the outset that the Regulation does not address the fact that restructuring proceedings can take various forms. Even though, as it was mentioned, the Directive allows for variability of restructuring proceedings, the Regulation would support only public and collective restructuring frameworks. In terms of substance, there's nothing wrong with that. When viewed from the perspective of the Directive, however, the contradiction is clear: although the Regulation materially includes the restructuring procedures in its scope, it does not give due consideration to the different types of restructuring procedures that are available under the Directive.

Moreover, the condition that the frameworks must be based on the 'laws related to insolvency' is quite ambiguous in respect of restructuring frameworks and will depend solely on the national legal system of each Member State. While some frameworks may indeed satisfy this requirement, restructuring proceedings which are based on private law will fall outside of the scope of the Regulation.[99] These are, first and foremost, agreements between the debtor and its creditors that are not based on insolvency law.

Therefore, the Regulation is rather stringent with respect to restructuring frameworks. The Virgos-Schmit report offers some insight into this, claiming that while restricting the application to only liquidation proceedings would help to simplify the rules, it would not meet the expectations of many Member States.[100] According to the report,

> '[e]conomic analysis shows that retaining the option between two possibilities in insolvency law (winding-up or reorganization) is in itself a sound decision. [...] There is no economic reason to justify the exclusion of reorganization proceedings from international cooperation. [...] For some Contracting States the exclusion of reorganization proceedings would therefore be unjustified.'[101]

It could be said that the inclusion of restructuring proceedings under the scope of the old Regulation was a political concession. Safeguarding pre-insolvency proceedings was a long-term agenda of the EU legislator and it was reserving the space for pre-insolvency proceedings

[99] In respect to the latter, see English Schemes of Arrangements; See JCOERE Report 1 (n 27): 'The provisions in the PRD emulate the US Chapter 11 to some extent, but there are stark differences between the provisions of the PRD and the English Scheme of Arrangement, despite anecdotal evidence that the Scheme was an influence in the drafting process of the PRD. […] the Scheme is not considered an insolvency procedure deriving as it does from UK Company Law and is therefore not included in Annex A of the EIR Recast.'.
[100] Miguel Virgos, Etienne Schmit, Report on the Convention on Insolvency Proceedings (1996) [50].
[101] ibid.

in the scope of the Regulation in case the Directive wouldn't be enforced. Perhaps more troublesome is that the Regulation treats restructuring in a very narrow and liquidation-like manner. While drafting the Directive, the legislator specifically focused on the contrary.[102] The Directive follows a different, much broader direction. It does not favour a specific form of restructuring, therefore offering a wide discretion for Member States. According to its recital 13, the Directive should not prejudice the scope of the Recast Insolvency Regulation and Member States shall be able to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A of the Regulation.[103] Annex A is the formal scope of the Recast Insolvency Regulation. It lists national proceedings that were indicated by the Member States to be covered by the Regulation. The list in the Annex A is exhaustive which means that the Regulation will not cover the procedures not listed in the Annex A (even if they materially satisfy the scope of the Regulation). At the same time, there will be no additional assessment whether the procedures that have been already included in the Annex A actually satisfy the material scope of the Regulation.[104]

Only certain restructuring frameworks that meet the criteria of Article 1(1) of the Regulation can be included in Annex A. It entails only supporting for restructuring frameworks that necessitate the intervention of the courts. By contrast, the procedures that are confidential would not satisfy the material requirements of the Regulation and, since it would not be possible to include them in the Annex A, would stay out of its formal scope too.[105] This means that out-of-court restructurings will be difficult to recognise as well as enforce the obligations stemming from such private restructuring agreements in other Member States.

The fact that a national preventive restructuring framework is listed under Annex A can be important for cross-border companies that want to use it, because the Regulation will not only specify which court should have jurisdiction and which insolvency regime is relevant, but it will also provide for cross-border recognition. However, in general, Member States have complete discretion on whether or not to include restructuring frameworks in the Annex A. While including public restructuring frameworks in Annex A will undoubtedly be advantageous in terms of recognition of the proceedings, Member States may opt not to do so in order to avoid

[102] See Dominik Skauradszun, 'Ein Umsetzungskonzept für den präventiven Restrukturierungsrahmen' (2018) KTS - Zeitschrift für Insolvenzrecht 2019 2, 10 <https://ssrn.com/abstract=3300609> accessed 20 May 2021: 'Furthermore, it is not without concerns that an expansion of Annex A brings the preventive restructuring framework very close to insolvency proceedings, simply by the terminology of the EuInsVO. The aim has always been to avoid this.', as translated by the author.
[103] Preventive Restructuring Directive, recital 13.
[104] ibid.
[105] ibid., recital 9.

complying with the other material conditions of Article 1(1) of the Regulation. Such freedom, however, may be troublesome because it will increase the legal uncertainty faced by debtors and their creditors.

3.2. The problematic nature of Annex A

The nature of Annex A was widely debated, especially after the enforcement of the Preventive Restructuring Directive. It was already mentioned that the fact that the Member States are not obliged to include the pre-insolvency framework in the Annex A and have a discretion to decide whether to do so[106] can raise numerous problems to efficiency of the principle of mutual recognition. If a Member State opts not to include the national framework in the Annex A, the Recast Insolvency Regulation will not apply to national pre-insolvency proceedings, which might consequently fall under the jurisdiction of legislative acts that are historically used to recognize judgments but are not explicitly related to the insolvency framework. This relates, for instance, to the Brussels Regulation, Rome I Regulation and UNCITRAL Model Law.[107] If a pre-insolvency proceeding finds itself outside of the scope of the European Insolvency Regulation, the risk of conflict of jurisdiction is high.[108]

Secondly, the inclusion of national restructuring frameworks in the Annex A by Member States prior to the Preventive Restructuring Directive's entry into force does not imply that these frameworks are or will be consistent with the Directive's minimum requirements. Neither the Regulation, nor the Directive itself require the frameworks already included in the Annex A to comply with the minimum requirements listed in the Directive. Such regulatory choice of the EU legislator offers the Member States a wide playing field during the transposition of the requirements of the Directive. This means that for the Member State that chooses not to amend Annex A frameworks as required by the Directive, the possible escape route would be to introduce at least one restructuring framework which would be compliant with the Directive.[109]

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[106] ibid, recital 13.
[107] See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Recast Brussels Regulation'); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[108] Lorenzo Stanghellini, Andrea Zorzi, 'Coordinating the Preventive Restructuring Directive and the Recast European Insolvency Regulation, (2019) 77 Eurofenix 24 <https://www.insol-europe.org/download/documents/1648> accessed 20 May 2021.
[109] ibid., 23; possibility not to implement the Directive through Annex A is suggested by Article 6(8) of the Preventive Restructuring Directive: '[w]here Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848 [...]'.

This, however, would not address the underlying issue of a potential inconsistency between the Annex A frameworks and any current pre-insolvency frameworks introduced under the Directive but not included in Annex A. The apparent risk would be that despite being compliant to the Directive, national pre-insolvency frameworks would give rise to even more regulatory diversity in the EU as well as problems with mutual recognition which does not essentially follow the harmonisation aim of the Directive. Furthermore, it will create confusion for cross-border companies when deciding on the basis on which the proceedings will be based.

Another weakness related to Annex A is that it is difficult to incorporate national restructuring frameworks adopted by Member States after the Recast Insolvency Regulation took effect. The old version of the Regulation contained a provision that enabled the European Council to amend the Annexes through the qualified majority voting.[110] Annexes to the old version were amended eight times since its entry into force in 2002.[111] However, the recast version of the Regulation moved away from including a similar provision in its text which means that it became nearly impossible to include a new national procedure in the Annex A after its entry into force on 26th of June 2017 without changing the Regulation itself.[112] Although the possibility for the Commission to amend Annexes were included in the Proposal to the Regulation, it was renounced by the Council which, as suggested by Bob Wessels who advised the European Committee on the recast of the Insolvency Regulation, did not want to transfer this power to the Commission.[113] It is needless to say that this will call for lengthy and costly negotiations preceding drafting the new version of the Insolvency Regulation. Here, again, arises the problem of legislative inconsistency and possible loopholes. One of the obvious examples is the fact that including the national framework in Annex A does not mean this framework is, in practice, compliant to the cornerstone provision of Article 1 of the Regulation itself. The reason is - once included in Annex A, the national framework is untouchable. In the context of impossibility of amendments to Annex A, this situation is very concerning. Bob Wessels describes the current state of affairs as 'the worst choice that could have been made'.[114]

[110] Insolvency Regulation [2000], Article 45.
[111] See Wessels (n 94) 130.
[112] Kyriaki Karadelis, Interview with Bob Wessels, Emeritus Professor of International Insolvency law at Leiden University and expert counsel on restructuring and insolvency to the European Commission, 'On Annex A of the Insolvency Regulation', <https://bobwessels.nl/blog/2017-09-doc5-on-annex-a-of-the-insolvency-regulation/> accessed on 31 March 2021.
[113] ibid.
[114] Wessels (n 94) 132.

That being said, the legislator is well aware of this problem. The Netherlands, Italy, Lithuania, Cyprus and Poland have notified the Commission of the changes to national law related to restructuring proceedings.[115] On 11th of May 2021, the Commission issued the Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings.[116] The proposal provides that '[i]t is […] of utmost importance that these Annexes are regularly updated in order to reflect the actual legal situation in the Member States'.[117] The Recast Insolvency Regulation and its Annexes could hopefully be updated shortly.[118]

3.3. Functional connection between the Directive and the concept of COMI

One of the key elements introduced under the European Insolvency Regulation is the notion of the centre of main interest (COMI). The identification of COMI is particularly important for cross-border companies entering in restructuring proceedings as COMI will define the jurisdiction for restructuring proceedings. National restructuring frameworks which are included in the Annex A of the Regulation will therefore benefit from the definition of the debtor's COMI.

Identifying COMI in restructuring proceedings is no different than identifying COMI in conventional insolvency proceedings, since it is regulated by the Recast Insolvency Regulation and the CJEU's interpretation of COMI. According to Article 3(1) of the Regulation, COMI is defined as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'. It further adds the presumption that 'the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary'.[119]

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[115] See Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings [2021] COM(2021) 231 final 2021/0118 (COD) <https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2021/0231/COM_COM(2021)0231_EN.pdf> accessed 19 May 2021.

[116] ibid.

[117] ibid., 1.

[118] The procedure of the amendment can be followed at the Legislative Observatory of the European Parliament. See Insolvency proceedings: replacing Annexes A and B to Regulation 2021/0118 (COD) <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0118(COD)&l=en> accessed 19 May 2021.

[119] Recast Insolvency Regulation, Article 3(1).

As explained in the Virgos-Schmit, the notion of 'the place that is ascertainable to third parties' should be perceived as having in mind, first and foremost, the creditors who will be able to predict legal risks in case of the debtor's insolvency.[120] However, if the place of jurisdiction is recognised by the creditors, it is still possible to rebut it. Such circumstances usually arise when a company has its place of administration and the place of operation in separate Member States.[121] In addition, the same situation often occurs in relation to the group of companies when the main company administers the activities of other companies of the group in a given Member State without being economically involved in that market.[122]

The notion of COMI has been formed by CJEU case law and the recast version of the Regulation has incorporated a more crystalised approach developed by the Court.

3.3.1. Interpretation of COMI in *Eurofoods* and *Interdil*

There were several landmark cases in the CJEU that explained the concept of COMI in a more detailed way. In *Eurofoods* judgement, CJEU has interpreted COMI concept restrictively and held that

> '[…] the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted *only* if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect'.[123]

The Court in *Eurofoods* approached the decision in favour of incorporation theory and underlined the predominance of the registered office in identification of jurisdiction but nevertheless held that in case of a 'letterbox' company such presumption can be rebutted.[124] With regards to group of companies, the presumption of registered office still remains even if

[120] Virgos-Schmit Report (n 100) [75].
[121] Renato Mangano, 'The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises', European Business Organization Law Review (2019) 20:779–800 784 < https://link.springer.com/article/10.1007/s40804-019-00141-3?wt_mc=Internal.Event.1.SEM.ArticleAuthorOnlineFirst&utm_source=ArticleAuthorOnlineFirst&utm_medium=email&utm_content=AA_en_06082018&ArticleAuthorOnlineFirst_20190302#citeas> accessed 20 May 2021; Case C-341/04 *Eurofood IFSC Ltd*, [2006] ECR I-3813, para 25.
[122] ibid.
[123] Case C-341/04 *Eurofoods,* para 34 (emphasis added).
[124] ibid, para 35.

the economic activity is controlled from the other Member State than the Member State where the company is registered and the business is carried out.[125] The interpretation of *Eurofoods* is claimed to be too restrictive[126] and the explanation might indeed be too scarce to apply it to practical matters when complex commercial arrangements exist.

The Court took the possibility to clarify the notion of COMI later in the case *Interdil* and acknowledged that situation 'must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case'.[127] The Court brings an example that in case of a company which concludes lease agreements and agreements with financial institutions in the Member State other than the Member State where the office of the company is registered, COMI may be considered to be situated in the former Member State.[128] In its view, such factors 'may be regarded as objective' and 'likely to be matters in the public domain, as factors that are ascertainable by third parties'.[129] However, the margin set by *Eurofoods* still stays in favour of presumption that the centre of main interest cannot be situated in the Member State where the company's assets are and in which the contracts for the financial exploitation of those assets are executed, unless it can be proven otherwise.[130]

The Recast Insolvency Regulation has incorporated *Interdil* approach in recital 30 which provides the rebuttable presumption on the basis of assessment of relevant factors.[131] However, although the recast Regulation's effort to comprehensively encapsulate all problematic aspects of COMI evaluation is commendable, it still leaves problems that existed even during *Eurofoods* and *Interdil*, and which will be encountered again in restructuring proceedings. For instance, the problem with which the Court was dealing in *Eurofoods* and the interpretation that was incorporated in Article 3(1) of the recast Regulation regarding the companies whose place of regular administration and place which is ascertainable by third parties are situated in

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[125] ibid, para 36.
[126] Costanza Honorati, Avv. Giorgio Corno, 'A double lesson from Interedil: higher courts,lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation', IILR_2012_000018_1 19 <https://www.iiiglobal.org/sites/default/files/iilr_2012_000018_1-2.pdf> accessed 20 May 2021.
[127] Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.* [2011] EU:C:2011:671, para 52; Case C-396/09 *Interedil*, Opinion of AG Kokott, para 70.
[128] Case C-396/09 *Interedil*, para 53.
[129] ibid.
[130] ibid.; Case C-341/04 *Eurofoods*, para 36.
[131] Recast Insolvency Regulation, recital 30: 'Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is *genuinely* located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State [...].'(emphasis added).

different Member States still exists, specifically in terms of 'letter-box' companies or groups of companies. For such companies, as it is claimed, "the elements of 'administration on a regular basis' and 'ascertainability by third parties' [...] can be mutually exclusive *de facto*".[132] Another problem that remains is that the assessment of 'other relevant factors' does not give much clarification on COMI in complex cases since it is unclear how each of those factors should actually impact the assessment.

The only possible solution would, it seems, be the list of assessment elements where each of their significance to COMI would be described.[133] Until then, it will still be a challenge for national courts to determine the place of COMI since the territory where all the elements of the company's activity are executed can be mutually significant in terms of assessment. Where national courts will indeed struggle with identifying the debtor's centre of interests, the overlap of opened proceedings can happen which the Regulation, ultimately, was trying to avoid.

3.3.2. The influence of the difference in substantive laws and the notion of COMI on forum shopping and jurisdictional competition

As it was discussed, national insolvency frameworks differ substantially in terms of law on restructuring. While certain national proceedings are debtor-friendly and provide more possibilities for rescue of businesses as a going concern[134], others are prioritising safeguarding the claims of creditors. Alternatively, opening insolvency proceedings in a certain Member State can also be driven by opportunity for lower costs and faster court proceedings. As Eidenmüller suggests, '[t]he main forum shoppers were (and are) large corporations: the fixed

[132] Mangano (n 121) 787.
[133] ibid., 788.
[134] Reference is made to the UK which before withdrawal from the European Union was regarded as the 'restructuring capital' of Europe. Many big companies like Schefenacker, Deutsche Nickel and Hans Brochier commenced restructuring proceedings in the UK, however, the situation changed drastically after Brexit. Although the Withdrawal Agreement between the UK and the EU provides that European Insolvency Regulation will apply to restructuring proceedings commenced 31 December 2020, it can no longer be regarded as the capital of European restructuring. On this matter, see Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' [2009] The Cambridge Law Journal 68(1) 169–197 <https://www.jstor.org/stable/40388776?seq=1> accessed 26 May 2021; Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, XT/21054/2019/INIT, OJ C 384I, Article 67(3)(c) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29> accessed 26 May 2021; Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (n 40) 552-554.

costs of insolvency forum shopping are high, and these can be more economically incurred by large corporations'.[135]

The notion of COMI is inherently connected to the freedom of establishment - it regulates the status of the company after it has exercised its right to mobility in the EU. Freedom of establishment and the variety of national frameworks that are presented on the EU businesses' 'menu'[136] provides the possibilities for EU companies to choose a jurisdiction that would be particularly favourable to them. It does not only impact the choices of companies whose restructuring proceedings will commence in court, but also those who choose to opt for out-of-court restructuring. Companies that prefer out-of-court restructuring can try to benefit from the choice of law in the Member States that provide ambitious frameworks allowing no court involvement.[137] The availability of such choices as a whole has an impact on actions of not only the companies, but also that of the national legislator facilitating the creation of jurisdiction competition among the Member States. Striving towards a harmonised insolvency system in the EU, both forum shopping and jurisdictional competition are the concepts that the EU legislator is trying to avoid.

Although forum shopping for insolvency proceedings is not *per se* prohibited, both the Regulation and the Directive advice against the abusive forum shopping. From the legislator's point of view, forum shopping is abusive when the debtor moves its COMI to another Member State immediately prior commencement of restructuring proceedings solely for the reason of benefiting more favourable law, i.e. when the debtor 'has no real connection to a particular jurisdiction'.[138] To preclude such cases, the Regulation limits the presumption of the debtor's COMI as the place of the registered office if the COMI was transferred 'to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings'.[139]

However, it is possible that some national frameworks will not be included in Annex A due to the overly complicated assessment of COMI and the preference for territorial proceedings.[140] Such frameworks will for sure not benefit from the automatic recognition of

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[135] Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (n 40) 552.
[136] See Rasmussen, (n 51) 51.
[137] See, for example, Darren Azman et al, 'Out-of-Court Restructuring Alternatives in the EU, Germany and the US' (2020) The National Law Review <https://www.natlawreview.com/article/out-court-restructuring-alternatives-eu-germany-and-us> accessed 8 April 2021.
[138] JCOERE Consortium Report 1 (n 27), 'Chapter 3: The Regulation of Cross-Border Insolvency and Restructuring in the EU' 36.
[139] Recast Insolvency Regulation, Article 3(1)(3).
[140] JCOERE Consortium Report 1 (n 99), 14.

judgments under the Regulation but can nevertheless be seen as being more favourable for the entities 'if they provide an easier means of access along with better potential outcomes'.[141] The Directive was rather liberal by not obliging the Member States to include the national restructuring frameworks in Annex A, but the question how to fight the risk of abusive forum shopping still existed. To tackle it, the Directive limits certain rights of the debtor. For instance, the problem of abusive forum shopping is addressed in the Article 6(8) of the Directive: it limits the duration of stay of individual enforcement action from traditional 12 months to 4 months if the transfer of COMI was performed in the 3-month period prior commencing restructuring in the Member State that implements the Directive through the framework which does not 'fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848'.[142]

The thought behind Article 6(8) is that since the national framework is not listed in Annex A, it will not be covered by the Recast Insolvency Regulation and consequently the interpretation of COMI will not extend to such national frameworks. This would mean that no safeguards against abusive forum shopping, such as 3-month limitation, would be in force. Recognising such a problem, the EU legislator decided to transpose the 3-month limitation in the Directive which would then cover the national frameworks which chose not to be included in the Annex A.

Surprisingly, it appears that the EU legislator overlooks the fact that the Directive itself lacks a definition of COMI and that the concept of COMI only applies to the national frameworks mentioned in Annex A when considering Article 6(8) of the Directive. This means that, even if the national framework was not included in Annex A, a COMI evaluation based on the Recast Insolvency Regulation would be needed. That suggests that the notion of COMI extends beyond the scope of the Regulation.

In the context of a variety of substantial laws the result of forum shopping is regulatory competition. This means that EU Member States are engaged in the competition between each other for the most attractive insolvency framework. As Eidenmüller describes it, regulatory competition implies the existence of three elements: '*first*, a diversity of legal rules that are 'on offer', *second*, incentives for states to compete with each other, and *third*, feasibility of choice by market actors'.[143] Based on the elements he described, it can be concluded that all of them

[141] Supra note 136.
[142] See Preventive Restructuring Directive, Article 6(8).
[143] Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (n 40) 549.

are present in 'the race to the top'[144] for the best restructuring law. It is indeed that the Directive provides a wide discretion and the playing field for the Member States and, thus, multiple formats of compliant implementation of the Directive is possible.[145] Secondly, making national legislative frameworks appealing means more possibilities to attract the interest of both businesses and investors.[146] And finally, national legislators know that the possibility for forum shopping exists and businesses are openly using it.

The incentives for the jurisdictional competition are all present in case of restructuring frameworks and, unlike forum shopping, neither the Directive nor the Regulation specifically discuss it. Moreover, regulatory competition has its own set of benefits. To begin with, such competition between the Member States can be regarded as a driver for the modernisation of laws.[147] More restrictive regulations result in the loss of businesses to other Member States. In order to avoid losing them, the Member States prefer to make their frameworks more lenient in order to be able to compete with traditionally favourable jurisdictions. This was a particular example of Germany which proposed a whole new reform for the law on restructuring.[148] According to Eidenmüller, situations like these are 'discovery processes for new and, hopefully, more efficient legal products'.[149]

The EU legislator, on the other hand, attempts to flatten the regulatory competition curve by harmonising national laws, acknowledging that since these concepts are so intertwined, it can fuel abusive platform shopping. The important thing to remember is that today's harmonisation does not eliminate forum shopping or regulatory competition. It smooths out the edges but does not rip it apart at the roots.

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[144] Vasile Rotaru, 'The Restructuring Directive: a functional law and economics analysis from a French law perspective' [2019] 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461716> accessed 8 April 2021, 22.

[145] As claimed, the Directive provides around 70 different options to the Members States. See Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (n 40) 560.

[146] Alain Pietrancosta, Sophie Vermeille, 'Le droit des procédures collectivesà l'épreuve de l'analyse économique du droit Perspectives d'avenir?' RTDF N° 1 - 2010, 2 <https://droitetcroissance.fr/wp-content/uploads/2015/04/1.-Le-droit-des-proc%C3%A9dures-collectives-%C3%A0-l%C3%A9preuve-de-lanalyse-%C3%A9conomique-du-droit.pdf> accessed 21 May 2021: 'States are now called upon to reason globally, by comparison with their neighbors, partners but also competitors, to be situated by in relation to international standards, and summaries of the rules likely to attract investors, in the best interests of companies.', as translated by the author.

[147] ibid.; Rotaru (n 144).

[148] See Horst Eidenmüller, 'Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law' (2018) ECGI Working Paper Series in Law, Working Paper N° 403/2018 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171973> accessed 21 May 2021.

[149] ibid.

3.4. Interim Conclusion to Chapter 3

The Chapter has shown that the Directive has a close relationship with the Regulation. The EU legislator's decision to include pre-insolvency proceedings in the framework of the Recast Insolvency Regulation is generous on the one hand, but restrictive on the other.

In comparison to the Directive, the Regulation takes a different approach to pre-insolvency frameworks. This results in a discrepancy between the two legislative instruments: while the Directive provides for broad discretion in implementation of the national insolvency frameworks, the Regulation is very selective prioritizing public collective restructuring proceedings which are based on the laws related to insolvency.

Although the Directive does not require the national restructuring frameworks to satisfy the scope of the Regulation, it prompts the Member States to do so by highlighting the benefits of the Regulation. Such benefits include automatic recognition, center of main interests' definition and the safeguards against abusive forum shopping. However, in reality, only a few restructuring frameworks will be able to benefit from these provisions of the Regulation.

The role of the formal scope of the Regulation (i.e., Annex A) is given a lot of attention in this chapter. It finds that the Annex A is problematic from the perspective of implementation of the requirements Directive. In particular, the decision of the European Council to disallow the Commission to have to power to amend Annex A is purely political and has adverse consequences in the efficiency of the pre-insolvency frameworks that were adopted by the Member States as a result of implementation of the Directive.

For the frameworks which will fall under the scope of the Regulation, the Regulation will define the concept of COMI. Despite the CJEU's comprehensive case law on the subject, identifying COMI remains difficult. Apart from the difficulties in defining it, the notion of COMI extends beyond the frameworks that are covered by the Regulation, and it can be considered an independent concept. Although the Directive does not regulate on the cross-border matters and jurisdiction, the concept of COMI is provided in Article 6(8) of the Regulation. This shows the legislator's strong intention to regulate the shifts of COMI and prevent abusive forum shopping.

4. Recognition puzzle for restructuring of cross-border businesses

The efficiency of European restructuring frameworks must be measured not only by their general availability to companies seeking to restructure their debts, but also by the legislative systems that enable their long-term viability across the EU. It was already discussed that the Member States possess a wide discretion in transposition of the Directive which consequently gives the rise for high variability in substantive laws. The centre of focus is therefore placed on cross-border companies: how will the companies that operate in several Member States facilitate the recognition and enforcement of the proceedings across the EU?

There are several scenarios in which the recognition of national restructuring decisions is important. The first classical example that comes to mind is the case where the restructuring proceedings need to be recognised in other Member States in order to give an enforcement effect to such proceedings.[150] Moreover, recognition of the restructuring is significant in cases where 'the court having jurisdiction to decide on matters relating to a debtor's preventive restructuring framework is not located in the Member State in which the debtor is incorporated'.[151] It is important that restructuring proceedings that have far-reaching effects in more than one Member State can be successfully enforced in another Member State.

Another complex situation arises where one of the creditors requests opening an insolvency proceeding against the debtor which undergoes the process of restructuring in another Member State.[152] On this matter, the Directive provides under Article 6 that the debtors must be able to benefit from the mechanism called the 'stay of individual enforcement

[150] Dominik Skauradszun, Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' (2019) International Corporate Rescue <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367332> accessed 6 May 2021, 194. The enforcement may, inter alia, concern the seizure of property of the debtor in another Member State. On this matter, Skauradszun and Nijnens claim that '[i]f a restructuring plan therefore contains a provision stating that a secured creditor has to release its pledge, the automatic recognition of the confirmation order of the restructuring plan in the Member State in which the enforcement takes place is important. After that, the debtor can easily request the competent enforcement authority to end the seizure'.

[151] ibid.

[152] ibid.

actions'.[153] The stay allows a temporary suspension of the right of a creditor to enforce a claim against a debtor or of the right to seize or realise out of court the assets or business of the debtor.[154] This is specifically reserved for the situations where such individual action may result in liquidation of the debtor.[155] The decision on the stay of individual enforcement actions is granted in court.[156] Therefore, where the decision on the stay is not recognised in other Member States 'and insolvency proceedings are opened, the framework loses its value'.[157]

While mutual recognition is a core concept of the EU insolvency system as a whole, the situation could be much more complicated than it appears. For the purposes of this discussion, it is important to remember that the term restructuring proceedings encompasses not only *formal* proceedings, such as in-court public proceedings, but also *informal* proceedings based on a debtor-creditor arrangement. This chapter will clarify the problematic nature of both of these categories. The former involves looking into practical problems of recognition that can occur both when the proceedings are covered by the Recast Insolvency Regulation and the ones related to the position of proceedings that will stay outside of its scope. The latter will deal with the enforcement of informal proceedings across the EU.

4.1. Recognition of formal proceedings under European Insolvency Regulation

The judgments that were handed down in relation to the opening, course and closure of insolvency proceedings which fall under the scope of the Recast Insolvency Regulation would enjoy automatic recognition.[158] To fall under the scope of the Regulation, the national frameworks have to satisfy the conditions of Article 1(1) of the Regulation and be included in the Annex A. The principle of automatic recognition is based on the principle of mutual trust and means immediate *ipso iure* recognition of main insolvency proceedings that does not require any additional validation or legitimisation of such judgments in other Member States.[159]

Since Article 19(1) of the Regulation stipulates that:

[153] Preventive Restructuring Directive, Article 6(1).
[154] ibid., Article 2(4).
[155] ibid., Article 7(1),(2).
[156] ibid., Articles 6 and 7.
[157] Skauradszun, Nijnens (n 150).
[158] Recast Insolvency Regulation, Article 19; Virgos-Schmit report (n 100) [143].
[159] Virgos-Schmit report (n 100) [152].

> ‘any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings’[160],

the concept of automatic recognition is inalienable from the notion of COMI which regulates the jurisdiction. According to the Regulation, the proceedings initiated in the Member States where the debtor has its COMI are referred to as ‘main insolvency proceedings’, while those initiated in other Member States where the debtor has an establishment are referred to as ‘secondary insolvency proceedings’.[161] The governing law will remain the national law of the opening judgement and it will dictate both procedural and substantive effects of proceedings in other Member States.[162] By contrast, secondary proceedings will be governed by the law of the Member State in which they were opened.

Main and secondary insolvency proceedings are not mutually exclusive - secondary proceedings can be opened in parallel with the main proceedings in the court which has the jurisdiction. Such jurisdiction can be dictated by assets that the debtor possesses in the Member State. Secondary proceedings are usually opened on the request of the insolvency practitioner or the creditors.[163]

In a similar vein, restructuring proceedings that are listed under Annex A would benefit from the automatic recognition of the main proceedings. Rules on secondary proceedings cover restructuring frameworks as well and it is theoretically possible to initiate them. However, it is hard to ascertain the situation in which the secondary restructuring proceedings will be opened. What differs restructuring from insolvency is that restructuring often presents itself as an agreement between the debtors and the creditors. Such an agreement is ultimately a restructuring plan on which affected parties vote collectively. Depending on the national framework, the court involvement will be limited to review and confirmation of the restructuring plan. The court of the Member State in which the debtor has its COMI will hand down the judgement when it will confirm or reject the restructuring plan and such judgment will be deemed to be the main proceeding in accordance with the Article 19(1) of the Regulation

[160] Recast Insolvency Regulation, Article 19.
[161] ibid., Article 3(1), (2).
[162] Virgos-Schmit report (n 100) [90], [153]; Recast Insolvency Regulation, recital 65, Article 35.
[163] Bernard P.A. Santen, Fabian A. van de Ven, Gert-Jan Boon, ‘Opening secondary insolvency proceedings in the EU’ (2015) Eurofenix 20 < https://www.insol-europe.org/download/documents/682> accessed 21 May 2021.

and will therefore be binding on the other Member States. The problem can, however, arise when the creditor or another affected party were not involved in the adoption of the restructuring plan, especially if such affected party is situated in another Member State. To resolve this matter, the Directive rather vaguely stipulates that 'affected parties which were not involved in the agreement *could* nevertheless be offered the opportunity to join the restructuring plan'.[164] The decision whether to present the uninvolved parties the opportunity to join the restructuring plan is left for the Member States to decide.

It is nevertheless unclear what the EU legislator had in mind by the right of uninvolved parties to 'join' the restructuring plan. This could mean that the party that was not involved in the process of adoption of the plan must have the right to appeal the judgment handed down in relation to such plan in accordance with the Article 16 of the Directive. In such case, the judicial authority has to review the appeal in an efficient manner with a view to expeditious treatment.[165]

The right of the appeal reduces the possibility of opening of secondary restructuring proceedings almost to a minimum. Generally speaking, it has been recognized that opening secondary proceedings have 'a destabilizing effect on main proceedings at times hindering the administration of the main proceedings and leading to increased costs with unnecessary duplicative work across borders'.[166] The national courts must therefore ensure that all the affected parties were involved in the adoption of the plan.

4.1.1. Recognition of non-Annex A frameworks: the case of special frameworks which are part of the general proceedings included in Annex A

The question that is especially relevant at the day of writing this thesis relates to the impact of the relationship between the material scope and the formal scope of the European Insolvency Regulation on automatic recognition of judgements across the EU.

The transposition deadline of the Preventive Restructuring Directive did not yet pass, and the legislator has not updated the Annex A of the Regulation accordingly to include the national frameworks which were introduced as the result of the Directive. At the same time, during the transposition period of the Directive Member States have introduced new restructuring frameworks. Some of these restructuring frameworks may satisfy the criteria of the Article 1(1)

[164] Preventive Restructuring Directive, recital 43 (emphasis added).
[165] ibid., Article 16(2).
[166] Paul Hastings, 'New EU Regulation on Insolvency Proceedings' (2015), 3 <https://webstorage.paulhastings.com/Documents/PDFs/stay-current-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 1 May 2021.

of the Regulation but will not be included in the Annex A until the Regulation is amended.[167] The current status of such national frameworks is that they fall within material scope of the Regulation but stay outside its formal scope. Based on the text of the Regulation, the judgements within these frameworks should not receive automatic recognition.[168] However, some scholars believe that this is indeed possible in some circumstances.

The authors of the Recommendations and Guidelines on the Implementation of the New Insolvency Regulation, Bariatti *et al*, consider the case of several Italian proceedings – *concordato preventivo con continuità aziendale*, *concordato in bianco*, *accordi di ristrutturazione con intermediari finanziari*, *convenzione di moratoria*.[169] These proceedings form a part of general restructuring frameworks *concordato preventivo* and *accordi di ristrutturazione dei debiti* which are included in the Annex A. However, serving as 'sub-categories of general proceedings' the former proceedings are not specifically addressed by Annex A.[170] The question posed by Bariatti *et al* is thus: will such sub-category proceedings benefit from automatic recognition?

Bariatti *et al* refer to the second sentence of the Article 4(1) of the Regulation in their analysis of restructuring frameworks provided by Italian Bankruptcy Law.[171] Article 4(1) of the Regulation provides that

> '[a] court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2)'.[172]

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[167] On this matter, see Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 (n 115).

[168] Virgos-Schmit report (n 100) para 145: 'Proceedings not listed in those Annexes shall not be eligible for recognition under the Convention nor shall they prevent the recognition of proceedings provided for in the Convention even though they were opened earlier'.

[169] See Stefania Bariatti, Ilaria Viarengo, Francesca Clara Villata, Fabio Vecchi, The Implementation of the New Insolvency Regulation, Recommendations and Guidelines (2013) JUST/2013/JCIV/AG/4679, 31 <http://ejtn6r2.episerverhosting.com/PageFiles/16467/Guidelines.pdf> accessed 26 May 2021. The authors refer to national restructuring frameworks *concordato preventivo con continuità aziendale*, *concordato in bianco*, *accordi di ristrutturazione con intermediari finanziari*, *convenzione di moratoria* contained in Respectively regulated by Articles 186-bis, 161(6), 182-septies and 182-septies (5) of Italian Bankruptcy Law (Regio decreto 16 March 1942, n. 267).

[170] ibid. It is unknown to the author of this thesis whether the judgement within the sub-category proceedings have procedural differences compared to general Annex A proceedings *concordato preventivo* and *accordi di ristrutturazione dei debiti*. However, it is suggested that if sub-category proceedings following a different procedural path, the situation may be much more complex than that described by Bariatti et al. In this case, such proceedings will be more likely to serve as independent proceedings.

[171] Supra note 169.

[172] Recast Insolvency Regulation, Article 4(1).

It means that the court which is considering the motion to open the proceedings has 'has the obligation to examine its jurisdiction *ex officio* prior to opening such proceedings and to specify in the decision on which grounds the jurisdiction is based'.[173]

According to Bariatti *et al*, Italian courts may put named sub-category frameworks in the material scope of the Regulation and consequently open the proceedings specifically mentioning the legal basis for such proceedings.[174] The authors claim further that 'foreign courts requested to recognize the judgments opening the proceedings could not but comply with the Italian judgments and grant automatic recognition'.[175]

This solution is especially relevant for restructuring frameworks that were introduced as compliance to the requirements of the Directive and were placed by the national legislator in the frameworks previously included in Annex A. As mentioned earlier, the national legislator is free to do so. Furthermore, this solution could be favored by a large number of the Member States. For many factors, adding a Directive-compliant restructuring framework as a sub-category to the general Annex A framework could be advantageous to the Member States. First and foremost, the sub-categories will meet the Directive's criteria. Second, it would avoid the lengthy process of amending Annex A to specifically include independent frameworks. Third, once the frameworks are in Annex A, they are untouchable.

4.1.2. Recognition of non-Annex A frameworks: the case of frameworks which satisfy the conditions of Article 1(1) of the Regulation but are not (yet) included in Annex A

It is important to compare the solution presented by Bariatti *et al* to the situation where a Directive-compliant independent restructuring framework meets the conditions of Article 1(1) of the Recast Insolvency Regulation, but is not included (or is not yet included) in Annex A. May national courts follow the same solution as offered by Bariatti *et al* in order to ensure recognition of decisions based on such proceedings?

The crux of this issue is a topic that is almost inevitable in any discussion in relation to Annex A. There are many questions that come up. What is the relationship between the material and formal scope of a legal act? What part of the scope should be prioritized and given more

[173] Francisco Garcimartín, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' (2016) 17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 1 May 2021.
[174] Bariatti et al (n 169) 31.
[175] ibid.

weight in circumstances like these? Where does this leave companies that want to restructure and have their decisions recognised in the EU, given that certain national restructuring frameworks could be on hold for recognition due to the process of amending the Annexes to the Regulation? Is the legislative pressure on Annex A's position, in essence, justified in light of the legislator's primary goal of facilitating EU restructuring?

Whether provided by Article 4(1) is a valid loophole that can be used in these circumstances may be subject to a big debate. It is clear that the EU legislator ultimately seeks to avoid such flaws.

On the one hand, based on the principle of mutual trust and the principle of automatic recognition enshrined in the Regulation, the courts in other Member States have to recognise the decision issued on the basis of the Regulation without any formalities. The jurisdiction of the national court which bases its decisions on the framework that is outside of Annex A, on the other hand, should not be defined by the Recast Insolvency Regulation in the first place because the frameworks do not satisfy its formal scope.

The Regulation expressly states in recital 9 in support of the above statement that '[n]ational insolvency procedures not listed in Annex A should not be covered by this Regulation'.[176] Moreover, the Court of Justice has held in case C-461/11 *Ulf Kazimierz Radziejewski* that the Regulation 'applies only to the proceedings listed in that annex'.[177] However, the difference between the suggested example and the decision of the Court is that in the framework brought under the *Ulf Kazimierz Radziejewski* also did not satisfy the condition of being based on laws relating to insolvency within Article 1(1) of the Regulation.[178] It should therefore be underlined that the example that is considered within this chapter is based on the situation when the framework fully satisfies the conditions of Article 1(1) of the Regulation.

Will the court in another Member State rely on the presumption that the decision issued on the basis of a framework not included in the Annex A but nevertheless placed within the scope of the Regulation by the court controlling the main proceedings deserves the recognition? Neither the Regulation, nor the Directive provide an explicit answer to this question and that, undoubtedly, complicates the matter. The Regulation nevertheless offers the principle that can be taken as a starting point. Recital 65 of the Regulation stipulates: 'grounds for non-recognition

[176] Recast Insolvency Regulation, recital 9.
[177] Case C-461/11 *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* [2012] EU:C:2012:704 Para 24; See also Case C-116/11 Bank Handlowy w Warszawie SA v. Christianapol sp z oo, EU:C:2012:739, para 33.
[178] Case C-461/11 *Ulf Kazimierz Radziejewski*, para 23; Case C-341/04 *Eurofoods,* para 46.

should be reduced to the minimum necessary'.[179] The only possible exception for automatic recognition that is presented in the Regulation is the public policy exception enshrined in Article 33 of the Regulation, namely,

> '[a]ny Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'.[180]

The text of the Regulation does not provide any further explanation as to the interpretation of Article 33. In *Eurofoods* case the Court did, however, consider the question related to public policy exception.[181] The Court drew a link between the public policy exception provided in Article 26 of the old version of the Insolvency Regulation and Article 27 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters ('Brussels Convention')[182], making a reference to *Krombach* case[183]. It noted that 'case-law is transposable to the interpretation of Article 26' of the old version of the Insolvency Regulation.[184] As was explained by the Court in *Krombach*, since public policy exception 'constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely, to facilitate the free movement of judgments' it is 'reserved for exceptional cases'.[185] The Court further explained that

> '[...] recourse to [Article 27 of Brussels Convention] can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The

[179] Recast Insolvency Regulation, recital 65.
[180] ibid., Article 33.
[181] Case C-341/04 *Eurofoods*, paras 60-68.
[182] See Brussels Convention. Brussels Convention was superseded by the Brussels I Regulation adopted in 2001 after the establishment of the European Community and revised again in 2012 by Recast Brussels Regulation. See respectively, Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L1 2/1 ('Brussels I Regulation'); see also Recast Brussels Regulation.
[183] Case C-7/98 *Krombach* [2000] ECR I-1935.
[184] Case C-341/04 *Eurofoods*, para 64.
[185] Case C-7/98 *Krombach*, para 19 and 21.

infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.'[186]

The interpretation offered by the Court in *Krombach* and *Eurofoods* is strict and narrow. It is therefore highly unlikely that the refusal to recognise the decision based on the reason that the framework was not included in the Annex A would fall under the public policy exception of Article 33 of the Insolvency Regulation. The Court notes crucially that the public policy exception is the obstacle to the free movement of judgements, the principle that can be interpreted in the way that weakens the importance of the formal scope of the Regulation, namely Annex A.

The controversy in whether to recognise the decisions that fall outside the formal scope of the Regulation nevertheless exists. Notwithstanding the public policy exception, recognition of such judgements would contradict the recital 9 of the Regulation. Moreover, the reading of Article 2(4) suggests that proceedings which are not listed in Annex A are not deemed to be 'insolvency proceedings' within the meaning of the Regulation. Although it is understandable that the national courts which consider opening the proceedings based on the frameworks which are not included in the Annex A but are within the material scope of the Regulation may indeed want to put such proceedings under the Regulation's scope, the decision serious questions of complying with the EU law. This move, although contentious, would make insolvency proceedings easier for the debtor and the creditors.

If one would think about the true intention of the legislator, one may come to the conclusion that such actions are not inherently invalid. To start with, Article 19(1) of the Regulation places the emphasis specifically on the jurisdiction set out in Article 3 and not the scope. Indeed, bypassing the formal scope of the Regulation would contradict the recital 9 of the Regulation, however, the recitals themselves do not have a legally binding function.[187] Moreover, even when the national court decided to put such proceedings within the scope of the Regulation, the legal basis of such a decision can be (and perhaps should be) challenged by the parties to the proceedings in accordance with national law.[188] Unless the decision is

[186] Case C-341/04 *Eurofoods*, para 63; Case C-7/98 *Krombach*, para 23 and 37.
[187] Case C-162/97 *Nilsson*, [1998] ECR I-7477, para 54.
[188] The appeals will most certainly be based on the national law provisions that regulate the grounds for judgements. Although Article 5 of the Recast Insolvency Regulation provides the basis for challenging opening main insolvency proceedings on grounds of international jurisdiction, the parties wishing to challenge the legal basis of the decision would not be able to rely on this provision.

challenged in accordance with the national law of the Member State in which the decision was opened, the decision would stay valid. Due to the principle of mutual trust which has a primary importance in the EU the courts in other Member States do not have the power to challenge the legal basis. Therefore, the rule *lex superior derogat legi inferiori* would place the principle of mutual trust that governs automatic and immediate recognition above the formalities of Annex A.

The solution proposed by Bariatti *et al* seems feasible, despite the fact that it is still rebuttable. The explanation for this is Annex A's inflexibility. To solve the problem, European legislator would have to get to the root of the issue. To avoid such deadlocks, Annex A and its role need to be revised. The restructuring frameworks which will fall outside of the scope of the Regulation, may instead follow the recognition procedure in accordance with Recast Brussels Regulation. This may be an alternative route for the frameworks which are not listed in Annex A.

4.2. Recognition of proceedings under Recast Brussels Regulation

The decisions based on the proceedings that fail to fall under the scope of the Recast Insolvency Regulation may, as an alternative, be capable of recognition and enforcement in another Member State in accordance with Article 36(1) of the Recast Brussels Regulation. Article 36(1) of the Recast Brussels Regulation states that '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.[189] Cross-border recognition enshrined in Article 36(1) is based on the principle of mutual trust.[190] It means that 'a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed'.[191] As previously stated, the process of recognition under the Recast Brussels Regulation might be a way out for the proceedings that do not fulfil the requirements of Article 1(1) of the European Insolvency Regulation, or it is not possible to recognise them due to the fact that they are not listed under its Annex A. To determine which restructuring proceedings will be able to fall under the Recast Brussels Regulation, it is necessary to analyse its scope.

[189] Recast Brussels Regulation, Article 36(1).
[190] ibid., recital 26.
[191] ibid.

4.2.1. The scope of Recast Brussels Regulation

According to the scope of the Recast Brussels Regulation enshrined in Article 1(1),

> '[Recast Brussels Regulation] shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).'[192]

Article 1(2) of the Recast Brussels Regulation further limits material scope of the Regulation, excluding in subparagraph (b) its application with regards to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.[193] Therefore, to fall under the material scope of Recast Brussels Regulation, a decision taken in restructuring proceedings must fulfil three cumulative criteria: (i) the decision must constitute a judgment in accordance with Article 2(a), (ii) the judgment must be issued in civil and commercial matters and (iii) the judgment must not fall under the excluded proceedings listed under Article 1(2).

A. Definition of judgment

According to a definition provided in the Article 2(a), the judgment

> 'means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court'.[194]

Due to the nature of preventive restructuring proceedings, the fulfilment of this requirement may become more complex than it seems. Similar to the Recast Insolvency Regulation, the definition of the judgment in the Recast Brussels Regulation presupposes that the judgment is public and not private. However, unlike the Recast Insolvency Regulation, the Recast Brussels Regulation only allows for judgment of judicial authority to fall under its scope.

[192] ibid, Article 1(1).
[193] ibid., Article 1(2)(b).
[194] ibid., Article 2(a).

As was explained by the Court of Justice in *Solo Kleinmotoren*, the definition of judgment refers 'solely to judicial decisions actually given by a court or tribunal of a Contracting State'.[195] This means that the decisions of the administrative body will not be considered a judgment under the Recast Brussels Regulation. As compared to formal judicial proceedings, the definition of the judgment can be challenging for restructuring settlements that seek court's confirmation. The Court has stated in *Solo Kleinmotoren* that

> '[judicial body] condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention'.[196]

In spite of the Court's unambiguous position in *Solo Kleinmotoren*, some claim that the confirmation of restructuring plan and its substantive effects as provided by Article 10 of the Preventive Restructuring Directive is 'much more than a pure settlement'.[197] Therefore, according to the Directive and the effects it grants to the decisions of national courts, such decisions will most certainly fulfil judgments criteria within the meaning of Article 2(a) of the Recast Brussels Regulation.[198]

B. Civil and commercial matters

Under Article 1(1) of the Recast Brussels Regulation, only judgments within the area of civil and commercial matters would be covered by the material scope of the Regulation. The regulator therefore draws a line between civil and public matters, excluding the latter from the scope of the Recast Brussels Regulation. It can be stated with certainty that in case of corporate restructurings where all affected parties are private legal persons, the judgments issued will be able to qualify as the judgments within the area of civil and commercial matters.[199]

The question that might arise concerns the proceedings in which an affected party (e.g., the creditor) is a public authority. Will the judgements issued to proceedings where the public authority is the party to such proceedings qualify as civil and commercial matters? The answer

[195] Case C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch* [1994], 1994 I-02237, para 15.
[196] ibid., para 18.
[197] Skauradszun, Nijnens (n 150) 195: 'The same applies to a granted stay: the court order not only has procedural effects (e.g. a suspension of the obligation to file for insolvency, Article 7(1) Directive), but also substantive effects (e.g. a suspension of contractual termination rights etc., Article 7(5) Directive).'.
[198] ibid.
[199] ibid., 196.

seems to be affirmative. Firstly, the Court of Justice has explained in judgments *Nickel* and *Nortel* that the 'decisive criterion for identifying the area within which an action falls is not the procedural context of that action, but its legal basis'.[200] The Court follows: '[a]ccording to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law [...]'. The Court's interpretation suggests that even in the proceedings with a public authority as an affected party, the focus should be set on the legal basis and effects that the proceedings create, while the procedural aspects are secondary. The definition of an area of civil and commercial matters should be therefore defined broadly.[201] Skauradszun and Nijnens corroborate such approach in relation to restructuring proceedings:

> 'When determining whether the frameworks fall under the definition of civil and commercial matters, attention must be paid to the nature of the framework, not to the nature or origin of individual assets and liabilities. [...] Even if a Member State, such as Germany, deems procedural law to be a form of public law, the contents of the frameworks relate to civil law matters. [...] Despite the number of procedural aspects [...], the restructuring plan as the envisaged outcome of restructuring frameworks pertains to civil law.'[202]

C. Excluded proceedings under Article 1(2)

Article 1(2) excludes certain proceedings from the scope of the Recast Brussels Regulation. Of particular interest to preventive restructuring frameworks is the provision enshrined in Article 1(2)(b). It prevents the application of the Regulation from 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.[203]

The obvious question would be whether preventive restructuring frameworks fall within this exception. As was discussed before in this paper, the line between restructuring and

[200] Case C-649/13 *Comité d'entreprise de Nortel Networks SA and Others v Cosme Rogeau and Cosme Rogeau v Alan Robert Bloom and Others* [2015] EU:C:2015:384, para 28; Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* [2014] EU:C:2014:2145, para 27.
[201] Skauradszun, Nijnens (n 150) 196; Paul Oberhammer, 'Article 32— Recognition and enforceability of other judgments' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (OUP, Oxford, 2016), 380 [32.33].
[202] Skauradszun, Nijnens (n 150) 196.
[203] Recast Brussels Regulation, Article 1(2)(b).

insolvency might be rather thin. Preventive Restructuring Directive nevertheless provides that restructuring frameworks should be available 'for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor'.[204] As the Directive explicitly tries to prevent frameworks from falling within the definition of bankruptcy or winding-up, it can be assumed that the national frameworks which were introduced to transpose the Directive would likewise not be covered by the Article 1(2)(b) exception.

The Court of Justice held in Case 133/78 *Gourdain* that 'it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the '*liquidation des biens*' [winding-up of the affairs of a person, firm or company not expected to continue in business] or the '*règlement judiciaire*' [administration of the affairs of an insolvent person, firm or company expected to continue in business under the supervision of the court].[205] Therefore, as confirmed by the Court in Case C-213/10 *F-Tex*, two conditions must be satisfied for the proceedings to fall within Article 1(2)(b) of the Recast Brussels Regulation: firstly, the proceeding must derive directly from the bankruptcy or winding-up, and secondly, it must be closely connected with the proceedings for realising the assets or judicial supervision.[206] The proceedings that satisfy the two cumulative conditions should be covered by the Recast Insolvency Regulation instead[207] and 'are broadly referred to as annex proceedings'.[208] Therefore, those restructuring proceedings that transpose the Directive and are included in the Annex A of the Recast Insolvency Regulation would fall within the exception provided by Article 1(2)(b) and will not be covered by the Recast Brussels Regulation.

[204] Preventive Restructuring Directive, Article 1(1).
[205] Case 133/78 *Henri Gourdain v Franz Nadler* [1979] 1979 00733 (interpretation added); see also Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB „Jadecloud-Vilma"* [2012] EU:C:2012:215 para 22: '[...] if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for realising the assets or judicial supervision'.
[206] Case C-213/10 *F-Tex*, para 22; Skauradszun, Nijnens (n 150), 197.
[207] Recast Insolvency Regulation, recital 7; Skauradszun, Nijnens (n 150) 197.
[208] Rimvydas Norkus, 'Annex proceeding and the continued interplay with the Brussels Ia Regulation', ERA Forum (2015) 16 198 <https://link.springer.com/article/10.1007/s12027-015-0396-x> accessed 26 May 2021.

4.2.2. Relationship between Recast Insolvency Regulation and Recast Brussels Regulation

It should be noted that due to the fact that both Recast Insolvency Regulation and Recast Brussels Regulation provide the possibility for recognition, the two instruments tend to have a close connection. The European legislator tends to eliminate the possibility of proceedings falling under the scopes of two instruments. In addition, it is emphasized by the legislator that the possibility of the regulatory loopholes between the two instruments must be brought down to a minimum.[209]

The legislator has foreseen that the proceedings which are excluded from the scope of the Recast Brussels Regulation should be covered by Insolvency Regulation instead.[210] This clearly refers to the categories of judgments excluded from the scope of the Recast Brussels Regulation by Article 1(2)(b).[211] It means that 'the two Regulations should be interpreted so that proceedings should not fall within both but within one or the other without leaving any gap between them'.[212] Skauradszun and Nijnens explain the rationale in the following way: '[t]he *lex generalis* for civil and commercial matters is Brussels Ia. However, Article 1(2)(b) Brussels Ia in connection with Article 1(1) and Annex A EIR Recast provides a *lex specialis* for insolvency proceedings and actions directly derived from them'.[213]

Although the matter of applicability of either of the Regulations often comes down to the question of whether the proceedings at hand are related to insolvency, the real analysis often tends to be much more complex than that.[214] It is proposed that since the EU legislator is striving towards a gapless applicability, the text of either one or another Regulation needs to be more straightforward by incorporating the provision 'expressly stating that all the relevant questions which do not fall within the scope of one regulation are to be included into another automatically'.[215] Despite the fact that the Recast Insolvency Regulation provides guidance on this matter in recital 7, it might be reasonable to incorporate the preamble to the main text of

[209] Recast Insolvency Regulation, recital 7; See also CJEU reasoning in judgments *Nortel* C-649/13 and *Nickel* C-157/13: 'Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum'. See respectively, Case C-649/13 *Nortel*, paras 26-27; Case C-157/13 *Nickel*, paras 21-24.
[210] ibid.
[211] See Dammann (n 12): 'With respect to ancillary proceedings, the ECJ has decided [in *Nortel* C-649/13, *Nickel* C-157/13] that this exception must be narrowly interpreted and there should be no gap between the scopes of both instruments.'.
[212] Norkus (n 208).
[213] Skauradszun, Nijnens (n 150) 198.
[214] Norkus (n 208) 200.
[215] ibid.

the Regulation. The importance of plain interpretation, as explained by Rimvydas Norkus, lies in the fact that

> '[i]n the sphere where risks of disputes over competence are very high, ambiguity or over complication of jurisdictional rules undoubtedly lead to devastating effects: the paramount principle of fast and efficient insolvency proceedings may be rebutted if complex procedural matters have to be resolved prior to approaching the essential questions'.[216]

Apart from what has already been mentioned, the additional complexity can be also described by the fact that although the Recast Insolvency Regulation covers the proceedings excluded from Recast Brussels Regulation, it is not a reciprocal declaration. The Recast Brussels Regulation does not necessarily cover those judgements that were excluded from the Insolvency Regulation. In this respect, the last sentence of recital 7 of the Recast Insolvency Regulation provides that 'the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.'[217] The possible interpretation of this sentence can be the fact that some restructuring proceedings might fail to fall under the scopes of both Insolvency Regulation and Recast Brussels Regulation.[218] Skauradszun and Nijnens explain this by bringing the following example: if the preventive resturing frameworks 'do not fall within the material scope of the *lex specialis*, but do fall under the exception in Article 1(2)(b) Brussels Ia, which points to the EIR Recast, neither the *lex generalis*, nor the *lex specialis* can be used'.[219]

It would be therefore beneficial for a national legislator to place the national restructuring frameworks either within the formal scope of Recast Insolvency Regulation or within the material scope of the Recast Brussels Regulation.[220] The judgment passed on such restructuring frameworks will be able to enjoy automatic recognition across the EU Member States.

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[216] ibid.
[217] ibid.
[218] Stanghellini, Zorzi (n 108), 24.
[219] Skauradszun, Nijnens (n 150) 198.
[220] Although favourable for the debtors and the affected parties to be in the ambit of Recast Brussels Regulation, the EU legislator might consider it to be problematic because of the forum shopping. See, for instance, Dominik Skauradszun, Walter Nijnens, 'The Toolbox for Cross-Border Restructurings Post-Brexit – Why, What & Where?', Nottingham Business and Insolvency Law e-Journal (2019), 38 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426438> accessed 11 May 2021: 'As long as Brussels I applies to international jurisdiction, forum shopping will likely be the *rule* instead of the *exception* and there is a good chance that more than one framework will be required if there are among the affected parties secured

4.3. Enforcement of out-of-court restructuring agreements

Substantive laws of the Member States tend to vary in relation to the degree of court involvement – 'from no involvement or minimal involvement in some Member States to full involvement in others'.[221] Preventive Restructuring Directive thus establishes a flexible approach to restructuring, promoting the principle of minimal court involvement.[222] In that respect, recital 29 of the Directive provides:

> '[e]xcept in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is *necessary* and *proportionate*, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures.'[223]

This approach is enshrined in Article 4(6) of the Directive. Therefore, Article 10(1) provides for mandatory judicial confirmation of the restructuring plan in the situations where the judicial intervention is crucial for safeguarding the rights of affected parties, namely where: (a) restructuring plans affect the claims or interests of dissenting affected parties, (b) restructuring plans provide for new financing, and (c) restructuring plans involve the loss of more than 25 % of the workforce.[224]

Nevertheless, the text of the Directive suggests that where national law so allows, the restructuring can be performed with no court involvement whatsoever, for instance on the basis of the mutual agreement between the affected parties. The particular difficulty with this type of

creditors with rights of mortgage or employees domiciled in multiple Member States. It is unlikely that the European legislator has foreseen these problems, but they will have to be dealt with.'.

[221] Preventive Restructuring Directive, recital 4.

[222] Francisco Garcimartin, 'Article 4. Availability of preventive restructuring frameworks' in Christoph G.Paulus, Reinhard Dammann (eds.) *European Preventive Restructuring, Directive (EU) 2019/1023, Article-by-Article Commentary* (Beck 2021) 95-96. 'During the negotiations in the Council some Member States argued that the intervention of judicial authorities would not necessarily mean that the procedures were less efficient and/or that there were not sufficient reasons for such an intervention upon the procedural autonomy of the Member States.'.

[223] Preventive Restructuring Directive, recital 29 (emphasis added).

[224] ibid., Article 10(1).

restructuring is the question of recognition and enforcement. Since purely informal proceedings will not be able to fall within the scope of either the Recast Insolvency Regulation or the Recast Brussels Regulation, the possibility of enforcement of restructuring plans in accordance with the Regulation (EC) No 593/2008 ('Rome I)[225] must be analysed.

In respect of the agreements falling within the scope of the Regulation, Rome I allows the parties to choose the law which will govern the agreement or the part of the agreement.[226] According to Article 12(1), the choice of law will therefore extend to the interpretation, performance, the consequences of a total or partial breach of obligations, the various ways of extinguishing obligations and the consequences of nullity of the contract.[227]

It is important for businesses that the effects and enforcement are given to the process of restructuring. The scope of the Rome I should be therefore considered. According to Article 1(1), Rome I applies, 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'.[228] Therefore, the following elements have to be present for Rome I to apply: (a) contractual obligation arising from a free agreement between the parties[229], (b) the agreement is made in civil and commercial matters[230], and (c) the situation involves a conflict of laws[231].

A restructuring plan can, indeed, be considered a contract within the meaning of Rome I. However, it will be able to satisfy the first condition only insofar as the affected parties have voted on the plan freely and unanimously. An important thing to note is that the Directive allows purely informal proceedings only in where a unanimous agreement has been reached between the affected parties. As long as there is at least one dissenting affected party, the restructuring plan has to be confirmed by the national court. The reason for this has been explained by Francisco Garcimartin:

> "[...] the modification of individual (contractual and property) rights that a restructuring plan may entail takes place through a majority decision, and therefore against the will of dissenting creditors or even equity holders. This extension of the effects of the plan to dissenting creditors is justified in order to prevent hold-out strategies that may

[225] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177 [2008].
[226] ibid., Article 3(1).
[227] ibid., Article 12(1).
[228] ibid, Article 1(1).
[229] Alfonso-Luis Calvo Caravaca, Javier Carrascosa González 'Chapter I: Scope' in Ulrich Magnus, Peter Mankowski (eds.) *Rome I Regulation - Commentary* (Köln, Verlag Dr.Otto Schmidt 2016) [5]-[6] 62-64.
[230] ibid., [2]-[4] 60-61.
[231] ibid., [24]-[26] 72-76.

jeopardise the general interest of all stakeholders. But, in such a case, the confirmation of a restructuring plan by a judicial or administrative authority '*[...] is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy*' (Recital 48; see also Recital 29)".[232]

In this particular case, as shown, the court involvement will be necessary in accordance with Article 10(1)(a) of the Directive. The restructuring plan that is subject to court confirmation will not be covered by Rome I and therefore be able to fall within the scope of either Recast Insolvency Regulation or Recast Brussels Regulation.

The focus must therefore be on the process of contractual restructuring where there are no dissenting affected parties in the meaning of Article 10(1)(a) of the Directive, namely where the affected parties have reached an unanimous conclusion on the restructuring of the debtor.

The agreement must also be made in civil and commercial matters, i.e., subject to private law. The definition of civil and commercial matters must be interpreted in line with the interpretation given to Article 1(1) of the Recast Brussels Regulation.[233] Therefore, the same conclusion can be reached - restructuring plans will satisfy the requirement of civil and commercial matters within the meaning of Article 1(1) of the Rome I.

To fall within the scope of the Rome I, the situation must involve the conflict of laws. It means that there must be a cross-border element involved in the process of restructuring. This requirement is usually interpreted broadly.[234] The restructuring that involves the interests of parties which are situated in several Member States (e.g., creditors, equity holders, employees) will be able to satisfy this requirement. The same holds for the cases of restructuring where the debtor has its operations in different Member States, or where the registered office of the debtor and its place of operations or its assets are not situated in the single Member State.

An interesting situation occurs, however, where the debtor's registered office, place of operations, assets and the affected parties are situated in a certain Member State, but the parties

[232] Francisco Garcimartin, 'Article 10. Confirmation of restructuring plan' in Christoph G.Paulus, Reinhard Dammann (eds.) *European Preventive Restructuring, Directive (EU) 2019/1023, Article-by-Article Commentary* (Beck 2021) 168.
[233] See Rome I, recital 7. See also Caravaca, González (n 229) 61: "The concept of 'civil or commercial matters' (= matters of Private Law) should be kept the same as in Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.".
[234] Caravaca, González (n 229) [24] 72: 'Most legal scholars think that a "conflict of laws" arises when there is a reasonable doubt about the state law applicable to a contract. The use of the expression "situations involving a conflict of laws" shows the intention of the European legislator to hold a broad concept of "internationality" of the contractual situation.'.

decided to choose the law of another Member State as a governing law. Article 3 of Rome I allows the parties to choose the law applicable to the whole or to part only of the contract.[235] The choice of law provision will therefore satisfy the 'internationality' criterion and such a restructuring plan will also fall under the Rome I.[236] However, Rome I will not cover the situation where 'the contract may have an impact on other countries or may produce some effects on the international trade'.[237] This shows that the assessment of the element of 'internationality' must be made on the basis of objective criteria.

The agreements that are excluded from the scope of Rome I are listed in Article 1(2) of the Regulation. Among those is the list provided under subclause (f), namely

> 'questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body'.[238]

This limitation is quite broad which can be explained by the difference in substantive of the Member States in relation to company law.[239] While exclusion of winding-up of companies can be effectively rebutted in relation to restructuring plans and restructuring in general (see part 4.2.1 on the scope of Recast Brussels Regulation), the problems may arise in relation to the interpretation of 'internal organisation of companies'. The Regulation does not provide any further explanation on this point, nor is there a clear-cut answer among the academics. Some suggest that Article 1(2)(f) precludes application of Rome I to the contracts that affect the 'constitution of the legal entity' as well as 'the structure and inner organisation of the

[235] Rome I, Article 3(1).
[236] Caravaca, González (n 229) [26] 74: Rome I will therefore apply to the following situations: "(a) If a contract contains 'elements' objectively connected with different countries, the Regulation allows the parties to choose the law applicable to their contract because that is an 'international' contract and the situation involves a 'conflict of laws' (Article 3.3 Rome I Regulation a contrario sensu); (b) If all the objective elements of the contract are connected with a single country but the parties have chosen a foreign law as the law of the contract, the Rome I Regulation applies because a foreign element already exists, which is precisely the choice of law made by the parties (Article 3.3 Rome I Regulation)".
[237] ibid., 75 [26].
[238] Rome I, Article 1(2)(f).
[239] See Caravaca, González (n 229) [13] 66-67.

company'.[240] The question is therefore whether the objective of a restructuring plan is to affect the inner organisation of the entity.

While some are of the opinion that restructuring plans will fall within the exclusion provided under Article 1(2)(f)[241], others suggest that restructuring plans will not be affected.[242] The parallel can be drawn with the English Schemes of Arrangements. Since there was little possibility of putting the Schemes of Arrangements within the scope of Recast Brussels Regulation, the companies have been relying on the Rome I to enforce their agreements in the EU.[243] On this respect, Jayne Pane argues in favour schemes of arrangements being covered by Rome I:

> '[g]iven that schemes are governed by company law, it appears that schemes should be excluded. However, it could be argued that this exclusion seems to be aimed predominantly at corporate governance issues, and matters concerning the life and death of companies, rather than procedures to vary the contractual rights of the members and other stakeholders. Indeed, it could be argued that the sorts of schemes with which we are concerned, namely creditor schemes aimed at restructuring the debt of the company, seem to be predominantly geared towards rearranging the contractual arrangements of the parties inter se, rather than affecting the company's share capital or anything affecting the company per se.'[244]

Since the Court of Justice did not yet have the possibility to provide interpretation on Article 1(2)(f), in particular with respect to restructuring plans, it is possible that the scope of Rome I might not, nevertheless, extend to such contracts and schemes.[245]

It can be suggested, however, that in its assessment the Court will rely on the nature of the restructuring plan and the provisions of the substantive law to identify whether it is covered

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[240] ibid. [13] 66-67; Ulrich Magnus 'Chapter II: Uniform Rules' in Ulrich Magnus, Peter Mankowski (eds.) *Rome I Regulation - Commentary* (Köln, Verlag Dr.Otto Schmidt 2016) [268] 347.
[241] Gerald McCormack, Wai Yee Wan 'Transplanting chapter 11 of the US bankruptcy code into Singapore's restructuring and insolvency laws: Opportunities and tunities and challenges' (2019). Journal of Corporate Law Studies 19(1) 29 <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4735&context=sol_research> accessed 26 May 2021.
[242] Dammann (n 12) [78]-[79] 56.
[243] See Re Rodenstock GmbH [2011] EWHC 1104 (Ch); Re Primacom Holding GmbH [2012] EWHC 164 (Ch).
[244] Jayne Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) Oxford Legal Studies Research Paper No. 68/2013 24 <https://ssrn.com/abstract=2277451> accessed 11 May 2021.
[245] Susan Block-Lieb, 'Reaching to Restructure Across Borders (Without Over-Reaching), Even after Brexit', 92 Am. Bankr. L. J. 1 (2018) 21 <https://ir.lawnet.fordham.edu/faculty_scholarship/852/> accessed 11 May 2021.

by the Rome I. Given the fact that the restructuring plans are individual for each company and the substantive laws of the Member States are varying, it is not impossible to give a certain answer and the assessment must be made on a case-by-case basis.

The overall risk that the restructuring plans might not be covered by the Rome I presents even bigger uncertainty to debtors and its creditors during the process of restructuring. This uncertainty might prolong the restructuring. Moreover, the fulfilment of contractual obligations might be also postponed. These are the outcomes that the legislator ultimately strives to avoid.

4.4. Interim Conclusion to Chapter 4

One of the biggest challenges that the cross-border companies face during restructuring is the recognition and enforcement of the national decisions and agreements in other Member States. This aspect is critical in relation to the overall issue of efficiency of the EU restructuring framework.

It should be noted that although it may seem from the text of the Preventive Restructuring Directive that allocating national restructuring frameworks within the scope of the Recast Insolvency Regulation is the easiest way possible, it is not entirely so. Only restructuring proceedings that are drafted in the way to satisfy the Article 1(1) of the Regulation and are listed in the Annex A will be able to benefit from automatic recognition without any further formalities.

The decisions that are based on the frameworks that fall outside the formal scope of the Regulation, on the other hand, will inevitably face difficulties in recognition under the Regulation. Here again, one needs to remember all the possible ways that the Directive could be implemented to understand that this is not at all a rare situation.

Whether non-Annex A frameworks will be able to be recognise under the Regulation depends on whether they are part of the general insolvency proceedings that were listed under Annex A. This is the case for restructuring frameworks which, although might not be explicitly mentioned in Annex A, be nevertheless recognised by the national law views as a separate special category of proceedings. The case of proceedings which do not have connections with such general frameworks and are not included in the Annex A, but which nevertheless satisfy the conditions of Article 1(1) of the Regulation is way more complex. The discussion whether to recognise them necessitates the examination of the principles (and, more importantly, the limits) of the principle of mutual trust, as well as, on the other hand, the public policy exception.

Nevertheless, these proceedings may be able to fall under the Recast Brussels Regulation if the scope of Article 1(1) is be satisfied. The legislator aims for gapless application of the Recast Brussels Regulation and Recast Insolvency Regulation which means that there will be no possibility for both Regulation to apply to restructuring frameworks. Recast Brussels Regulation thus applies only to formal restructuring judgments that are outside of the scope of the Recast Insolvency Regulation.

When it comes to informal cross-border restructuring agreements between the parties, the enforcement of these agreements may be facilitated through Rome I. In accordance with the scope of Rome I, the possibility of enforcement is open for cross-border agreements which were taken on a free and unanimous basis with no court involvement. Even for such agreements, some problems can occur due to exception contained in Article 1(2)(f) of Rome I.

Recognition of the decisions and enforcement of private agreements that are related to restructuring is a complex matter where many exceptions can occur. For cross-border preventive restructuring, it is the matter that directly affects the expediency and efficiency of the procedure. Since the possibility of recognition would almost undoubtedly be decided on a case-by-case basis, it does not provide cross-border businesses with expected legal certainty. This means, in particular, that the choice of cross-border company to restructure implies an extensive understanding of EU pre-insolvency law.

5. Conclusion

The aim of this study was to look into the role of the Preventive Restructuring Directive in the context of early restructuring proceedings in the EU, with a particular emphasis on cross-border companies' perspectives. It sought to clarify the incentives and intentions behind the implementation of the Directive to determine the regulatory priorities of the legislator. Furthermore, the thesis examined the relationship between the Directive and the Regulation in order to determine what foundations were laid prior to the Directive's implementation and how, in turn, such foundations affect the Directive's rationale. Following a description of the legislative context, the study looked at the difficulties that cross-border companies may face during the process of restructuring in terms of recognition of the national proceedings in other Member States. While the Directives provide for various options to implement restructuring frameworks, the study used a broad approach to classify the frameworks and determine the consequences of recognition and enforcement for each. The findings are described in this chapter.

The Directive must be addressed first. Despite widespread criticism from Member States and scholars, the Directive is, in itself, a valuable and long-awaited tool that had previously been absent from the EU's insolvency system. Indeed, by the time the Directive was adopted, many Member States have passed national restructuring legislation but without an EU-wide concept it will remain a product of national law that will have little impact on cross-border companies.

However, it is worth considering whether the situation would be worse if the legislator had agreed not to continue with the Directive and instead allowed the Member States to develop their own regulatory patterns in restructuring law. The question should be answered in the affirmative. It is true that, in contrast to more comprehensive national restructuring systems, the Directive has, perhaps, only shown the tip of the iceberg. However, a debtor incorporated in a Member State whose national legislation does not provide for early restructuring would not be on an equal footing with companies whose national legislation allows for such mechanisms. For these companies, liquidation would be most likely the way out of financial distress. This outcome is therefore prevented by the Directive. Moreover, individual enforcement actions that the creditors may claim against the debtor are prevented for the time of negotiations of a restructuring plan by Article 6(1) of the Directive. If the Directive was not adopted, a creditor

could bring such action in the court of the Member State other than the Member State where the restructuring is taking place. As such action can ultimately result in liquidation of a debtor, this mechanism has significant benefits for the debtors.

On the other hand, one may note that if the Directive was not adopted, the situation would remain unchanged because debtors might use forum shopping to choose a more favourable jurisdiction for restructuring purposes. The Directive, admittedly, takes a rather weak stance on this issue. Despite the legislator's efforts to restrict abusive forum shopping, some forms of it remain possible even after the Directive's adoption. However, in a cross-border environment where affected parties can take legal action against the debtor, common minimum provisions for national jurisdictions are required to provide cross-border companies with at least some legal certainty.

The thesis has found that the Directive sought to encapsulate several various approaches taken by the Member States' national laws in relation to restructuring proceedings. Since restructuring rules are inextricably linked to the matters of private law of the Member States, the EU legislator approached the process of harmonisation of national laws with caution. Although such strategy may seem problematic, it is appropriate given the situation at hand. On the one hand, the minimum requirements provided in the Directive might be too modest for the mere attempt of restructuring. On the other hand, the EU's diverse set of laws makes it almost impossible to harmonise every aspect of restructuring law since it implies harmonisation of insolvency law in the first place. Harmonisation efforts in insolvency law in the EU have not progressed far enough to allow for a middle ground with restructuring law harmonisation.

At the same time, the minimum requirements proposed by the Directive have no significant impact on regulatory competition in the EU. In this case, the situation is likely to be similar to that which existed prior to the Directive's implementation. Member states will continue to compete for more favourable restructuring environment even after the Directive is implemented. While the concept of regulatory competition can encourage abusive forum shopping, which the EU legislator is attempting to curtail, regulatory competition has little negative connotation in and of itself. On the contrary, jurisdictional competition can encourage the modernisation of the national laws and increase the economic and business climate of the Member State. As the EU strives for a healthier, friendlier business environment with unique legislative solutions, the jurisdictional competition is not on the preventative radar of the EU legislator.

The analysis of the Directive, on the other hand, cannot be separated from the analysis of the relationship between the Directive and the Recast Insolvency Regulation. The insolvency

law regime built by the Regulation has a significant impact on the Directive. Although the Directive is intended to be merely complementary to the Regulation, the scope and requirements of the Regulation might present considerable challenges for the national legislators and the companies.

Firstly, while the Directive does not require the restructuring frameworks to also satisfy the scope of the Regulation, the national legislators may, sooner or later, consider this. The most problematic aspect of the Regulation is that it takes a very narrow approach to restructuring. The material scope of the Regulation considers the concept of restructuring to be somewhat similar to the concept of liquidation, thus obliterating the wide range of restructuring frameworks that are allowed under the Directive. This was not the legislator's intention when drafting the Directive.

Secondly, not only in terms of the material scope, but also in terms of the formal scope, the Regulation appears to be restrictive against restructuring frameworks. To benefit from the automatic recognition provided under the Regulation, the frameworks must satisfy the material scope of the Regulation as well as included in the Annex A, the formal scope of the Regulation. The Member States possess a wide discretion with regards to inclusion of the frameworks to Annex A. Perhaps, the choice must be rather strategic. If the national legislator wishes that the Regulation would determine the recognition of the restructuring frameworks, it must not only satisfy the minimum requirements of the Directive, but also choose the most appropriate way of placing the framework under the scope of the Regulation.

This is true, in particular, in respect of the national frameworks which are adopted as a result of the implementation of the Directive in the form of independent general restructuring proceedings. Even if the frameworks fulfil the conditions of Article 1(1) of the Regulation, the frameworks may have to wait a considerable time to be included in the Annex. This may put the recognition of the restructuring decisions which were taken before or during the time when the Member States notify the EU legislator of the need to include such framework in the Annex A into a long line of waiting. Consequently, only when the Regulation is amended will the decision based on such frameworks be able to benefit from the automatic recognition in other Member States.

The situation would be different if the EU legislator had acknowledged the possibility for this gap to occur and offered an easier procedure for inclusion in Annex A of restructuring frameworks implemented as a result of implementation of the Directive. There is currently little legal certainty for cross-border companies and the parties involved in cross-border restructurings. Where the process of restructuring has a cross-border element to the

proceedings, the expediency and the outcome depends greatly on the choice of the national legislator regarding the inclusion of the framework under Annex A as well as the status of legislative procedure of amendment of the Regulation. The reconsideration of the role of Annex A in the context of preventive restructuring proceedings and the procedure for its amendment is therefore crucial.

The companies might experience even greater uncertainty where the framework falls outside the scope of the Recast Insolvency Regulation. This thesis examined the Recast Brussels Regulation and Rome I to determine which restructuring frameworks will be able to fall under their scopes. It is difficult to provide a definitive answer to this question since the fulfilment of the conditions of each of these legal acts would be decided on a case-by-case basis. Due to the fact that both Brussels Regulation and Rome I were drafted without explicit focus on the restructuring frameworks, the exceptions which the legal acts contain might be difficult to bypass. Therefore, the recognition and enforcement of restructuring decisions will also depend on the substantive laws and the interpretation of the position of the restructuring frameworks under this set of rules.

The Directive is a useful tool that forms the foundation for the EU preventive restructuring framework. It does, however, coexist alongside other legislative acts that are part of the European Union's insolvency regime. The Directive’s implementation is made more difficult by this coexistence. During the implementation of the Directive, national lawmakers must therefore carefully consider the options. It involves looking closely into the regime of the insolvency law and the role of national restructuring frameworks in this regime.

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