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TITOLO: CROSS BORDER INSOLVENCY: NEW TRENDS

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When we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.

Lord A. T. Denning

TABLE OF CONTENTS

INTRODUZIONE.....	5
OVERVIEW	11
CHAPTER I: THE EU REGULATION NO. 1346/2000	17
1. Background: brief history of the Regulation.....	17
2. Main features of the Regulation.....	20
2.1 Scope, definitions and the role of the Annexes	21
2.2 Jurisdiction	23
2.2.1 The concept of COMI.....	24
2.2.2 Main and secondary proceedings.....	26
2.3 Recognition of insolvency proceedings.....	29
2.3.1 Powers of the liquidators and equal treatment of creditors	32
2.3.2 Refusal to recognize proceedings and public policy clause	34
2.4 Applicable law	36
2.5 Secondary proceedings	37
2.6 Information for creditors and lodging of claims.....	40
3. Conclusions.....	41
CHAPTER TWO: THE PROPOSAL FOR A MODIFICATION OF THE REGULATION	42
1. Why the Proposal? The new European approach to business failure and insolvency	42

2. Solutions proposed.....	48
2.1 The scope and the role of Annex A.....	48
2.2 The jurisdiction.....	52
2.3 The secondary proceedings.....	55
2.4 The publicity of insolvency proceedings.....	58
2.6 Groups of companies.....	61
3. The first reading of the EU Parliament.....	64
3.1 Scope and relation with Annex A.....	65
3.2 Definition of COMI.....	66
3.3 Jurisdiction and competence.....	66
3.4 Secondary proceedings.....	67
3.5 Groups of companies.....	68
4. Conclusions.....	69
CHAPTER III: NEW TRENDS.....	70
1. Minor adjustments for minor weaknesses.....	71
2. Harmonization: is the time ripe?.....	77
3. A concrete proposal.....	86
CONCLUSION.....	93
BIBLIOGRAPHY.....	96

INTRODUZIONE

L'obiettivo che questo elaborato si propone è di offrire una panoramica sulla disciplina giuridica europea dell'insolvenza transfrontaliera.

Quest'ultima è un fenomeno assai complesso e, almeno nelle sue dimensioni attuali, relativamente nuovo. E' complesso perché quel delicato equilibrio cui ogni legge fallimentare deve tendere, l'equilibrio cioè tra la massima soddisfazione dei creditori e la tutela degli altri interessi coinvolti, dev'essere ricercato non già all'interno di uno stesso ordinamento, ma di più ordinamenti talora molto diversi tra loro. E' poi relativamente nuovo perché, nonostante i primi tentativi di disciplinare in modo uniforme la materia risalgano addirittura a fine '800, solo la liberalizzazione e la globalizzazione dei mercati avvenute negli ultimi decenni hanno comportato l'espansione del commercio oltre i confini nazionali, cambiando in ultima istanza il modo stesso di fare impresa.

In uno scenario del genere, e in un contesto di sempre maggiore integrazione europea, l'adozione di una normativa coerente e vincolante per gli Stati Membri venne percepita dalle autorità europee come una necessità non più rimandabile alla fine del XX secolo. Di qui, l'adozione del Regolamento 1346/2000 relativo alle procedure d'insolvenza.

Scopo ultimo del Regolamento è dissuadere il debitore dal trasferire i beni o i procedimenti giudiziari da un Paese a un altro nell'intento di migliorare la propria situazione giuridica (*forum shopping*), fenomeno che può pregiudicare il buon funzionamento del mercato interno. In realtà, senza una vera armonizzazione delle leggi fallimentari nazionali, difficilmente tale fenomeno può essere contrastato in maniera efficace: solo condizioni uniformi in tutta l'Unione farebbero infatti venire meno il presupposto stesso del *forum shopping*, eliminandone ogni vantaggiosità per il debitore. Tuttavia, almeno fino a questo momento, una simile azione armonizzatrice non è stata possibile, proprio per via delle profonde differenze in materia fallimentare esistenti tra i vari Stati Membri, e per la "solita" resistenza di questi ultimi a cedere porzioni di sovranità all'Unione. Il legislatore europeo si è perciò dovuto accontentare di una disciplina meno ambiziosa che - in estrema sintesi - si limita ad individuare il giudice competente ad avviare la

procedura di insolvenza, la legge applicabile, e un meccanismo di riconoscimento automatico delle decisioni.

La descrizione analitica di questa disciplina costituisce l'oggetto del Capitolo I, in cui per motivi di chiarezza le norme del Regolamento vengono analizzate seguendo l'articolato dello stesso.

La prima questione affrontata è dunque quella del suo ambito di applicazione, limitato alle procedure concorsuali nazionali "fondate sull'insolvenza del debitore che comportano lo spossessamento parziale o totale del debitore stesso e la designazione di un curatore".

Si analizza poi il criterio di riparto di giurisdizione tra i vari Stati, tema tra i più interessanti e complessi dell'intera disciplina. Nello specifico, il Regolamento prevede la possibilità di aprire due tipi di procedure: accanto alla necessaria procedura principale dagli effetti universali, si possono infatti avere una o più procedure locali funzionali alla tutela dei creditori stranieri. La prima può essere aperta *solo* nello Stato in cui si trova il centro degli interessi principali del debitore ("COMI", secondo l'acronimo inglese), che nel caso di società o persone giuridiche si presume essere il luogo in cui si trova la sede statutaria; le altre invece in ogni altro Stato in cui il debitore abbia delle dipendenze.

Il centro di interessi principali del debitore è quindi un elemento chiave ai fini del riparto di giurisdizione; nonostante ciò, il Regolamento non ne fornisce alcuna definizione, e si vedrà come la Corte di Giustizia abbia in questo senso svolto un fondamentale ruolo di supplenza.

In ogni caso, la legge da applicare alle procedure è la legge dello Stato di apertura (c.d. *lex concursus*), che ne disciplina tutti gli effetti: condizioni di apertura, svolgimento e chiusura, ma anche poteri del curatore, azioni giudiziarie individuali ecc. Ci sono però alcune eccezioni tassativamente previste dal Regolamento per i casi in cui l'applicazione della *lex concursus* potrebbe pregiudicare i vari interessi coinvolti. Ad esempio, a tutela dei diritti reali dei creditori sui beni del debitore, è previsto che a questi si applichi la legge dello Stato in cui si trovano i beni, e non la legge dello Stato di apertura.

Tutto questa impalcatura sarebbe però inefficace se non fosse previsto un meccanismo di automatico riconoscimento delle decisioni, altro grande pilastro della disciplina europea.

L'apertura della procedura principale deve essere infatti immediatamente ed automaticamente riconosciuta in tutti gli Stati Membri, senza possibilità di controllo supplementare da parte di questi ultimi. Inoltre, e salvo avvio di una procedura secondaria in un altro Stato, la procedura principale produrrà in tutta l'Unione gli stessi effetti previsti dalla legge dello Stato di apertura. Ad esempio, il curatore potrà esercitare, in qualunque Stato Membro, i poteri a lui concessi dalla legge dello Stato di apertura.

Dal momento della sua entrata in vigore nel 2002, il Regolamento ha funzionato piuttosto bene, dando prova di essere uno strumento importante anche ai fini della cooperazione giudiziaria promossa dal nuovo Art.65 del Trattato sul Funzionamento dell'Unione Europea. Nel corso di questi anni però, lo stesso ha anche mostrato numerosi problemi applicativi, rivelandosi non più in linea con le attuali priorità dell'Unione e con le più moderne prassi nazionali in diritto fallimentare, in particolare per quanto riguarda il salvataggio delle imprese in crisi. Oggi infatti le leggi fallimentari nazionali privilegiano la ristrutturazione, cercando di evitare - ove possibile - la liquidazione degli *asset* e la cessazione dell'attività. Questo anche a causa della crisi finanziaria scoppiata nel 2008, che ha determinato un cambiamento nell'approccio dei legislatori nazionali al problema dell'insolvenza: l'impresa viene ora riconosciuta come fonte di ricchezza per sé e maggiore importanza viene data alla tutela dell'occupazione.

In questo quadro, la revisione del Regolamento viene considerata anche come misura efficace per favorire la tanto agognata ripresa economica: salvaguardia dei posti di lavoro e seconda chance all'imprenditore onesto sono gli elementi chiave del nuovo orientamento europeo in materia fallimentare.

Proprio sulla base di questi elementi, nel 2012 la Commissione Europea ha avanzato la sua Proposta per l'aggiornamento del Regolamento, cui è dedicata gran parte del Secondo Capitolo.

Quest'ultimo si apre con l'analisi delle carenze della disciplina europea individuate dalla Commissione e delle relative soluzioni proposte. In particolare, queste riguardano:

1. L'ambito di applicazione. Si evidenzia innanzitutto come l'ambito di applicazione del Regolamento sia troppo stretto, non coprendo le procedure nazionali per la ristrutturazione delle società in fase di pre-insolvenza ("procedure di pre-insolvenza") né le procedure che mantengono in carica la dirigenza esistente ("procedure ibride"), nonostante le stesse siano state di recente introdotte in molti Stati Membri e considerate un prezioso strumento per evitare il fallimento. Per questo, la Commissione propone di modificare la definizione di "procedura d'insolvenza", così da ampliarne la portata;
2. La competenza. La Commissione rileva come le norme sul riparto di giurisdizione e sull'individuazione del centro di interessi principali del debitore si siano rivelate di difficile applicazione pratica, e per questo le chiarifica;
3. Le procedure secondarie. Anche la possibilità di aprire una o più procedure secondarie ha mostrato i suoi limiti, dato che spesso queste finiscono per ostacolare il corretto svolgimento della procedura principale. Di conseguenza, la Proposta consente al giudice di negare l'apertura di una procedura secondaria laddove questa non sia necessaria ai fini della tutela dei creditori locali. Inoltre, viene abolito il requisito per cui le procedure secondarie devono necessariamente essere procedure di liquidazione, requisito che automaticamente esclude ogni ipotesi di ristrutturazione;
4. La pubblicità della procedura. La Commissione rileva la totale mancanza di regole sulla pubblicazione obbligatoria delle decisioni dei giudici nazionali. Per questo, viene istituito l'obbligo per gli Stati Membri di pubblicare le decisioni giudiziarie relative ai casi transfrontalieri d'insolvenza in un registro elettronico e si prevede l'interconnessione dei registri fallimentari nazionali;
5. L'insinuazione dei crediti. La Proposta introduce moduli standard per l'insinuazione dei crediti, essendo la disciplina del Regolamento troppo vaga in materia;

6. I gruppi societari. Il Regolamento manca del tutto di una disciplina specifica per i gruppi societari, cosa che diminuisce le possibilità di successo nella ristrutturazione del gruppo. Quindi, la Proposta dispone il coordinamento delle procedure di insolvenza riguardanti società diverse facenti parte dello stesso gruppo, obbligando i curatori e i giudici coinvolti nelle varie procedure a cooperare tra loro. Inoltre, esse fornisce ai curatori gli strumenti per ottenere la sospensione delle altre procedure e per proporre un piano di salvataggio delle società facenti parte del gruppo sottoposte a procedura d'insolvenza.

La seconda parte del Capitolo II è invece dedicata all'analisi della prima lettura del Parlamento Europeo, che ha approvato la Proposta apportandovi numerose modifiche sostanziali. Una su tutte, la specificazione - evidentemente volta a limitare i casi di *forum shopping* - che il centro di interessi principali è il luogo dove il debitore esercita la gestione dei suoi interessi in modo abituale “*almeno tre mesi prima*” dell'apertura di una procedura di insolvenza o di una procedura provvisoria.

Comunque, nonostante i miglioramenti che deriverebbero dall'approvazione definitiva della Proposta della Commissione, il Regolamento continuerebbe a presentare ulteriori profili problematici, le cui possibili soluzioni costituiscono l'oggetto del Terzo ed ultimo Capitolo.

Nello specifico, quest'ultimo è diviso in tre parti.

La prima riguarda quelle che vengono definite “lacune minori” del Regolamento, ovvero problemi superficiali che in quanto tali potrebbero essere risolti con interventi “di cacciavite”, sulla scia di quanto fatto finora. Ad esempio, la questione della tassatività dell'Allegato A, contenente la lista delle procedure nazionali cui si applica il Regolamento. E' evidente che detta tassatività può comportare la paradossale esclusione dall'applicazione del Regolamento di molte procedure che, pur rientrando nella definizione di “procedura d'insolvenza” di cui all'Art.1, non sono elencate nell'Allegato. Una possibile soluzione sarebbe allora quella di stabilire una gerarchia chiara tra la definizione dell'Art.1 e l'elenco dell'Allegato, in modo da far prevalere la prima sul secondo, che quindi verrebbe ad avere una funzione meramente esemplificativa.

La seconda parte del Capitolo si occupa invece dei problemi più strutturali del Regolamento che, affondando le loro radici nelle divergenze tra le legislazioni nazionali, non possono essere risolti senza una vera azione armonizzatrice al livello europeo. Quest'ultima non soltanto risolverebbe i problemi applicativi riscontrati nell'attuazione del Regolamento (ad esempio quelli riguardanti la definizione e individuazione del COMI), ma soprattutto fornirebbe una risposta definitiva al problema del *forum shopping*. Come si è detto infatti, solo una reale parità di condizioni tra i vari Stati priverebbe di ogni convenienza per il debitore il trasferimento di beni o procedimenti all'estero.

Per questi motivi, la terza e ultima parte del Capitolo è dedicata all'analisi di una proposta concreta di armonizzazione avanzata dal Direzione Generale delle Politiche Interne del Parlamento Europeo nel 2010.

Da tale analisi si evince che, accanto ad aspetti del diritto fallimentare dove un'azione armonizzatrice appare ancora come un miraggio, essendo le legislazioni nazionali troppo divergenti (ad esempio, per quanto riguarda le classi di creditori), ve ne sono altre dove la stessa sembra più a portata di mano. Ad esempio, tra le varie misure proposte, spicca l'armonizzazione delle regole sui piani di ristrutturazione, che avrebbe il doppio effetto positivo di scoraggiare il *forum shopping* ed accrescere le possibilità di un'efficace ristrutturazione dell'impresa.

OVERVIEW

The objective of this work is to offer an overview of the European legal discipline of cross border insolvency.

This phenomenon is a very complex one, and because its scope has recently been broadened dramatically, can be considered relatively ‘new’. It is complex because that delicate balance that any insolvency law should tend to, i.e. the balance between the best satisfaction for creditors and the protection of the other interests involved, must be reached in not only one but multiple systems, often with very different legal frameworks. It is also relatively new because, although the first attempts to provide a uniform discipline to the subject date back to the end of the XIX century, the liberalization and globalization of markets that has occurred in the last few decades has fostered the expansion of trade beyond national borders, ultimately changing the very way a business is run.

In such a scenario, and in a context of ever-deeper European integration, at the end of the XX century it appeared to the European institutions that the adoption of a framework that is both coherent and binding for all Member States could no longer be postponed. Hence, the adoption of Regulation 1346/2000 on Insolvency Proceedings.

The Regulation aims to dissuade debtors from transferring assets or judicial proceedings from one Member State to another in an effort to obtain a more favorable legal position (forum shopping), as this phenomenon can jeopardize the good functioning of the Internal Market. Actually, without a true harmonization of national insolvency laws, this phenomenon can hardly be combated effectively: only a level playing field throughout the Union would eliminate the very premise of forum shopping by depriving the possibility benefit for the debtor in another jurisdiction. However, at least up to now, such a harmonizing action has not been possible, precisely because of the deep differences that exist between national

insolvency laws, and because of the “usual” reluctance of the Member States to relinquish portions of their sovereignty to the Union. The European lawmaker therefore has had to draft a less ambitious discipline that, simply put, confines itself to the identification of the national court competent to open proceedings, the applicable law, and a mechanism for the automatic recognition of decisions.

The description of this discipline constitutes the object of Chapter I, in which for the sake of clarity, the provisions of the Regulation will be analyzed following their numerical order.

The first issue examined is therefore the scope of application of the Regulation, which is limited to “collective insolvency proceedings that entail the total or partial divestment of the debtor and the appointment of a liquidator”.

From there, we will move to the analysis of the criteria used to distribute jurisdiction amongst the Member States, which is one of the most interesting and complex issues of the whole discipline. More specifically, the Regulation provides the possibility of opening two types of procedures: in addition to the main proceedings, which have universal effects, one or more local proceedings can be run for the protection of foreign creditors. The former can be opened *only* in the Member State in which the center of main interest (COMI) of the debtor is situated, which in the case of a company or legal person is presumed to be the place of the registered office; the latter, in turn, can be opened in any other State where the debtor possesses establishments.

As appears evident, the COMI is a key element for the distribution of jurisdiction; despite this, not a single definition is given by the Regulation, meaning that the interpretations of the Court of Justice have played a fundamental supplementary role.

Regardless, the law applicable to the procedures is the law of the opening State (*lex concursus*), which regulates all their effects: conditions of opening and closing, powers of the liquidator, actions of the creditors etc. However, the Regulation exhaustively provides some exceptions for those cases where the application of the *lex concursus* might jeopardize the various interests involved. For example, in order to protect creditors’ rights in rem, it is established that the

law of the State in which this rights are situated that shall apply, rather than the law of the opening State.

All this construction however, would be ineffective without a mechanism for the automatic recognition of decisions, another mainstay of the European discipline. Indeed, the opening of main proceedings must be recognized immediately, automatically and without challenge by all Member States. In addition, the main proceedings shall produce the same effects in any other Member State as under the law of the State of the opening of proceedings, as long as no secondary proceedings are opened in that other Member State. For example, the liquidator shall be able to exercise, in any Member State, the powers he enjoys under the law of the opening State.

Since its entry into force in 2002, the Regulation has proven to be fairly effective, proving itself to be an important tool even as concerns the judicial cooperation promoted by the new Art.65 of the Treaty on the Functioning of the European Union. However, not only has the Regulation suffered from problems in its application, but also it has revealed itself to be out of touch with the changing priorities of both the Union and of domestic insolvency law.

Indeed, today national insolvency laws privilege the restructuring of businesses and tend to avoid –where possible- their liquidation and shutting down. The onset of the financial crisis in 2008 also affirmed the need for national legislators to change their approach to the problem of insolvency: the protection of both employment and the business itself as a ‘source of wealth’ are given more importance.

In this framework, the revision of the Regulation is also considered an effective measure to favor long awaited economic recovery: safeguarding jobs and giving a second chance to the honest entrepreneur are the key elements of the new European approach to business failure and insolvency.

It is precisely upon these elements that in 2012 the European Commission based its Proposal for the updating of the Regulation, to which the greatest part of Chapter II is dedicated.

This opens with the analysis of the deficiencies of the European discipline as identified by the Commission, as well as of the respective proposed solutions. In particular, these concern:

1. The scope. The Regulation does not cover national pre-insolvency and hybrid proceedings, even though they have been recently introduced in many Member States and are considered to increase the chances of successful restructuring of businesses. Therefore, the Proposal extends the scope of the Regulation by revising the definition of insolvency proceedings so as to include them;
2. The jurisdiction. There are difficulties in determining which Member State is competent to open insolvency proceedings. Therefore, the Proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction;
3. The secondary proceedings. The opening of secondary proceedings can hamper the efficient administration of the debtor's estate. Moreover, secondary proceedings currently have to be winding-up proceedings, which constitutes an obstacle to the successful restructuring of a debtor. For these reasons, the Proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this would not be necessary to protect the interest of local creditors, and by abolishing the requirement that secondary proceedings must be winding-up proceedings;
4. The publicity of proceedings. The Proposal requires Member States to publish the relevant court decisions in cross border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers;
5. The lodging of claims. The Proposal introduces standard forms for the lodging of claims;
6. The groups of companies. The Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group although a large number of cross border insolvencies involve groups of companies. Therefore, the Proposal provides for the coordination of the insolvency

proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other. In addition, it gives the liquidators involved the procedural tools to request a stay of the other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

The second part of Chapter II is dedicated to the first reading of the European Parliament, which approved the Proposal with several amendments. A key example, and one evidently directed towards limiting cases of forum shopping, is the clarification that the COMI is the place where the debtor conducts the administration of his interests on a regular basis “*at least three months prior to the opening of insolvency proceedings or provisional proceedings*”.

In any case, notwithstanding the improvements that would derive from the final approval of the Proposal, the Regulation would keep presenting further problems, whose possible solutions constitute the object of the Third and final Chapter. Specifically, this is divided into three parts.

The first one concerns what I have termed the “minor lacunae” of the Regulation, i.e. superficial problems that as such could be solved with noninvasive interventions, in line with what has been done until now. For example, the question of the exhaustiveness of Annex A, which contains the list of national procedures to which the Regulation applies. It is evident that this exhaustiveness can cause the paradoxical exclusion from the application of the Regulation of many procedures that, although fitting the definition of “insolvency procedure laid by Art.1, are not listed in the Annex. A possible solution would therefore be the establishment of a hierarchy between the definition of Art.1 and the list of the Annex, so that the former prevails over the latter, which would henceforth be considered illustrative rather than exhaustive.

On the other hand, the second part of Chapter III deals with the more structural problems of the Regulation that, being rooted in the differences between national legislations, cannot be solved without a true harmonization at European level. This would not only solve the problems occurred in the implementation of the

Regulation (for example, those concerning the definition and identification of the COMI), but would especially provide a definitive answer to the problem of forum shopping. As said, only a true uniformity of conditions between Member States would deprive debtor's pre-insolvency migrations of any advantage.

For these reasons, the third and last part of the Chapter is dedicated to the analysis of a concrete proposal of harmonization presented by the Directorate General for Internal Policies of the European Parliament in 2010.

What emerges from this analysis is that, beside aspects of insolvency law where harmonization still seems unattainable, given the great divergence between national legislations (for example, as concerns the ranking of creditors), there are others areas in which it seems already achievable. For example, amongst the several measures proposed, the harmonization of the rules on restructuring plans deserves to be highlighted, as it would have the double beneficial effect of discouraging forum shopping and increasing the chances of a successful restructuring of the business.

CHAPTER I

THE REGULATION (EC) NO 1346/2000

1. BACKGROUND: BRIEF HISTORY OF THE REGULATION

Regulation 1346/2000, which came into force on May 31 2002¹, constitutes the culmination of a long history of attempts at providing a discipline for cross border insolvency. This occurs when a debtor going bankrupt (be it an individual or a company) has conducted his businesses in more than one Member State, and so has creditors and/or assets scattered across the Union.

From a historical point of view, it is interesting to note that the issue was considered serious even before the adoption of the Regulation. By the end of the XIX century, international organizations such as the International Law Association and the Institut de Droit International started elaborating proposals to provide a coherent discipline and many European countries resorted to coordination instruments, like bilateral or multilateral conventions².

However, the actual efforts to draft a convention on insolvency proceedings at a European level did not begin until the sixties. In 1959, the European Commission invited the then six Member States to prepare a convention to provide a uniform

¹ After a *vacatio legis* period of two years, to allow Member States to modify their respective national laws and make them compatible with this European intervention.

² Amongst these conventions it is worth recalling the one between France and Switzerland in 1869 “*sur l’exécution des jugements et la compétence judiciaire en matière civile*”, the one between Italy and France of June 3 1930, the one between Italy and the Great Britain of February 7 1964 and the one between Italy and Austria of July 12 1977.

discipline for the recognition and enforcement of judgments, including those pertaining to insolvency. Each Member State appointed scholars in order to identify a set of uniform norms to be applied transnationally. However, from the beginning, dealing with insolvency law turned out to be so problematic that the original working group was divided into two sub-groups. The first one with the task of focusing on the general aspects of civil and commercial law, while the second concentrated on the issues specific to insolvency law. Eventually, the first group produced the fundamental Brussels Convention³. Conversely, the second went on working for more than twenty years and finally abandoned the project in 1984 when “*it became painfully clear that ‘harmonizing’ the insolvency laws of the then six Member States of the EU was an impossible task*”⁴.

In spite of this, a few years later, in 1990, the Council of Europe managed to draft the Convention on Certain International Aspects of Bankruptcy (aka Istanbul Convention). Even though the latter never came into force⁵, it constituted a remarkable initiative as it anticipated the Regulation discipline⁶ and somewhat “*reinvigorated*”⁷ the European institutions’ intent to create a coherent framework for cross-border insolvency situations. In addition to this, the liberalization and globalization of markets in that period saw the increasing expansion of commercial activities beyond national territorial borders. In such a context, the absence of a common set of rules for cross-border insolvency proceedings started to be viewed as a void in the framework of the Internal Market, detrimental to both persons and businesses. Initially Member States tried to address the issue by providing their respective systems with specific internal disciplines. However, these interventions soon proved inadequate to face the challenges arising from an

³ The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The Convention was originally signed by the then six members of the Communities and then amended several times. Today, it has been almost completely superseded by Regulation (EC) No 44/2001 (aka Brussels I Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴ U. DADUSH, D. DASGUPTA, M. UZAN (2000) *Private Capital Flows in the Age of Globalization. The aftermath of the Asian crisis*, Edward Elgar. p.160.

⁵ The Convention was ratified only by Cyprus.

⁶ Specifically, the Convention would have been applied had an insolvency proceeding presented links with other countries, either for the location of goods or for the residence of creditors. In addition, it contained a “modified universalism model” very similar to the one that was later created for the Regulation 1346/2000.

⁷ U. DADUSH, D. DASGUPTA, M. UZAN (2000) *Private Capital Flows in the Age of Globalization. The aftermath of the Asian crisis*, Edward Elgar. p.160.

ever more interconnected European and global economy. Transnational problems require transnational solutions. Therefore, after meeting informally in San Sebastian in 1989, the European Community Ministers of Justice re-launched discussions and negotiations regarding a European Convention on cross-border insolvency. Member States gave instructions to that effect by setting up, within the Council of the European Communities, an ad hoc working party made of a number of national experts purposely designated to that end. The latter met for discussion frequently from 1991 until the conclusion of the definitive text in 1995. The “European Union Convention on Insolvency Proceedings” was tabled for approval by the EU Council of Ministers on September 1995.⁸ However, when the deadline for its signature passed, the United Kingdom did not ratify it⁹ and the whole project lapsed¹⁰.

Despite these multiple failed attempts, at the end of the XX century the time appeared ripe to fill this loophole in European legislation¹¹ and the entry into force of the Treaty of Amsterdam in 1999 constituted a crucial turning point. Indeed, among several other things, the Treaty expanded the competences of the Union, establishing an “Area of freedom, security and justice” and authorized the European institutions to legislate on civil law and civil procedure. In particular, Art. 65 and 67 of the EC Treaty encouraged judicial cooperation in civil and commercial matters¹², and on this basis the Regulation was finally adopted.

⁸ WESSELS B. (2006) European Union Regulation on Insolvency Proceedings. An Introductory Analysis. INSOL. [Online]. Available from: www.insol.org.

⁹ The UK did not ratify the Convention because of some political controversies it had with other Member States (among which the question of the “mad cow disease” and the struggle for the sovereignty over Gibraltar with Spain).

¹⁰ CORNO G. (2002) La disciplina comunitaria dell’insolvenza. *Dir. Fallim.* (1). p.272ff. VANZETTI M. (2006) *L’insolvenza transnazionale: storia del problema*, Giuffrè.

¹¹ In fact, between the end of the nineties and the beginning of the new century, many directives were enacted to approximate national commercial laws with an eye on insolvency laws. See for example Directive 98/26 on settlement finality in payment and securities settlement systems and Directive 2001/17 on the reorganization and winding-up of insurance undertakings. See also Directive 2001/24 on the reorganization and winding-up of credit institutions; Directive 2002/47 on financial collateral agreements; Directive 2002/74 on the approximation of the laws of the Member States relating to the protection of employees in the event of insolvency of their employer.

¹² Because of their importance in the adoption of the Regulation, it seems worth recalling the content of both the provisions. Art.65: “Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Art.67 and in so far as necessary for the proper functioning of the internal market, shall include:

a) Improving and simplifying:

a. The system for cross-border service of judicial and extrajudicial documents;

Consequentially, its approval on May 29, 2000 can be seen as an important part of the process of Europeanization of international private and procedural law and another step towards a full judicial cooperation.¹³

2. MAIN FEATURES OF THE REGULATION

Given the strong reluctance of the Member States to relinquish portions of sovereignty to the growing field of insolvency law, an agreement would have never been reached, had the European discipline been too intrusive from the Member States' perspective.

In fact, the Regulation does not provide uniform substantive law provisions for the Member States. Nor does it aim at harmonizing all the national insolvency procedures. Rather, its objective is to establish common criteria to identify the State that has jurisdiction to open insolvency proceedings and to provide the whole discipline accordingly¹⁴. Recital (11) makes this point very clear:

This Regulation acknowledges the fact that as a result of widely differing substantive law it is not practical to introduce insolvency proceedings with universal scope in the entire community.

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- b. The recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
 - c. Cooperation in the taking of evidence
- b) Promoting compatibility of the rules applicable in the Member States concerning the conflicts of laws and of jurisdiction;
 - c) Eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Art.67 provides, inter alia, that the Council shall adopt the measures provided for in Art.65.

Later, when the EC Treaty was amended by the Treaty of Lisbon in 2007, these provisions ended up in the new Title V of the Treaty on the Functioning of European Union ("Area of freedom, security and justice"), and became Articles 67 and 81. In particular, Art.67 (4) provides that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters". Art.81 (1) provides that "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member State".

¹³ See also Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and Regulation 1347/2000 on the recognition and enforcement of judgments in matrimonial matters. To this extent, see QUEIROLO I. (2002) L'evoluzione dello spazio giudiziario europeo: in particolare la disciplina comunitaria delle procedure d'insolvenza. Still being published on *Comunicazioni e studi*.

¹⁴ See, for the general features of the Regulation, WESSELS B. (2006) European Union Regulation on Insolvency Proceedings. An Introductory Analysis. INSOL. [Online]. Available from: www.insol.org; OMAR P.J. (2004) *European Insolvency Law*, Ashgate.

The Court of Justice confirmed this aspect in *Bank Handlowy*: “the Regulation is designed not to establish uniform proceedings on insolvency, but [...] to ensure that cross-border insolvency proceedings operate efficiently and effectively. To that end, it lays down rules on recognition and jurisdiction as well as rules on the applicable law in the area”¹⁵.

For the sake of clarity, these rules will be grouped and analyzed in the following six subchapters, which cover: the scope of the Regulation; the jurisdictional issues; the principle of recognition of proceedings and its effects; the law applicable to the concrete case; the interplay between main and secondary proceedings; and the information for creditors and lodging of claims.

2.1 Scope, Definitions and the Role of the Annexes

The scope of the Regulation is defined in Art.1: it applies to collective¹⁶ insolvency proceedings that entail the total or partial divestment of the debtor and the appointment of a liquidator, and that are listed in Annex A¹⁷.

Surprisingly though, nothing more is said with respect to the notion of insolvency. Art.1- and the Regulation in general- do not provide a unitary definition, nor do they establish any subjective/objective requirements to identify whether the debtor is insolvent. Everything is left to national laws. Undoubtedly, this stems from the above-mentioned difficulties the Member States in agreeing upon a common discipline for insolvency. The intention of the European legislator has been therefore to avoid conflicts with national legislations: a unitary definition of insolvency could have contrasted with national ones (still very different from one another), and led Member States to adopt conflicting interpretations of the Regulation, jeopardizing its effectiveness. Hence, the silence of the European legislator with respect to the notion of insolvency.

¹⁵ Case C-116/11, paragraph 45.

¹⁶ Therefore, the Regulation does not apply to those proceedings that are commenced by one creditor.

¹⁷ Not all the proceedings that meet the requirements of Art.1 (1) are listed in Annex A and therefore covered by the Regulation: some are excluded by paragraph (2) because they are generally subject to special regimes under national laws. These are namely: proceedings concerning insurance undertakings, credit institutions, investment undertakings that provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

In any case, Art.2 provides the definitions of many other expressions used in the Regulation. Specifically, the “liquidator” is defined as any person or body whose function is to administer or liquidate assets of which the debtor has been divested or supervise the administration of his affairs, and these subjects are listed in Annex C.

The “winding-up proceedings” must be intended as all the insolvency proceedings within the above-mentioned meaning involving realizing the assets of the debtor, and these proceedings are listed in Annex B.

Evidently, the Annexes play a crucial role within the Regulation. It is by referring to them that the Member States can be sure that their respective insolvency proceedings meet the formal requirements set by the Regulation, and can consequently benefit from the European discipline. In other words, they are supposed to “*eliminate any uncertainty regarding the types of proceedings, and the types of office holders, to which the Regulation applies*”¹⁸.

Annex A, in particular, contains a list of those national insolvency proceedings that are thereby brought within the ambit of the Regulation. However, the question whether this list is exhaustive or not (i.e. if *only* those proceedings listed in Annex A fall under the European discipline) is highly controversial, and will be widely discussed in Chapters II and III.

In any case, the direct consequence of the function of all the Annexes is that they need to be easily adaptable to the swift and constant changes in national insolvency legislations. For this reason, Art.45 of the Regulation provides a relatively easy procedure to amend the Annexes at any time¹⁹. Specifically, the Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may affect the desired amendment.

Going back to the definitions of Art.2, within the Regulation the term “court” indicates the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings.

¹⁸ MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. p.44.

¹⁹ So far, the Annexes have been amended four times: see Council Regulations (EC) 603/2005, 649/2006, 1791/2006 and 681/2007.

A “judgment”, in relation to the opening of insolvency proceedings or the appointment of a liquidator, is the decision of any court empowered to open such proceedings or to appoint a liquidator.

The “time of the opening of proceedings” must be intended as the time at which the judgment that opens proceedings becomes effective, be it a final judgment or not. When a judgment becomes effective is a matter for domestic regulation.

As far as the expression “Member State in which assets are situated” is concerned, we have to distinguish. In case of tangible property, the expression means the Member State within the territory of which the property is situated. In cases where the ownership, right or entitlement to property must be entered in a public register, the Member State is the one in which the register is kept. In case of claims, the relevant Member State is the one in which the third party required to meet the claim has the center of main interest (hereinafter referred as to COMI).

Finally, for the purposes of the Regulation, “establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods. The European Court of Justice in *Interedil* has further specified the concept, clarifying that “*a structure consisting of a minimum level of organization and degree of stability necessary for the purpose of pursuing an economic activity*” is required, and that “*the presence alone of goods in isolation or bank accounts does not, in principle, meet that definition*”²⁰.

2.2 Jurisdiction

The provisions dealing with jurisdictional issues are probably the most important and certainly the most interesting ones. Deciding which national court has jurisdiction to open insolvency proceedings is in fact the very purpose of the whole Regulation²¹. This sets down a rule, contained in Art.3, which provides the fundamental principles in relation to the allocation of international jurisdiction in respect of insolvency proceedings²². Whilst prima facie simple, the practical

²⁰ Case C-396/09, paragraph 62.

²¹ BACHNER T. (2006) The Battle over Jurisdiction in European Insolvency Law. *European Company and Financial Law Rev.* (310) p.327.

²² MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. p.246.

application of the rule has suffered from lack of clarity, as will be discussed in Chapter II.

2.2.1 *The concept of COMI*

Art.3 (1) establishes that the courts of the Member States within the territory of which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings, as long as this COMI is situated in the Union (Recital 14)²³. In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

The concept of COMI is of the utmost importance because it is what all the dispositions concerning jurisdiction, and in truth the entire Regulation, revolve around. Despite this vital role, not a single definition of COMI is given by the Regulation²⁴. However, guidance can be found in Art.3 (1) when read in conjunction with Recital (13), which would indicate that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. This, according to the Court of Justice in *Eurofood*, is “to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main proceedings”²⁵. This represents, to some authors, a “victory of substance over form”²⁶.

²³ For MOSS, FLETCHER and ISAACS this limitation is of the utmost importance as it excludes many cross-border insolvencies from the ambit of its provisions even though interested parties and assets may be located within the EU.

²⁴ Initially, it was not even clear whether the concept of COMI had to be interpreted in the light of European Union law or of national law. Eventually, the Court of Justice in *Interdil*, 43-44 made it clear that “the concept [of COMI] is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislations. [...] therefore the term ‘COMI’ must be interpreted by reference to European Union law”.

²⁵ Case C-341/04, paragraph 33

²⁶ See MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford p.46. See also GRIER R. (2006) *Eurofood IFSC Ltd – An end to forum shopping? Commercial Law Practitioner* (161) p.165 ff; and MONTELLA G. (2012) *La Corte di Giustizia e il COMI: eppur (forse) si muove. Il fallimentarista*. [Online]. Available from: www.ilfallimentarista.it/Corte_giustizia_COMI_competenza_internazionale_insolvenza.

MONTANARI M. (2007) *La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure di insolvenza. Int'l Lis* (1). p.20.

BARIATTI S. (2005) *L'applicazione del Reg. 1346/2000 nella giurisprudenza. Riv. Dir. Processuale*. P.673-700.

However, the Regulation is silent also on to the nature or degree of proof required to rebut the presumption laid in the second sentence of par. (1). Again, the words of the Court in *Eurofood* give guidance:

[...] in determining the COMI of a debtor company, the presumption in favor of the registered office 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.

That could be so in particular in the case of a ‘letterbox company’, not carrying out any business in the territory of the Member State in which its registered office is situated.

By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation²⁷.

This would indicate that the presumption laid down in Art.3 (1) can be rebutted *only* where the company in question does not carry out any business in the Member State in which its registered office is situated.

This point has been deepened even further in *Interdil*, where the Court clarified what the possibility of ascertainment by third parties exactly means:

[...] for the purposes of determining a debtor company’s COMI, the second sentence of Art.3 (1) must be interpreted as follows:

A debtor company’s COMI must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors that are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company’s central

²⁷ *Eurofood* 34, 35, 36.

administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in that other Member State.

Where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's COMI is presumed to be the place of its new registered office²⁸.

In summation, according to Court of Justice case law, the presumption in favor of the registered office can be rebutted only if, based on factors both objective *and* ascertainable by third parties, it is demonstrated that the company does not carry out any business in the Member State where its registered office is situated. The 'ascertainable' criterion may be met where the material factors used to establish the location (and subsequent nationality) of the company's COMI have been made publicly, or at least sufficiently, accessible.

2.2.2 Main and Secondary Proceedings

In an ever more interconnected judicial space like that of the Union²⁹, the impact a domestic court decision can have beyond its nations' borders is continuously increasing. Hence, today Member States are more willing to identify with precision the cases where their jurisdiction is limited, as well as those where national judicial decisions can have a trans-territorial reach.

The question of whether decisions taken within national insolvency proceedings belong to the first or to the second category does not have a straightforward solution. This is because historically Member States have chosen between two

²⁸ Case C-396/09, para59.

²⁹ See note 15.

opposing models to enforce insolvency law, namely universalism and territorialism³⁰.

According to the former model, only a single set of insolvency proceedings can be conducted against the same debtor, and this is intended to encompass the debtor's assets on a worldwide basis and to affect all creditors, wherever they are located.

Conversely, according to the latter model, insolvency proceedings can be opened in each country in which the debtor has assets, and this can result in a multitude of proceedings concerning the same debtor.

Both of these models have advantages and disadvantages. Universalism would appear to offer the best protection of the principle of *par condicio creditorum* (equal treatment of creditors). However, its concrete applications require a certain degree of cooperation with the other States involved in the insolvency. Furthermore, in a transnational context, it can be difficult for creditors (especially small ones) to lodge claims and seek satisfaction in foreign jurisdictions. Not to mention the fact that the identification itself of the State that has jurisdiction can be problematic because national laws vary considerably as concerns the prerequisites to open insolvency proceedings.

On the other hand, territorialism does offer a solution to these drawbacks. However, it remains clear that opening several proceedings against the same debtor in several countries can be detrimental to the principles of legal certainty and foreseeability in general. In addition, because of its very nature territorialism can increase forum shopping.

For these reasons, despite the clear abstract distinction between the two, in practice only rarely have the Member States applied either of these theories in their "pure" form.

Likewise, even the Regulation has opted for a compromise, tellingly called "limited universalism", which is realized by creating two different types of proceedings that can run simultaneously: main proceedings and

³⁰ On the dichotomy territorialism/universalism, see VIGROS M. and GARCIMARTIN F. (2004) *The European Insolvency Regulation: Law and Practice*, The Hague. P.12ff. See also QUEIROLO I. (2007) *Le procedure d'insolvenza nella disciplina comunitaria. Modelli di riferimento e diritto interno*, Giappichelli. P130ff; DE CESARI P. and MONTELLA G. (2003). *Insolvenza transfrontaliera e giurisdizione italiana. Competenza internazionale e riconoscimento delle decisioni*, Giuffrè. P.23ff; and DE CESARI P. and MONTELLA G. (2004). *Le procedure di insolvenza nella nuova disciplina comunitaria*, Giuffrè. P.263ff.

territorial/secondary³¹ proceedings. The former proceedings, having (potentially) universal effects, can be opened only in the Member State where the debtor's COMI is situated. The latter proceedings can be opened in any other Member State as long as the debtor possesses an establishment in that State, and their effects are restricted to the assets of the debtor there situated. In addition, they must necessarily be winding-up proceedings, and are subject to the provisions of Chapter III of the Regulation (see below)³².

The mechanism created by the Regulation represents a mix between the two models because, as the Court of Justice highlighted in *MG Probud Gdynia*³³, “only the opening of secondary proceedings is capable of restricting the universal effect of the main proceedings”. This restriction, despite being detrimental in that it can slow down and complicate proceedings considerably, is however necessary for at least three reasons³⁴. The first and obvious one is the already mentioned protection of the diversity of interests. Creditors may have a legitimate interest in pursuing insolvency proceedings against a debtor in their own State, and to this extent, the opening of secondary local proceedings can be extremely convenient for them. The second reason is that the estate of the debtor may be too complex to be administered as a unit. The third one is that differences in the legal systems

³¹ According to Art.3 (3), after main proceedings are opened, any proceedings opened subsequently under paragraph (2) shall be secondary proceedings.

In turn, when these proceedings are commenced prior to the commencement of main proceedings, they are not “secondary”, but rather may be referred to as “independent territorial proceedings” or just “territorial proceedings”. According to MOSS, FLETCHER and ISAACS “one important advantage of opening independent territorial proceedings before the opening of any main proceedings is the possibility to have non-winding-up proceedings”. However, pursuant to Art.3 (4) this can happen only in two cases:

a) Where main proceedings cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the debtor's COMI is situated [in Italy, for example, it is not possible to commence insolvency proceedings against a debtor who is not classifiable as a trader (*imprenditore*), see Art. 2083 of the Civil Code.]; or

b) Where the request to open territorial insolvency proceedings comes from a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claims arise from the operation of that establishment.

In any case, as Recital (17) underlines, if main proceedings are opened, territorial proceedings automatically become secondary.

³² On the relationship between main and secondary proceedings, see MONTELLA G. (2009) *La procedura secondaria: un rimedio contro il forum shopping del debitore nel Regolamento (CE) n. 1346/2000. Fallimento*. P.1293-1299.

³³ C-444/07, 24.

³⁴ See Recitals (12) and (19).

concerned may be too deep and difficulties may arise from the extension of effects of the law of the State of the opening³⁵.

2.3 Recognition of Insolvency Proceedings

Not only does the universalism/territorialism dichotomy provide the theoretical basis for the distinction between main and secondary proceedings, but it also has vast implications on the recognition of foreign insolvency proceedings³⁶.

As the problem also involves delicate issues of private international law, it seems appropriate to analyze it starting from a wider perspective.

If the insolvency concerns only European States, *nulla quaestio* that the Regulation will apply. However, for the purposes of this study, it is first necessary to explain what happens if non-European States are also involved. Indeed, without these indications it is not easy to understand how the Regulation operates in the European framework.

Recital (14) makes it clear that the Regulation deals only with the intra-community effects of insolvency proceedings. Effects vis-à-vis third countries are therefore governed by the domestic rules of private international law of the Member State concerned. To this regard, the Vigros-Schmit Report³⁷ reads:

³⁵ For these reasons, the liquidator in the main proceeding is given the possibility to request the opening of secondary proceedings when the efficient administration of the estate so requires.

³⁶ On the dichotomy territorialism/universalism, see VIGROS M. and GARCIMARTIN F. (2004) *The European Insolvency Regulation: Law and Practice*, The Hague. P.12ff.

FUMAGALLI L. (2001) Il regolamento comunitario sulle procedure di insolvenza: competenza internazionale, legge applicabile e riconoscimento delle decisioni straniere. *Riv. Dir. proc.* (3) p.697.

MONTANARI M. (2007) La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure di insolvenza. *Int'l Lis* (1). p.20.

BARIATTI S. (2005) L'applicazione del Reg. 1346/2000 nella giurisprudenza. *Riv. Dir. Processuale*. P.673-700.

³⁷ The Vigros-Schmit Report was produced during the final phase of the negotiations for a Convention on Insolvency Proceedings under the auspices of the Council of the European Union. It was completed in 1996, but never formally adopted or officially published by the EU Council because the project for a Convention lapsed. However, because of the substantial identity between the provision of the Regulation and those of the draft Convention, the Report is still an important instrument of interpretation of the Regulation.

As the Convention³⁸ provides only partial (intra-community) rules, it needs to be supplemented by the private international law provisions of the State in which the proceedings were opened.

Member States are therefore free to regulate the scope of their own jurisdiction and, as seen, they variably opt for (moderate) forms of universalism and territorialism. This means that in practice uncountable combinations can occur when it comes to the recognition of foreign proceedings; however, at least theoretically two situations can be distinguished:

1. The insolvency also involves third countries, and there are bilateral or multilateral conventions between them and the European Member State(s). In this case, the discipline of such conventions will apply as the primary source of regulation;
2. The insolvency also involves third countries but there are no conventions. This case is more complicated because the governing legal framework varies from State to State. In Italy, for example, the case law indicates preference for the territorialism model, which establishes that insolvency proceedings opened in Italy can concern only those assets of the debtor situated in the Italian territory. Therefore, the debtor's assets situated in third countries are in principle excluded from the bankruptcy assets. To acquire them, the Italian liquidator shall have to take action in order to obtain the recognition of the Italian proceedings in those third countries, and shall act within the limits set by local laws. For example, the acquisition and sale of such assets will be regulated by the law of the country where these goods are situated³⁹.

That being explained, we can now move on to examine the issue from a purely European perspective. The principle of recognition⁴⁰ of foreign proceedings is a fundamental one within the Regulation⁴¹. The general philosophy is that of

³⁸ The 1995 European Union Convention on Insolvency Proceedings, upon which the Regulation is mostly based

³⁹ See, to this regard, the Italian Supreme Court ruling of 19 December 1990, n.12031.

⁴⁰ By recognition, the Regulation means precisely that the effects attributed to the proceedings by the law of the opening State extend to all other Member States (Recital 22).

⁴¹ FUMAGALLI L. (2001) Il regolamento comunitario sulle procedure di insolvenza: competenza internazionale, legge applicabile e riconoscimento delle decisioni straniere. *Riv. Dir. proc.* (3) p.697.

providing common criteria with which to identify the State that opens proceedings, rather than a blanket harmonization of proceedings. This necessitates a mechanism by which the decisions handed down by a given national court are considered valid within all Member States.

In short, this mechanism eliminates the risk of conflicting decisions⁴², which aligns with and reflects the fundamental EU law principle of mutual trust⁴³.

The core provisions here are Articles 16 and 17. The former expresses the principle of immediate, automatic⁴⁴ and universal (EU-wide) recognition of insolvency proceedings opened pursuant to Art.3. This recognition begins when the judgment opening proceedings becomes effective in the opening State, and the mechanism further applies where, on account of the debtors capacity, insolvency proceedings cannot be brought against them in other Member States⁴⁵.

In addition, the Court in *Eurofood* made it clear that “*the main proceedings opened by a court of a Member State must be recognized by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State*”⁴⁶.

MONTANARI M. (2007) La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure di insolvenza. *Int'l Lis* (1). p.20.

⁴² For some concrete examples, see *Re ISA-Daisytek SAS* case, where the Court of Appeal of Versailles (2003) and the Cour de Cassation (2006) held that they were not entitled to review the decision of the English court opening main proceedings in relation to a French company which the English court had found had its COMI in England. See also *Re ISA-Daisytek Deutschland GmbH*, where the Higher Regional Court of Dusseldorf (2004) came to the same conclusion.

⁴³ Art.67 TFUE: The Union shall constitute an area of freedom, security and justice [...] The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

In *MG Probud Gdynia* (C-444/07, 28), the Court highlighted: “It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings”.

The centrality of this principle is also enshrined in Recital (22), which claims that grounds for non-recognition should be reduced to the minimum necessary. Again, in *MG Probud Gdynia* (31ff.) the Court held that there are only two such grounds: the first regards judgments that might result in a limitation of personal freedom or postal secrecy (Art.25 paragraph 3); the second is about the public policy clause (Art.26).

⁴⁴ I.e. without any kind of preconditions under local law (for example, there is no requirement that the decision to open insolvency proceedings be published locally before the proceedings can be recognized).

⁴⁵ For example because the debtor is not a trader, as under Italian law.

⁴⁶ *Eurofood*, 44.

As far as the effects of this recognition are concerned, Art. 17 provides that the judgment opening the main proceedings shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, as long as no secondary proceedings are opened in that other Member State⁴⁷ and where the Regulation does not provide otherwise. In addition, the effects of the secondary proceedings may not be challenged in other Member States⁴⁸.

2.3.1 Powers of the Liquidators and Equal Treatment of Creditors

The principle of recognition extends also to the rules concerning liquidators. Indeed, the liquidator may exercise all the powers conferred on him by the law of the opening State in another Member State, as long as no other insolvency proceedings have been opened there, nor any preservation measures to the contrary have been taken there further to a request for the opening of insolvency proceedings in that State. The liquidator may remove the debtor's assets from the territory of the Member State in which they are situated. In addition, the liquidator may, in any other Member State, claim through the courts or out of court that moveable property was removed from the territory of the opening State to the territory of that other Member State after the opening of the insolvency proceedings. This provision is in line with the hostile approach that the Regulation adopted towards forum shopping⁴⁹.

In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realization of assets⁵⁰. However, according to the

⁴⁷ The effects of main proceedings will not be recognized in relation to local assets, whose discipline will in fact be governed by local law after the opening of the secondary proceedings.

⁴⁸ More precisely, pursuant to Art.17 (2), second part, any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

⁴⁹ In this regard, Recital (4) can be considered the landmark provision, establishing that "it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position".

⁵⁰ The interpretation of this provision is not straightforward. Some authors (among which MOSS, FLETCHER and ISAACS) suggest that the manner in which a liquidator is to exercise his powers is to be determined by local law but the nature and extent of those powers are to be determined by

final sentence of this disposition, those powers may not include coercive measures or the right to rule on legal proceedings or disputes⁵¹.

Another fundamental principle within the Regulation is the equal treatment of all creditors⁵². To this end, Art.20 establishes that a creditor who, after the opening of the main insolvency proceedings obtains by any means total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State shall return what he has obtained to the liquidation. In addition, a creditor who in the course of insolvency proceedings has obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have obtained an equivalent dividend in those other proceedings.

Pursuant to Art.21, “Publication”, the liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Art.3 (1) or (2). However, according to the second paragraph, any Member State within the territory of which the debtor has an establishment may require mandatory publication, and in such cases, the liquidator (or any authority empowered) shall take all necessary measures to ensure such publication.

Art.22 further states that the liquidator may request that the judgment opening the main proceedings be registered in the land register, the trade register and any other public register. However, the provision of Art.21 (2) applies here as well.

A very important discipline when it comes to the debtor-creditor relation is contained in Art.24. This pertains to cases where an obligation has been honored in one Member State for the benefit of a debtor facing insolvency proceedings in another, and where the obligation in question should have been honored for the

the law of the state of the opening of proceedings. The alternative view is that local law effectively determines the powers, which a liquidator can exercise. The former interpretation is preferable.

⁵¹ This, according to MOSS, FLETCHER and ISAACS can constitute a possible discrimination against an EU citizen, because the liquidator of the main proceedings cannot profit of all the instruments available to local liquidators.

⁵² MOSS, FLETCHER and ISAACS “*the policy of pari passu distribution for all creditors with the same ranking throughout the EU is one of the fundamental policies of the Regulation*”.

benefit of the liquidator in those proceedings. The obligation is discharged if the party honoring it was unaware of the opening of proceedings.

In addition, where such an obligation is honored before the publication provided for in Art.21 has been effected, the person honoring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings. Vice versa, where the obligation is honored after such publication⁵³ the presumption is reversed.

Similar to Art.16 is the provision contained in Art.25 about the recognition and enforceability of other judgments, which also have to be recognized with no further formalities. By other judgments, the Regulation means both those deriving directly from insolvency proceedings, those that are closely linked with them (even if they were handed down by another court), and those relating to preservation measures taken after the request for the opening of insolvency proceedings.

2.3.2 Refusal to Recognize Proceedings and Public Policy Clause

Undoubtedly, automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the legitimate expectations and certainty of transactions that are carried out in other Member States. Therefore, Recital (24) calls for the application of some exceptions to the general rule. The most important of these, at least from a theoretical point of view, is contained in Art.26. This allows Member States to refuse to recognize 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).

⁵³ This is in line with the provision of Recital (30), whereby it may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

To have a more complete idea of what this public policy clause actually means, we can refer again to the Vigros-Schmit Report:

Public policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.

Public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Member State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings [...]

However, the theoretical relevance of the public policy exception has very little to do with its practical applications, which are in fact rather sporadic. The Court of Justice has traditionally limited the scope of this exception, showing a very restrictive approach to the possibility of derogating from the principle of recognition. The question was dealt with some detail in *Eurofood*:

In the context of the Brussels Convention, since it constitutes an obstacle to the achievement of one of the fundamental aims of the Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Art.27 (1) of the Convention is reserved for exceptional cases. [...]

Recourse to that clause can be envisaged only where recognition or enforcement is sought inasmuch as it infringes a fundamental principle. The 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 recognized as being fundamental within that legal order.

The case law is transposable to the interpretation of Art.26 of the Regulation. [...]

In the procedural area, the Court of Justice has expressly recognized the general principle of Community law that everyone is entitled to a fair legal process. [...]

Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organization and conducts of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. [...] any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by

such proceedings actually have the opportunity to challenge the measures adopted in urgency⁵⁴.

In summation, in the opinion of the Court a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

2.4 Applicable Law

Given that the aim of the Regulation is not to harmonize national laws, and given that national laws remain very different, it is crucial to have a clear rule to determine which national law is to be applied during the proceedings⁵⁵. This rule is laid down in Art.4, which establishes that the law applicable to insolvency proceedings and their effects shall be that of the State of the opening of proceedings (the so-called *lex concursus*⁵⁶), save as otherwise provided in the Regulation⁵⁷. In addition, this law shall also determine the conditions for the opening of those proceedings, their conduct and their closure⁵⁸. As pointed out by

⁵⁴ Paragraphs 62-66.

⁵⁵ WESSELS B. (2006) European Union Regulation on Insolvency Proceedings. An Introductory Analysis. INSOL. [Online]. Available from: www.insol.org.

QUEIROLO I. (2002) L'evoluzione dello spazio giudiziario europeo: in particolare la disciplina comunitaria delle procedure d'insolvenza. Still being published on *Comunicazioni e studi*.

OMAR P.J. (2004) *European Insolvency Law*, Ashgate.

FUMAGALLI L. (2001) Il regolamento comunitario sulle procedure di insolvenza: competenza internazionale, legge applicabile e riconoscimento delle decisioni straniere. *Riv. Dir. proc.* (3) p.697.

⁵⁶ According to Recital (23), according to which the "*lex concursus*" determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

⁵⁷ The exceptions to the *lex concursus* rule are contained in Art.5-15.

⁵⁸ It shall determine in particular:

- a) Against which debtor insolvency proceedings may be brought on account of their capacity;
- b) The assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
- c) The respective powers of the debtor and the liquidator;
- d) The conditions under which set-offs may be invoked;
- e) The effects of insolvency proceedings on current contracts to which the debtor is party;
- f) The effects of the insolvency proceedings on proceeding brought by individual creditors, with the exception of lawsuits pending;
- g) The claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
- h) The rules governing the lodging, verification and admission of claims;

the Court of Justice, this provision indirectly gives even more importance to Art.3 because “*the determination of the court with jurisdiction entails determination of the law which is to apply*”⁵⁹.

2.5 Secondary Proceedings

The Third Chapter of the Regulation refers in part to Art.3 and clarifies the relation between its paragraphs (1) and (2). More specifically, it aims at ensuring that secondary proceedings are properly integrated into the general process of administering the debtor’s estate for the benefits of all the creditors.

Art.27, “Opening of proceedings”, provides that the opening of main proceedings by a court of a Member State which is recognized in another Member State shall permit the opening in that other Member State of secondary proceedings without the debtor’s insolvency being examined. This represents a significant exception to the principle set in Art.4 and reflects the fact that under the Regulation secondary proceedings “*are regarded as being very much ancillary and subordinate to the main proceedings*”⁶⁰. In fact, in such cases, the role of the local court is limited to verifying whether the court opening the main proceedings based its judgment on the COMI criterion (without the possibility of examining the merit of this decision).

Similar to the main proceedings’ discipline, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened (Art.28).

-
- i) The rules governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
 - j) The condition for and the effects of closure of insolvency proceedings, in particular by composition;
 - k) Creditor’s rights after the closure of insolvency proceedings;
 - l) Who is to bear the costs and expenses incurred in the insolvency proceedings;
 - m) The rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

It has to be noted, however, that this list is not exhaustive and does not have to be taken as a limitation of the general rule set in paragraph (1).

⁵⁹ *MG Probud Gdnyia*, 25.

⁶⁰ MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. P.326. DE BOER M.B. and WESSELS B. (2008) The dominance of Main Insolvency Proceedings under the European Insolvency Regulation. In *International Insolvency Law: themes and perspectives*, Ashgate. P.187ff.

The subjects entitled to request the opening of secondary proceedings are, pursuant to Art.29, the liquidator and any other person or authority empowered to request the opening under the law of the Member State within the territory of which the opening of secondary proceedings is required.

In the recent case *Burgo Group SpA*, the Court of Justice has specified that “*the question as to which person or authority is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the Member State within the territory of which the opening of such proceedings is sought*”.⁶¹

As said, the purpose of having two types of proceedings is the effective realization of the total assets of the debtor within the EU. This result can only be achieved if a strong coherence between the main and the territorial proceedings is ensured. Therefore, Art.31 establishes a duty to cooperate and exchange information⁶² between the liquidators in both the proceedings.

In addition, it is provided that the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity to submit proposals on the liquidation or use of assets in the secondary proceedings⁶³.

As far as the exercise of creditors’ rights is concerned, Art.32 provides that any creditor may lodge his claims in the main and in the secondary proceedings. Similarly, a liquidator in the main proceeding may lodge in the secondary proceeding the claims they have already lodged in the proceedings for which they were appointed, and vice versa. This, however, is contingent upon the interests of creditors in the latter proceedings being thereby served, subject to the right of creditors to oppose that or to withdraw the lodgment of their claims where the applicable law so provides.

Furthermore, the liquidators in the main or secondary proceedings are empowered to participate in other proceeding on the same basis as a creditor, in particular by attending creditors’ meetings.

⁶¹C-327/13, 51.

⁶² The Vigros-Schmit Report (paragraph 229) gives some a few examples of the information to be shared: assets of the debtor, liquidation of assets, lodging and verification of claims, ranking of creditors etc.

⁶³ According the Vigros-Schmit Report, this is particularly useful for the liquidator of the main proceedings to avoid the sale of assets in the secondary proceedings.

Art.33 deals with a fundamental instrument in any kind of insolvency proceeding -the stay of liquidation- and it implicitly demonstrates once again the primacy of the main proceedings. Pursuant to this provision, the court which opened the secondary proceedings shall stay the process of liquidation if the liquidator in the main proceedings so requires, provided that in such an event it may require the liquidator to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors⁶⁴. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceeding. The stay may be ordered for up to three months and it may be continued or renewed for similar periods. The court shall then terminate it: either at the request of the liquidator in the main proceedings; or of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified.

For what concerns the ending of secondary proceedings, Art.34 provides that where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself⁶⁵. Any restriction of creditors' rights arising from one of these measures which is proposed in secondary proceedings (such as a stay of payment or discharge of debt) may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest. In any case, during a stay of the process of liquidation⁶⁶, only the liquidator in the main proceedings or the debtor with the former's consent may propose the above-mentioned measures in the secondary proceedings.

In addition, it is important to mention that the closure of the secondary proceedings shall not become final without the consent of the liquidator in the

⁶⁴ For MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. p. 334, it is likely that the most common situation where a stay is requested is where a liquidator in the main proceedings is seeking to rescue, reorganize or sell the business or assets of the debtor as a whole (as in the *Collins & Aikman* case, see Chapter II). Therefore, in such situations he needs to avoid a liquidation of assets in the secondary proceedings.

⁶⁵ This once again confirm the very predominant role of main proceedings over secondary proceedings.

⁶⁶ See Art.33.

main proceedings unless the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

If then, according to the tenet of Art.35, by the liquidation of assets in the secondary proceeding it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings. It is indeed consistent with the supremacy of the main proceedings over secondary proceedings that the (possible) surplus in the secondary proceedings be passed over to the main proceedings rather than to the debtor.

Regardless, pursuant to Art.37 “Conversion of earlier proceedings”, the liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings listed in Annex B, if this proves to be in the interests of the creditors in the main proceedings.

The last provision of the Regulation’s Third Chapter is Art.38, “Preservation measures”, whose objective is to provide solutions where there is a gap between the request to open insolvency proceedings and the actual opening. To that end, it is established that where the court of a Member State appoints a temporary administrator in order to ensure the preservation of the debtor’s assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor’s assets situated in another Member State⁶⁷.

2.6 Information for Creditors and Lodging of Claims

Under Art.39 of the Regulation, any creditor has the right to lodge his claims⁶⁸ in each of the insolvency proceedings pending in the Community relating to the debtor’s assets⁶⁹.

⁶⁷ According to Recital (16) preservation measures are important, both prior to and after the commencement of insolvency proceedings, to guarantee the effectiveness of the insolvency proceedings. It also stresses the importance of the availability of such measures not only to the liquidator after the opening of the proceedings, but also to a temporary administrator before the judgment opening them.

⁶⁸ As far as the content of the claim is concerned, Art.41 provides that this has to include the nature of the claim, the date on which it arose and its amount, as well as whether preference is alleged, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

For this purpose, Art.40 establishes a mechanism of information, whereby as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States. This information has to include time limits, the penalties laid down in regard to those limits, the body or authority empowered to accept the lodgment of claims and the other measures laid down.

The importance of this disposition is even greater if we consider that, at present, there is no EU register of insolvency proceedings.

3. *CONCLUSIONS*

In this first Chapter we have outlined, although very briefly, the main features of the Regulation 1346/2000.

As has been seen, the Regulation does not provide a uniform insolvency discipline to be applied at European level. Therefore, its very backbone is composed of rules on the scope of application and on jurisdiction, as well as of the limited universalism system and the interplay between main and secondary proceedings.

Overall, the discipline set out is relatively simple and in fact has proven to be fairly effective. Nevertheless, some concrete reasons have lead the Commission to prepare a Proposal for the modification of the Regulation, which will be the object of our analysis in Chapter II.

⁶⁹ Recital (21) also establishes that in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should therefore be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

CHAPTER TWO

THE PROPOSAL FOR A REGULATION AMENDING REGULATION (EC) NO. 1346/2000

1. WHY THE PROPOSAL? THE NEW EUROPEAN APPROACH TO BUSINESS FAILURE AND INSOLVENCY

More than twelve years have passed since the entry into force of the Regulation 1346/2000. During this period, the latter has certainly proved to be a very effective tool in the European legislative framework, and has played an important role in the solution of many business crises with a cross border scope. In other words, “*the Insolvency Regulation is generally regarded as a successful instrument for the coordination of the insolvency proceedings of the EU Member States*”⁷⁰.

HESS B., OBERHAMMER P. and PFEIFFER T. (2011) *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation 1346/2000/EC on Insolvency Proceedings (External Evaluation)*, Beck-Hart-Nomos, p.1. The Report aims at

Despite this, several aspects revealed the necessity of an amendment of the Regulation, to better reflect the social and economic realities of the times we live in⁷¹. These aspects are profound and complex; however, given that the purpose of this part of the work is to analyze the Proposal made by the Commission⁷², they will be categorized into three main reasons.

First, the onset of “*the biggest crisis in European Union history*”⁷³.

The crisis has in fact completely changed the way national and international institutions approach insolvency issues. “*Nowadays insolvency law and its practitioners are focusing more and more on rescue and reconstruction, which have won precedence over bankruptcy and liquidation*”⁷⁴. Essentially the objective of insolvency proceedings has shifted away from merely winding up the

comprehensively analyzing the Regulation and its effects in the Member States and provides recommendations for its revision.

Many other authors also spoke about the Regulation with enthusiastic terms. For example, Professor C.G. Paulus, in the Foreword of MOSS, FLETCHER and ISAACS’ *The EC Regulation on Insolvency Proceedings* (2009), talks about a “*success story*” and points out that “*the Regulation has changed cross-border insolvency law in Europe more than all treaties, case law and academic writings in innumerable decades before*”. Moreover, the Professor continues, one of its most relevant effects has been that now “*Member States have an ambition to make domestic law better than that of the neighbors- an ambition which might improve the general standard all over Europe, if not the world*”.

⁷¹ MOSS G. and PAULUS C. (2006) *The European Insolvency Regulation—The Case for Urgent Reform. Insolvency International* (19). p.1ff.

⁷² 12/12/12 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, available at http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

⁷³ As the Impact Assessment (p.1) has defined the financial crisis that broke out in Europe in 2008. It is interesting to note how it is possible to identify three overlapping phases of the crisis. First came the financial crisis in 2008 where banks realized that, following the housing bubble and the general credit boom, they were holding too much toxic debt. They stopped lending to each other and to customers. This resulted in governments pumping large sums of money into the system to “bail-out” the banks. The sovereign debt crisis of 2010 followed shortly afterwards. A number of states had run up large deficits and because the money markets were worried that some states might default, they would lend to these states only at ever-higher rates. This became unmanageable for Greece, Ireland and Portugal, and they had to be “bailed out” (in fact given loans) by the EU Member States and the IMF in the case of Ireland in 2010 and Portugal in 2011. However, in order to be able to deliver on the major changes to fiscal policy demanded by the troika (the European Commission, the ECB and the IMF) an effective government was needed. Therefore, in Greece and Italy, democratically elected governments were replaced by governments of technocrats in November 2011, and this precipitated a third phase of the crisis: a crisis of democracy. For a complete analysis of the origin and developments of the crisis, see BARNARD C. (2012), *EU Employment Law*, Oxford. P.111-132.

The crisis has been so severe that it wiped out any gains in economic growth and job creation that had occurred over the previous decade. For example, European GDP fell by 4% in 2009, industrial production dropped back to the levels of the 1990a, and 23 million people were unemployed.

⁷⁴ EHRICKE U. (2010) *The Role of Courts in Cross-border Insolvency Cases*. In VERWEIJ A. and WESSELS B. (eds.) *Comparative and International Insolvency Law: Central Themes and Thoughts*, Nottingham and Paris.p.34.

debtors estate towards the ideal ends of restructuring the business in order for it to continue its commercial activities and discharging insolvent individuals in order to give them a second chance. Unlike fifteen years ago, national lawmakers tend today to give more importance to the moment before the actual failure, when the business is still viable. Therefore, they have introduced into their respective systems restructuring proceedings and proceedings for the discharge of private debtors. However, almost two thirds of these proceedings are still not covered by the Regulation, so there can be no EU-wide recognition of their effects⁷⁵.

In the light of all this, and considering that about 50'000 of the bankruptcies that happen in the EU every year have a cross border element⁷⁶, it appeared clear to the European institutions that one of the measures supporting economic recovery would be the revision of the Regulation, so that to include, among other things, these new national tendencies. As the Commission pointed out⁷⁷: *“Giving entrepreneurs a second chance to restart businesses and safeguarding employment are key elements of the new European approach to business failure and insolvency”*. It is precisely on this new approach that the whole Proposal is based.

Secondly, there is the influence of Chapter 11 of the U.S. Bankruptcy Code.

Undoubtedly, the introduction in European systems of proceedings for restructuring of business and for the discharge of private debtors cannot be attributed only to the financial crisis. The Reorganization provisions in Chapter 11

⁷⁵ Therefore, according to the External Evaluation, the following economic problems occur:

- Foreign creditors can continue with individual enforcement actions against the company and its assets. Individual enforcement action can jeopardize the success of the rescue or restructuring;
- Foreign creditors are less willing to fully engage in restructuring negotiations or consent to rescue plans involving a certain reduction of their claims; as a consequence, the opportunity of rescuing the company may be lost;
- Opportunities for the continuation of businesses through pre-insolvency and hybrid proceedings are reduced and jobs are lost.

See *Rechtbank's Gravenhage*. The case illustrates that a national pre-insolvency, hybrid or personal insolvency procedure that is not covered by the Regulation can prevent the successful rescue of business or reorganization of personal debt in cross-border situations.

⁷⁶ According to the Impact Assessment *“From 2009-2011, an average of 200'000 firms went bankrupt per year in the EU, resulting in direct job losses each year of 1.7 million. About one-quarter of these bankruptcies have a cross-border element, and so fall under the Regulation”*.

⁷⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 12/12/2012.

of the U.S. Bankruptcy Code have also strongly influenced European lawmakers. So strongly, that some authors have spoken about “*Chapter 11-ization*”⁷⁸.

These provisions mostly deal with, introduce and discipline the so-called “hybrid”⁷⁹, and “pre-insolvency”⁸⁰ procedures, both of which were excluded from the scope of the Regulation because they are not listed in Annex A despite their vital role in restructuring businesses before they go bankrupt⁸¹.

Considering the importance of such an influence, it seems appropriate to provide a brief overview on the U.S. insolvency system and in particular on the Reorganization procedure.

Bankruptcy in the U.S. is disciplined at federal level: Art.1, sec.8, clause 4 of the U.S. Constitution empowers the sole Congress to enact “*uniform laws on the subject of bankruptcies throughout the United States*”. Indeed, a single federal discipline was considered necessary to overcome the disparities existing within national laws and to support the demands of a single internal market. Regarding this, it is interesting to recall James Madison’s words describing the aim of insolvency law in *The Federalist n.42*:⁸²

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States that the expediency of it seems not likely to be drawn into question.

Currently the Bankruptcy Code, introduced with the Bankruptcy Act 1978, constitutes the Title 11 of the U.S. Code and applies to all the insolvency

⁷⁸ FAZZINI P. and WINKLER M. (2013) La proposta di modifica del regolamento sulle procedure di insolvenza. *Diritto del commercio internazionale*. p. 142.

⁷⁹ Proceedings that leave the existing management in place.

⁸⁰ Procedures that provide for the restructuring of a company at a pre-insolvency stage. At present, in the following Member States the national law provides for pre-insolvency proceedings: Austria, Belgium, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Spain, Sweden and United Kingdom. Their common feature consists in initiating quasi-collective proceedings under the supervision of a court or an administrative authority for enhancing corporate restructuring efforts to prevent the commencement of insolvency proceedings. Most of these proceedings, however, are not listed in Annex A; therefore, they do not fall within the scope of the Regulation.

⁸¹ OECD data cited in the IA show that the rate of loss of manufacturing companies is as much as one-third lower in countries that have hybrid or pre-insolvency proceedings compared to those that do not.

⁸² TABB C.J. (1997) *The law of bankruptcy*, University Textbook Series, The Foundation Press, p.35ff.

proceedings that began on October 1 1979 onwards. The Code is composed of eight chapters, which can be divided into two categories: chapters 1, 3 and 5 deal with general rules that apply to all the proceedings; chapters 7, 9, 11, 12 and 13 deal with specific procedures, each of them having its own set of rules.

Specifically, chapter 11 provides for the discipline of Reorganization. This fundamental procedure aims at allowing the debtor-entrepreneur⁸³ in financial difficulty to avoid liquidation- and the consequent exit from the market- and to prepare a plan to reconstruct the business and continue its commercial activities⁸⁴. As the U.S. Supreme Court held in *NLRB V. Bildisco&Bildisco*, “*the fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources*⁸⁵”.

The prerequisite of Reorganization is the existence of the so called “going concern value” (the value of a company as an ongoing entity), which, if preserved, allows a better satisfaction for creditors than the only possible alternative scenario, i.e. the liquidation of the single company’s assets. Indeed, the selling of single assets cannot adequately reflect the actual value of the business’ goodwill, reputation, trained workforce, consolidated commercial relationships etc. and often results in a below-cost sale, whose proceeds do not even suffice to pay preferred or secured creditors⁸⁶.

Moreover, in a meritocratic society like the American one, difficult periods- and insolvency- have always been considered as a natural phase of the life of a business, and not as a fault of the entrepreneur, to whom instead the legal system has to give the opportunity to start over again. Hence, the concept of “fresh start”. In the light of all this, the Reorganization really appears to be the best solution for all the parties involved. Indeed, protecting the going concern value allows a better satisfaction for creditors than the one they would have by liquidating the business. At the same time, the debtor maintains control over the business, preserves its

⁸³ Under US insolvency law it is not necessary to be qualified as an entrepreneur to be subject to insolvency proceedings, as these apply to consumer debtors as well.

⁸⁴ BENINCASA D. (2014) *Autonomia privata e principio di sussidiarietà nell’ordinamento concorsuale statunitense*, unpublished.

⁸⁵ *NLRB V Bildisco&Bildisco*, 4655 U.S. (1984)

⁸⁶ For a better understanding of the relationship between the Reorganization and the going concern value, it is worth recalling the origins of the procedure: the latter was originally conceived for railroad transport companies only. Indeed, railroad assets cannot be used for anything else but the railroad itself, and they cannot be sold separately as their intrinsic value is minimal.

viability and can continue to make profits. Obviously though, if the business concerned does not have a going concern value, or if the latter is largely inferior to its liquidation value, the reorganization is forbidden. The whole procedure is indeed based on the “best creditor’s interest principle”: the reorganization plan must grant to each creditor a satisfaction which is at least correspondent- if not superior- to the one they would receive with the liquidation. This is also the reason why every single creditor has the right to veto the approval of the plan.

Another fundamental feature of this procedure is that it is almost completely run by private parties, with a residual role of public authorities. The very core of chapter 11 are the negotiations carried out by parties throughout the whole procedure, from the moment the request is lodged to the approval of the plan.

Going back to the reasons that rendered necessary a change in the functioning of the Regulation, the third and most important one is constituted by the intrinsic weaknesses of the Regulation itself. Indeed, in the Explanatory Memorandum accompanying the Proposal, it is pointed out that there have been “*a range of problems in the application of the Regulation in practice*” and that “*the Regulation does not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties*”. More precisely, six main shortcomings have been identified, and they concern respectively:

1. The scope: the Regulation does not cover the so called national “pre-insolvency proceedings” and the “hybrid proceedings”, despite the fundamental role they have acquired;
2. The jurisdiction: difficulties have emerged in determining which Member State is competent to open insolvency proceedings and the concept of COMI has turned out to be fuzzy in its practical applications;
3. The secondary proceedings, the opening of which can hamper the efficient administration of debtor’s estate. In addition, the fact that they have to be necessarily winding-up proceedings constitutes an obstacle to the restructuring process;

4. The publicity of proceedings: the lack of rules on mandatory publication of the decisions of the Member State courts where proceedings are held has caused many criticalities;
5. The lodging of claims: the rules contained in the Regulation have proved to be too vague, and something more specific is required;
6. The groups of companies, for which a specific discipline is completely absent in the Regulation, this diminishing the chances of successfully restructuring the group as a whole.

2. SOLUTIONS PROPOSED

2.1 The Scope and the Role of Annex A

As briefly explained above, since the Regulation was enacted many Member States have updated their insolvency laws by introducing new procedures whose aim is to rescue businesses, helping sound companies to survive and giving a second chance to entrepreneurs⁸⁷, and whose economic benefits are widely recognized⁸⁸. To catch up with these novelties in national insolvency laws, the current Art.1 (1) is therefore replaced by the following:

⁸⁷ FRASCAROLI SANTI E. (2013) Gli accordi di ristrutturazione dei debiti, un procedimento concorsuale da inserire nell'ambito di applicazione del Regolamento (CE) 1346/2000: lo richiede la Commissione Europea. *Dir. fallimentare*. (I). p.351ff.

D'AIELLO C. P. (2014) *Il concordato "con riserva": una procedura concorsuale "cautelare" soggetta all'applicazione del Regolamento (CE) n. 1346/2000*. V convegno annuale dell'associazione italiana dei professori universitari di diritto commerciale "Orizzonti del diritto commerciale": L'impresa e il diritto commerciale: innovazione, creazione di valore, salvaguardia del valore nella crisi (Roma, 21-24 febbraio 2014).

MOSS G. and PAULUS C. (2006) The European Insolvency Regulation—The Case for Urgent Reform. *Insolvency International* (19). p.1ff.

SCARAFONI S. (2012) *Il processo civile e la normativa comunitaria*, UTET.

⁸⁸ The Impact Assessment summarizes the benefits of business rescue as follows:

- Maximization of asset value: the rescue of a company allows preserving the value of its technical know-how and business goodwill liquidation is limited to the value of the company's physical assets;
- Better recovery rates for creditors, i.e. the percentage of their debt that creditors get back.
- Saving jobs;
- Lower costs: the costs of pre-insolvency and hybrid proceedings are on average lower than that of traditional insolvency proceedings;
- Avoidance of reputational risks and directors' liability, allowing entrepreneurs to continue their activities;

This Regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debts and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation,

- a) The debtor is totally or partially divested of his assets and a liquidator is appointed; or
- b) The assets and affairs of the debtor are subject to control or supervision by a court.

The proceedings referred to in this paragraph shall be listed in Annex A.

As appears evident, the change is huge since the original referral to the requirement of insolvency, essential under the current version of Art.1, disappears. Therefore, the scope of the Regulation is extended considerably, in line with the new Recital (9a)⁸⁹.

As far as the relationship between the scope and Annex A is concerned, the proposal does not change the existing mechanism whereby the national insolvency proceedings covered by the Regulation are contained in Annex A and the Member States willing to include a particular procedure in that Annex have to notify it to the Commission. However, in order to ensure that only procedures that fit the rules of the Regulation are listed in the Annex, the proposal does introduce a procedure by which the Commission scrutinizes whether these notified procedures actually fulfill the requirements set by the new Art.1 (1)⁹⁰.

- Encouraging entrepreneurship: fear of bankruptcy and its consequences acts as a deterrent to entrepreneurship; efficient pre-insolvency and hybrid proceedings ease entrepreneurs' fear and encourage entrepreneurial activity.

⁸⁹Whose content deserves to be recalled for its importance: *"The scope of this Regulation should extend to proceedings that promote the rescue of an economically viable debtor in order to help sound businesses to survive and give a second chance to entrepreneurs. It should notably extend to proceedings that provide for the restructuring of a debtor at a pre-insolvency stage, proceedings that leave the existing management in place and proceedings providing for a debt discharge of consumers and self-employed persons. Since these proceedings do not necessarily entail the appointment of a liquidator, they should be covered by this Regulation if they take place under the control or supervision of a court."*

⁹⁰The procedure is laid down in Art.45 (2): *"In order to trigger an amendment of Annex A, Member States shall notify the Commission of their national rules on insolvency proceedings which they want to have included in Annex A, accompanied by a short description. The Commission shall examine whether the notified rules comply with the conditions set out in Article 1 and, where this is the case, shall amend Annex A by way of delegated act."*

In any case, as briefly mentioned in Chapter I, the most relevant issues stem from the discrepancies between the procedures listed in Annex A and the definition of insolvency proceeding in Art.1. In other words, the current version of the Regulation carries a significant interpretational problem: it is unclear whether the list contained in Annex A is exhaustive or not. The question is of the utmost importance because the principle of exhaustiveness is on the one hand connected to issues of foreseeability; on the other, it would entail the paradoxical exclusion of national procedures that fulfill the requirements set by Art.1 but are not listed in the Annex. However, this is not the only controversial issue. More specifically, according to the Reporters in the External Evaluation:

1. It is unclear whether the Regulation applies to a national insolvency procedure which is not listed in the Annexes, but which corresponds to the definition of Art.1⁹¹;
2. Vice versa, it is unclear whether the regulation applies to a national insolvency procedure that is listed in the Annexes, but do not correspond to the definition of Art.1;
3. It is also unclear what happens when national procedures are changed by the Member States without any notice to the Commission⁹².

In spite of these ambiguities, the Court of Justice opted for the exhaustiveness criterion. For example, talking about the Swedish debt relief procedure in *Radziejewski*, it held that the “*regulation applies only to the proceedings listed in the annex*”⁹³.

⁹¹ The Report enumerates a list of pre-insolvency and hybrid proceedings that are not listed in Annex A. For example, as concerns Italy, the “*accordo di ristrutturazione dei debiti*” (Art.182 of Italian Insolvency law) and the “*piano di risanamento attestato*” are not mentioned. As concerns the UK, the schemes of arrangement (part 26 of the Companies Act 2006) are not mentioned.

⁹² Two approaches are possible. A formal approach would determine situations where although the requirements set in Art.1 are no longer present, the procedure will continue to be under the Regulation because its name is still included in the list. A substantial approach would attribute importance to the requirements of the procedure in question, regardless of its name that might have changed.

⁹³ C-461/11 paragraph 24. See also case C-444/07 *MG Probud Gdynia*, paragraph 39: “*In accordance with the wording of Article 1(1) of the Regulation, insolvency proceedings to which the Regulation applies must have four characteristics. They must be collective proceedings, based on the debtor’s insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator. Those forms of proceedings are listed in Annex A to the Regulation, and the list of liquidators appears in Annex C.*” See also C-116/11 *Bank Handlowy* paragraph 33: “[...] *once proceedings are listed in Annex A to the Regulation, they must be regarded as coming*

Furthermore, and even more surprisingly, the approach chosen by the Commission is a formal one. The new version of Recital (9) indeed establishes:

This Regulation should apply to insolvency proceedings which fulfill the conditions set out in this Regulation, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed *exhaustively* in Annex A [...].

The addition of the adverb “*exhaustively*” implies, without any further doubt, that proceedings that are not included in Annex A cannot be affected by the Regulation, even if they possibly fulfil the criteria in Art.1. The solution is straightforward: exhaustiveness prevailed.

However, the fact that there can be only one possible conclusion does not necessarily make it flawless. Although understanding the rationale behind it, that is favoring the principle of foreseeability, it is difficult not to notice the insufficiency of such an approach. The mechanism created is clearly unfit to catch up with the continuous updates of national insolvency laws, and could lead to the paradoxical situations mentioned above (i.e. excluding new national procedures that although substantially coherent with Art.1, are not formally included in Annex A⁹⁴).

What is most, this approach seems to stand in marked contrast with the newly introduced Recital (9a), which calls for the extension of the Regulation to pre-insolvency and hybrid proceedings, and more in general with the new philosophy to which the Proposal is inspired, that is to rescue debtors in financial difficulties and to give honest entrepreneurs a second chance.

within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation”.

⁹⁴ In this regard, a concrete example is provided by the Italian Professor P. D’Aiello, whose analysis revolves around the question of whether the Italian “concordato con riserva”, a pre-insolvency proceeding that aims at giving the entrepreneur in difficulty a stay, can fall under the Regulation. Eventually, the answer turns out to be negative, not only because of the lack of a necessary requirement (the appointment of a liquidator) but especially because the “concordato con riserva” is not (yet) listed in Annex A. In any case, the analysis demonstrates that making the principle of exhaustiveness prevail will entail the exclusion of many national procedures even if they fit the requirements in Art.1. See D’AIELLO C. P. (2014) *Il concordato “con riserva”: una procedura concorsuale “cautelare” soggetta all’applicazione del Regolamento (CE) n. 1346/2000*. V convegno annuale dell’associazione italiana dei professori universitari di diritto commerciale “Orizzonti del diritto commerciale”: L’impresa e il diritto commerciale: innovazione, creazione di valore, salvaguardia del valore nella crisi (Roma, 21-24 febbraio 2014).

2.2 *The Jurisdiction*

As pointed out in Chapter I, the Regulation surprisingly does not provide a definition of COMI, despite its vital role in the whole discipline. Of course, the Court of Justice has given a fundamental contribution in the definition of the concept⁹⁵, but the situation has remained somewhat ambiguous and could not last long. For example, the Impact Assessment accompanying the Revision of the Regulation (hereinafter referred to as IA)⁹⁶ has been very critical towards the concept of COMI, in particular “*for being too vague and unclear, making it difficult for the parties concerned to predict the decision on jurisdiction and the courts involved to decide in a coherent manner*”⁹⁷.

For all these reasons, the Proposal aims at modifying the concept of COMI, rewriting Art.3 and replacing Recital (13) with Recital (13a), and following the guidelines set by the Court in its most important case law regarding the COMI. Specifically, in Art.3 the first part of paragraph (1) has not changed: the COMI of a company or a legal person is still presumed to be at the place of its registered office; however, the new Recital (13a), taking its language directly from *Interedil*, specifies that:

It should be possible to rebut this presumption if the company’s central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual center of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties.

In the light of this, a new sentence has been added to Art.3 (1), whereby “*The COMI shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties*”. The

⁹⁵ See, among others, *Eurofood* and *Interedil* in Chapter I.

⁹⁶ Available at www.ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf

⁹⁷ Impact Assessment, p.19.

outcome is a scenario whereby the concept of COMI must be determined keeping in mind two sometimes-conflicting objectives: predictability for the creditors on the one hand, and enabling insolvency proceedings to be opened in the Member State that has the closest ties with the debtor company on the other⁹⁸.

Another important innovation concerns individuals. The latter are in fact totally neglected by the current version of Art.3. The new version, consequently, provides that “*in the case of an individual exercising an independent business or professional activity, the COMI shall be that individual’s principle place of business; in case of any other individual, the COMI shall be the place of the individual’s habitual residence*”. Therefore, when the debtor is an individual, unlike companies, there is no opportunity to rebut the presumption about the COMI. The Commission has in such cases decided to privilege the principle of predictability for creditors. The rationale behind this choice is that individuals can more easily relocate their habitual residence or place of business, so the requested court must carefully assess the place of the COMI in each individual case.

The last important aspects of the new Art.3 are contained in its paragraph (3). First of all, secondary proceedings must no longer be necessarily winding-up proceedings. As explained in the IA, the fact that they have to constitute a big hurdle for the restructuring of business. Precisely, the IA reads:

The narrow scope of secondary proceedings can be an obstacle to the successful restructuring of a company with branches in several Member States, thereby diminishing the total value of the debtor’s assets and destroying jobs. This sub-problem therefore reinforces the first sub-problem that the current Regulation constitutes an obstacle to business continuation and the safeguarding of jobs⁹⁹. [...] Moreover, the opening of secondary proceedings can jeopardize the efficient administration of the estate. [...] The system of secondary proceedings was introduced to protect the interests of local creditors and/or to facilitate the

⁹⁸ BIERMEYER T. (2011) Not Yet Reported Court Guidance as to the COMI concept in Cross-border Insolvency Proceedings. *Maastricht Journ. Int. & Comp. Law.* (18) P.586. The author also states that preferring the first objective would have meant that the COMI must always be situated in the place where the registered office is. Instead, the Regulation aims at avoiding such a scenario. “*Since there is a second objective, the concept has to take into account more material factors that reflect where the debtor is conducting its business. This is a difficult task and requires a flexible case-by-case analysis because of the large variety of different economic activities possible and company forms involved*”.

⁹⁹ See for this *Bank Handlowy and Ryszard Adamiak v. Christianapol sp.zoo.*

administration of complex cases. In practice, however, secondary proceedings can obstruct both the effective administration of the estate and the successful reorganization of a company. They remove part of the assets from the control of the insolvency administrator in the main proceedings.

This is not all. The Proposal also improves the procedural framework for determining jurisdiction for the opening of proceedings, as in the current version of the Regulation the issue is dealt with by the single procedural laws of the Member and assessed differently by the national courts¹⁰⁰, this resulting in a duration of opening proceedings that varied a lot from State to State. Therefore, first of all, the newly proposed Art.3b (1) requires the court to examine its jurisdiction *ex officio* prior to opening insolvency proceedings and specify on which grounds it based its jurisdiction (i.e. whether the proceedings are main or secondary proceedings under the Regulation). This innovation is particularly fortunate, as one weakness of the current system is that courts are not obliged to specify whether the proceedings were based on Art.3(1) or (2), or are not covered by the Regulation at all (for example, if the COMI is situated outside of the EU). This can cause confusion, especially in other Member States, and can lead to the opening of parallel proceedings. Therefore, the innovation is also important for preventing forum shopping. In fact, a similar mechanism is provided even for those cases where insolvency proceedings are opened without a decision by a court. In such cases, it is up to the liquidator to verify whether the Member State in which the proceedings are pending has jurisdiction and to specify on which grounds jurisdiction is based.

Moreover, Art.3b (3) ensures that all foreign creditors are informed of the opening decision, in order to be able to exercise effectively their rights and to challenge the decision itself should they want to.

The aim of all the changes is clearly to ensure that proceedings are only opened if the Member State concerned does have in fact jurisdiction. “*They should*

¹⁰⁰ In some Member States, the opening of insolvency proceedings is based on the information provided by the debtor, without any further factual inquiries of the court. In other Member States, the court examines *ex officio* whether the factual requirements of Art.3 (1) are met or appoint a provisional liquidator for the necessary inquires.

therefore”, as the Commission would hope, “reduce the cases of forum shopping through abusive and non-genuine relocation of the COMP”¹⁰¹.

Finally, the newly proposed Art.3a (1) clarifies that the courts opening insolvency proceedings also have jurisdiction for actions that derive directly from insolvency proceedings or that are closely linked with them¹⁰². Paragraph (2) goes even further clarifying that where such an action “is related to an action in civil and commercial matters against the same defendant, the liquidator may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled [...] provided that that court has jurisdiction pursuant to the rules of Regulation (EC) No 44/2001”. Obviously, the liquidator would do that only if he considers it more efficient to bring the action in that forum. According to the new Recital (13b) “this could, for example, be the case if the liquidator wishes to combine an action for director’s liability on the basis of insolvency law with an action based on company law or general tort law”. In any case, for the purpose of this Article, the actions are deemed to be related, and this happens “where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

2.3 The Secondary Proceedings

As said, the requirement that secondary proceedings must necessarily be winding-up proceedings has triggered criticism as being “incompatible with today’s ‘corporate rescue’ culture”¹⁰³, and this is the reason why Art.3 has been amended.

However, the important innovations concerning secondary proceedings are not just those contained in Art.3 (3). In fact, the whole Chapter III of the Regulation (Articles 27-38) has been updated under the Proposal. In line with the general philosophy that inspired the Proposal though, the aim here is not to revolutionize the “limited universalism” system created by the Regulation, but rather to fix it and make it smoother.

¹⁰¹ Explanatory Memorandum p.7.

¹⁰² This provision actually codifies the Court of Justice case law in the *DekoMarty* case.

¹⁰³ Impact Assessment p.5.

First of all, according to the newly proposed Art.29a, the court seized with a request for opening secondary proceedings has to immediately give notice to the liquidator in the main proceedings and give him an opportunity to be heard. This amendment “*aims to ensure that the court is fully aware of any rescue or reorganization options explored by the liquidator and is able to properly assess the consequences of the opening of secondary proceedings*”¹⁰⁴.”

Moreover, if so requested by the liquidator in the main proceedings, the court must be able to refuse the opening or to postpone the decision where such an opening would not be necessary to protect the interests of local creditors. This new discretion given to the judge is not only to avoid secondary proceedings that are detrimental for the business, but also to encourage fruitful agreements between the liquidator in the main proceedings and local creditors. To this regard, the Explanatory Memorandum underlines how the opening of secondary proceedings should not be necessary if the liquidator in the main proceedings promises to the local creditors that they would be treated in the main proceedings as if secondary proceedings had been opened and that the rights they would have had in such a case (with respect to the determination and ranking of their claims) would be respected in the distribution of the assets¹⁰⁵. In other words, sometimes “*secondary proceedings can disrupt the beneficial rescue or realization of a*

¹⁰⁴ Explanatory Memorandum.

¹⁰⁵The practice of such “synthetic secondary proceedings” has been developed in several cross-border insolvency cases where main proceedings were opened in the U.K. See, for example, the insolvency proceedings concerning Collins&Aikman, MG Rover and Nortel Networks. In these cases, the English courts accepted that the English liquidators were entitled to distribute part of the assets according to the law of the Member State where the establishment was located. More specifically, in *Collins&Aikman* the administrators appointed by the English courts in main proceedings promised creditors in other Member States that if they did not trigger secondary proceedings to be opened in their own states the administrators would respect local law priorities in making distributions. In most Member States, the local creditors did not cause secondary proceedings to be opened and the English court agreed with the administrators that English domestic law allowed distributions to respect local law priorities in those cases. This resulted in a more beneficial realization of the business of the C&A companies incorporated outside the U.K. and is a useful model in situations where the domestic law of a main proceeding is sufficiently flexible to follow the C&A model.

See also Recital (19a) for an example of a scenario where the opening of secondary proceedings would not be necessary to protect the interests of creditors. “*This should notably be the case if the liquidator, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State.*” See WHITE & CASE. (2010) The benefits of UK-style pre-packs and comparisons with other jurisdictions. *Insight: Financial Restructuring & Insolvency* [Online] September. Available from: www.whitecase.com.

business” and local creditors can be persuaded to abstain from starting them “*in the interests of a better realization by promising to respect local law priorities in the eventual distribution*”¹⁰⁶.”

These provisions on the decision to open secondary proceedings are complemented and somewhat completed by paragraph (4) of Art.29, which establishes that the court opening secondary proceedings has to notify its decision to the liquidator in the main proceedings, and the latter has the right to challenge it. It is interesting to notice how all these novelties concerning the role of the liquidators in the main proceedings go in the direction set by Recital (20), which is to “*ensure the dominant role of the main proceedings*”¹⁰⁷.

In addition, Art.29a (3) provides that “*when deciding to open secondary proceedings, the court [...] shall open the type of proceedings under its national law which is the most appropriate taking into account the interests of the local creditors, irrespective of whether any condition relating to the debtor's solvency are fulfilled*”. As seen before, these proceedings no longer have to be winding-up proceedings, and this allows national courts to choose from the full range of proceedings available in their systems. Arguably, in this way secondary proceedings will no longer be a hurdle in the rescue or restructuring of the debtor. From this perspective, Art.29a (3) is also somewhat similar to the new version of Art.37. The latter in fact establishes that “*the liquidator in the main proceedings may request the court of the Member State where secondary proceedings were opened to order the conversion of the secondary proceedings into another type of insolvency proceedings available under the law of that Member State*”.

With all these amendments, the secondary procedure is no longer likely to be “*a necessary evil*”¹⁰⁸, but rather an opportunity.

¹⁰⁶ MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. p.288.

¹⁰⁷ In fact, to pursue this objective, the Recital continues, “*the liquidator in the main proceedings should be given several possibilities for intervening in secondary proceedings which are pending at the same time. In particular, the liquidator should be able to propose a restructuring plan or composition or apply for a suspension of the realization of the assets in the secondary proceedings.*”

¹⁰⁸ POTTOW J.A.E. (2011) A New Role for Secondary Proceedings in International Bankruptcies. *Texas International Law Journal* (46) p.584.

In any case, this is not all, because the proposal also aims at extending and strengthening the coordination between the two types of proceedings¹⁰⁹. Indeed, the current Regulation contains just one “*vague and might*”¹¹⁰ provision concerning the liquidators (Art.31). As a result, the judge in the main proceedings is not well informed of the developments in the secondary proceedings before deciding on further actions and vice versa. This “*ultimately reduces the efficiency of proceedings, increases their length and costs, and, ultimately, the chances to maximize the value of the assets may be lost*”¹¹¹. Therefore, in the new version, this coordination is also supposed to cover the courts involved (Article 31a), and their interactions with the liquidators (31b), and could turn out to be crucial for a successful restructuring.

2.4 The Publicity of Insolvency Proceedings

Although some of them are substantial, the proposed amendments to Chapter II do not involve the main principle of automatic recognition, which has remain unvaried, nor its effects. Therefore, even under the proposal, in principle the

¹⁰⁹ This is in line with the new Recital (20), whereby “*main proceedings and secondary proceedings can only contribute to the effective realization of the total assets if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators and the courts involved must cooperate closely. [...]*”

¹¹⁰ External Evaluation, p.20.

¹¹¹ The problems arising from this lack of coordination have been widely analyzed in the Impact Assessment. The liquidation of Alitalia provides an example of such problems.

By August 2008, Alitalia was heavily insolvent. In September of the same year, extraordinary administration proceedings aiming at reorganizing the company were opened in Italy and an administrator was appointed. Alitalia’s COMI was in Italy, and therefore these proceedings were main proceedings for the purposes of the Regulation. The administrator found a buyer for the company’s assets, which, however, took over only those employees indispensable for the operational activity. All other employment contracts were terminated but the administrator reached an agreement with the employees, which provided for a payment of an equivalent of 3 month’s salary in compensation for the failure to comply with the information and consultation requirements under the Directive on Transfer of Undertakings. The administrator kept one of the company’s UK bank accounts with funds sufficient to make the compensation payment to the 46 UK employees. In November 2008, secondary proceedings over the UK branch of Alitalia were opened in the UK. The UK liquidator blocked the distribution of the money to the UK employees, arguing that under UK law employees had no priority rights and divided the sum among all of Alitalia’s UK creditors. This argument was approved by the High Court. Consequently, the Italian administrator was obliged to pay the UK employees from the funds of the Italian estate to the detriment of other unsecured creditors.

According to the Impact Assessment (p.23), “*this shows that the opening of secondary proceedings can jeopardize the efficient administration of cross-border insolvency because the main administrator is no longer in control of assets located in the country where secondary proceedings have been opened*”.

judgment opening the main proceedings shall produce the same effects in any other Member State as under the law of the State of the opening of proceedings. What has changed substantially, however, is the way these proceedings are made public. Indeed, *“the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of all relevant decisions relating to an insolvency procedure. In particular, a court opening insolvency proceedings needs to know whether the company or person is already subject to insolvency proceedings in another Member State¹¹²”*. In the light of this, one of the main innovations introduced by the proposal is the creation of a compulsory system of publicity. Articles 20a, 20b, 20c and 20d have been inserted, and they concern respectively the establishment of insolvency registers, their interconnection, the costs of their establishment and interconnection, and the registration of insolvency proceedings. Basically, the proposal requires that each Member State has to establish one or more registers (“insolvency registers”) where some minimum information concerning the proceedings¹¹³ have to be published¹¹⁴ and available to the public for free via the internet. The main purpose of this innovation- apart from the obvious improvement of the information of creditors- is to *“prevent the opening of parallel insolvency proceedings”¹¹⁵*.

In addition, after the establishment of these national registers, it will be up to the Commission to establish a *“decentralized system for the interconnection”* of all the national insolvency registers which will be accessed via the European e-Justice Portal (Art.20b). In the vision of the Commission, this interconnection *“will ensure that a court seized with a request for opening insolvency proceedings*

¹¹² IA, p.23.

¹¹³ Pursuant to Art.20a, these information are specifically:

- a) The date of the opening of insolvency proceedings;
- b) The court opening insolvency proceedings and the case reference number, if any;
- c) The type of insolvency proceedings opened;
- d) The name and address of the debtor;
- e) The name and address of the liquidator, if any;
- f) The time limit for lodging claims;
- g) The decision opening insolvency proceedings;
- h) The decision appointing the liquidator, if different from the decision referred to in point g);
- i) The date of closing main proceedings.

¹¹⁴ Pursuant to Art.20d, the obligation to publish this information is limited to companies, self-employed and independent professionals: in the light of the disparities in national legal systems as to the publication of insolvency proceedings and the different needs of creditors it does not extend to proceedings relating to consumers.

¹¹⁵ Recital (29a) first sentence.

will be able to determine whether proceedings relating to the same debtor have already been opened in another Member State. It will also enable creditors to find out whether proceedings have been opened concerning the same debtor and, if so, which powers the liquidator has, if any”¹¹⁶. Obviously though, the establishment of this system of interconnection cannot be immediate. Therefore, Art.21 has been thought as an important temporary disposition, providing that until such time as the system of interconnection is established, the liquidator shall request the publication of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him in any other Member State where either an establishment of the debtor, or assets or creditors are located.¹¹⁷

The objective of all these innovations is two-fold¹¹⁸.

On the one hand, the proposal aims at preventing the inadequacy of information between national authorities from resulting in time-wasting parallel proceedings or a prolonged uncertainty about the court that has jurisdiction. This risk is in practice very high, and often turns out to be particularly harmful¹¹⁹.

On the other hand, the objective is to protect creditors- and in general third parties- who are interested in knowing about the insolvency in time, so that they can take part in the procedure.

2.5 The Lodging of Claims

The proposal facilitates the lodging of claims for foreign creditors in three ways.

First, legal representation will no longer be mandatory for lodging a claim in a foreign jurisdiction, thereby reducing costs for creditors¹²⁰.

Second, the proposal calls for the introduction of two standard forms (which will be available in all official languages of the Union, again to reduce translation

¹¹⁶ Explanatory Memorandum, p.9

¹¹⁷ This decision can be published in the land register, trade register or any other public register of the Member State concerned (Art.22).

¹¹⁸ See the Impact Assessment p.8

¹¹⁹ In particular when the executive effects of a judicial measure are hardly reversible. See, for example, Art.18 (6) of the Italian Insolvency Law, according to which “*se il fallimento è revocato, restano salvi gli effetti degli atti legalmente compiuti dagli organi della procedura.*”

¹²⁰ The average cost of lodging a claim for a foreign creditor has been estimated at between 2000 and 5000 euros in a cross-border situation. In particular, small and medium entrepreneurs (hereinafter referred to as SMEs) are affected with claiming problems, since the costs of translation and legal advice are often too high for them.

costs), one for the notice to be sent to creditors and the other for the lodging of claims. In the latter, which is supposed to be available on the European e-justice portal “by 24 months after the entry into force of the Regulation”, the creditor shall indicate all the information indicated in Art.41¹²¹.

Third, and most importantly, a new very favorable provision for foreign creditors is introduced. In some Member States, the time limits for presenting the claims are very short, and it can be hard to respect them, especially for foreign creditors. Therefore, Art.41 paragraph (4) establishes that foreign creditors are given at least 45 days following the publication of the opening of proceedings in the insolvency register to lodge their claims, irrespective of any shorter periods applicable under national law. Furthermore, they also have to be informed when their claim is contested by the liquidator and be given the possibility to supplement the evidence provided in order to prove their claim.

2.6 Groups of Companies

One of the biggest lacks in the current discipline is certainly that it “offers no rule for groups or affiliated companies”¹²². As a result, separate proceedings must be opened for each individual member of the group.

This apparently unexplainable omission was mainly due to two reasons¹²³. The first one is that when the Regulation was negotiated between the 1980ies and 1990ies, the phenomenon of groups of companies “was not as widespread as it is today”. The second and perhaps heavier one is that the subject raised complex problems and the drafter may have considered “politically and practically prudent to postpone it to a later date”¹²⁴. In any case, the lack of such measures has in fact

¹²¹ Namely:

- a) His name and address;
- b) The nature of the claim;
- c) The amount of the claim and date on which it arose;
- d) Whether any preferential creditor status is claimed;
- e) Whether security in rem or a reservation of title is alleged in respect of the claim and if so, what assets are covered by the security interest he is invoking;
- f) Whether any set-off is claimed and whether the amount claimed is net of set-off.

¹²² Virgos-Schmit Report paragraph 76

¹²³ Impact Assessment p.16

¹²⁴ For the high difficulties found in the process of drafting the Regulation, see Chapter I, 1: Background: brief history of the Regulation.

caused enormous problems, especially concerning the identification of the groups' COMI (hereinafter referred to as G-COMI) and the coordination of insolvency procedures opened in relation to the single entities involved. Somewhat surprisingly though, in its Proposal the Commission decided to focus only on the coordination of the procedures, completely neglecting the G-COMI problem¹²⁵. Therefore, even under the new framework, the G-COMI will still be determined according to the "old" criteria used for the single debtor. Accordingly, Recital (20b) provides that a court can open insolvency proceedings for several companies of the same group in a single jurisdiction, if it finds that the COMI of the group is in that Member State¹²⁶.

In any case, before analyzing the measures proposed to fill the gap concerning the coordination of procedures, it seems necessary to devote a few words on how the Court of Justice and the national courts have tried to overcome this lack during these years. In the first years after the entry into force of the Regulation, some courts interpreted its rules on jurisdiction very broadly, so as to bring insolvency proceedings for all members of the group, including those located in another Member State, before the court at the parent company's registered office. The courts concerned generally justified such a consolidation of insolvency proceedings on the grounds that the subsidiaries' commercial decisions were controlled by the parent company. This approach had obvious advantages in terms of efficiency but was also criticized for not respecting the legitimate expectations of creditors who did not contemplate the application of the parent company's law to the insolvency proceedings and, in particular, the ranking of their claims when entering into commercial relationships with the subsidiary.

Later, in *Eurofood*, the Court of Justice considerably reduced the scope of application of the possibility for such procedural consolidation and reinforced the rule that each legal entity should be treated separately, unlike in cases of heavily integrated companies (i.e. when factors showing that the subsidiary's COMI is

¹²⁵ Arguably not to encroach even more Member States' company law sovereignty. However, this does not make much sense, given the by now very deep level of integration reached within the Member States when it comes to insolvency law. See Chapter III.

¹²⁶ However, according to Recital (20b), in such situation the court should also be able to appoint the same liquidator in all proceedings concerned.

located at the seat of the parent company are objective and ascertainable by third parties).

Another approach taken in practice is the appointment of the same insolvency practitioner in the proceedings of all members of the group, or of insolvency practitioners who have previously worked together successfully on group insolvency. However, without specific rules on group insolvencies, the success of such measures depends on the willingness of these practitioners and judges to cooperate.

In such a confused scenario, the Commission decided to intervene with a completely new Chapter IVa, indeed denominated “Insolvency of members of groups of companies”.

First of all, the new version of Art.2 provides a definition of a group of companies, which must be intended as “*a number of companies consisting of parent¹²⁷ and subsidiary*”.

Moreover, the proposal introduces an obligation to coordinate insolvency proceedings relating to different members of the same group of companies. This objective is pursued by obliging the liquidators and the courts to cooperate among themselves and with one other, in a way that is very similar to the one designed for main and secondary proceedings¹²⁸.

¹²⁷ Specifically, parent company is defined by Art.2 as “*a company which a) has a majority of the shareholders’ or members’ voting rights in another company (a “subsidiary company”); or*

b) is a shareholder or member of the subsidiary company and has the right to:

aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or

bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association.”

¹²⁸ Specifically, pursuant to Article 42a (2) “*the liquidators shall*

a) Immediately communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;

b) Explore the possibilities for restructuring the group and, where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated restructuring plan;

c) Coordinate the administration and supervision of the affairs of the group members subject to insolvency proceedings.

The liquidators may agree to grant additional powers to the liquidator appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings.”

Pursuant to Article 42b (2) “*cooperation [between courts] shall take place by any appropriate means, including:*

In addition, the proposal gives each liquidator standing in the proceedings concerning another member of the same group. More specifically, according to the new Art.42d the liquidator has a right to be heard and participate (in particular by attending creditors' meetings) in these other proceedings, to request a stay of the other proceedings¹²⁹ and to propose a reorganization plan in a way which would enable the respective creditors' committee or court to take a decision on it. In the opinion of the Commission, these procedural tools should “*enable the liquidator which has the biggest interest in the successful restructuring of all companies concerned to officially submit his reorganization plan in the proceedings concerning a group member, even if the liquidator in these proceedings is unwilling to cooperate or is opposed to the plan*”¹³⁰.

3. THE FIRST READING OF THE EU PARLIAMENT

The Commission published its Proposal on December 12 2012. About one year later, this was approved with some amendments by the Parliament in first reading and, according to the procedure of co-decision¹³¹, it is currently awaiting the first reading of the Council, expected by April 2015.

-
- a) *Communication of information by any means considered appropriate by the court provided that such communication shall be free of charge and respect the procedural rights of the parties to the proceedings and the confidentiality of information;*
 - b) *Coordination of the administration and supervision of the assets and affairs of the members of the group;*
 - c) *Coordination of the conduct of hearings;*
 - d) *Coordination in the approval of protocols.”*

Pursuant to Art.42c (Cooperation and communication between liquidators and courts) “*A liquidator appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the proceedings and is not incompatible with the rules applicable to them. In particular, the liquidator may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed.*”

¹²⁹ In this case, the court shall stay the proceedings in whole or in part if it is proven that such a stay would be to the benefit of the creditors. Such a stay may be ordered for up to three months and may be continued or renewed for the same period. The court ordering the stay may require the liquidator to take any suitable measure to guarantee the interests of the creditors in the proceedings.

¹³⁰ Explanatory Memorandum, p.9

¹³¹ Article 294 TFUE.

The amended version of the European Parliament does not differ substantially from the original one¹³²; however, many important modifications have been introduced¹³³, and, for the purposes of this work, some of them need to be analyzed.

Even though these amendments are listed in numerical order in the Draft European Parliament Legislative Resolution on the Proposal, for the sake of clarity, they will be discussed here according to the topics they cover.

3.1 Scope and Relation with Annex A

The EU Parliament seems to show the same concerns of the Commission for the scope of the Regulation, regarded as one of the key elements for a successful reform.

However, unlike the Commission, the Parliament decided to amend some important expressions contained in the Regulation to broaden its scope and to better identify it. For example, the term “*liquidator*” completely disappears from the Regulation and “*insolvency representative*” takes its place. This is to reflect better the very objective of the whole discipline, which is to rescue companies in difficulty rather than liquidating them¹³⁴.

In addition, and effectively for the same reason, in Art.1 (1) the “*purpose of rescue*” is substituted by “*the purpose of avoidance of liquidation*”, and a new sentence has been added, establishing that “*where such proceedings may be commenced prior to the insolvency, their purpose must be the avoidance of liquidation*”.

As far as the relationship between the scope and Annex A is concerned, the procedure to modify the latter has been amended too. In the Parliament’s version

¹³² As it reads in the Explanatory Statement, “*many amendment tabled do neither aim to change the structure of the Commission proposal, not introduce new elements but much suggest clarifications or align the text with the aqis*”.

¹³³ To be precise, sixty-nine amendments in total.

¹³⁴ Because the replacement of the word “*liquidator*” by “*insolvency representative*” is a horizontal amendment, its definition could not be not updated in Art.2. In fact, its letter (b) (ii) now reads “*insolvency representative shall mean any person or body whose function, including on a provisional basis, is to administer, either in full or in part, or to liquidate assets of which the debtor has been divested or to supervise the administration of his affairs*”. Those persons and bodies remain listed in Annex C.

of Art.45, it is not for the Member States to decide whether to notify the introduction of a new procedure or the modification of an existing one. In other words, it is not for the Member States to decide which proceedings fall under Annex A: if the conditions of Art.1 are met, Member States are obliged to notify. In addition, a new paragraph (2a) is added to Art.45, providing that “*Member States shall notify the Commission of any substantial changes affecting their national rules on insolvency proceedings. The Commission shall examine whether the amended rules comply with the conditions set out in Art.1, and, where they do comply therewith, shall amend Annex A by means of delegated acts*”. This amendment was necessary, according to the Members, to clarify that also substantial changes need to be notified.

3.2 Definition of COMI

As far as the definition of COMI is concerned, Members have modified Recital (13a) quite considerably by clarifying that non only management decisions but also other relevant factors- such as the location of main assets- are relevant when determining the COMI.

Another substantial change concerns Art.3 (1) where it is now specified that the COMI shall be the place where the debtor conducts the administration of his interests on a regular basis “*at least three months prior to the opening of insolvency proceedings or provisional proceedings*” and which is ascertainable by third parties. The introduction of this amendment is to avoid last-minute COMI changing (forum shopping), which can be detrimental to creditors.

3.3 Jurisdiction and Competence

Whilst the Commission provides for the possibility of opening insolvency proceedings in accordance with national law without a decision by a court, Members feel that a minimum control by a court is always necessary when establishing the COMI. Therefore, they deleted Art.3 (2) which allows the insolvency representative, instead of a court, to examine whether the Member State in which proceedings are pending has jurisdiction.

A further amendment aims to clarify that the validity of the decision to open proceedings can be challenged within three weeks after its publication¹³⁵.

3.4 Secondary Proceedings

In Art.29a paragraph (2), the Members inserted a clarification whereby the court shall postpone the decision of opening or refuse to open secondary proceedings if “*the insolvency representative in the main proceedings provides sufficient evidence*” that the opening is not necessary to protect the interests of local creditors. In addition, the Parliament clarified that any decision to postpone or refuse the opening of secondary proceedings may be challenged by local creditors (within three weeks of the decision having been made available), and in turn, that the decision to open secondary proceedings may be challenged by the insolvency representative (within three weeks after receipt of the notification).

The Parliament also dealt with the situation of an insolvency representative not complying with his undertaking and proposed that in such a case the local creditors should have the right to seek protection through a court order, for instance by prohibiting removal from assets.

Finally, under the Parliament’s version, cooperation between insolvency representatives is strengthened¹³⁶.

¹³⁵ More precisely, the Members replaced the last sentence of Art.3b paragraph 3 (establishing that the court opening main proceedings or the liquidator shall inform creditors insofar as they are known of the decision in due time in order to enable them to challenge it) with a new one. The latter provides that these creditors have the right to challenge the decision opening main proceedings “*on the grounds of international jurisdiction within three weeks after information concerning the date of the opening of insolvency proceedings has been made publicly available in accordance with point (a) of Art.20a*”. With publication in register, there is no need for court/insolvency representative to inform creditors anymore.

¹³⁶ Art31 has been amended as follows: “*the insolvency representative in insolvency proceedings concerning the same debtor shall cooperate with each other to the extent that such cooperation is appropriate in order to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to each of the proceedings and does not entail any conflict of interests. Such cooperation may take the form of agreements or protocols.*” This amendment was necessary, in the opinion of the Members, to align the disposition with Art.42 as stated in Recital (20a), and also to clarify that territorial proceedings are covered.

To align Art.31b (1) with Art.42c as stated in Recital (20a) a new first subparagraph has been added, providing that “*in each case to the extent that such cooperation and communication are appropriate in order to facilitate the coordination of the proceedings, are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interests.*”

In Art.42c, the specification is added that conflicts of interests pose limits to the cooperation between courts and insolvency representatives.

3.5 Groups of Companies

Important changes also involve provisions about groups of companies.

Before getting into detail, we must preliminarily say that even the very definition of “*group of companies*” given by the Commission has been considered too restrictive and therefore expanded. Indeed, in the amended version of the Parliament, “*group of companies*” indicates “*a parent company and all its subsidiary companies*”¹³⁷.

This being said, we cannot omit to point out that like the Commission, Members did not feel like introducing a discipline for the determination of the G-COMI either. Therefore, this big lack remains.

Conversely, as far as the coordination and communication of different insolvency proceedings is concerned, the Parliament proposed a more ambitious solution than that proposed by the Commission in particular to avoid “*the possibility of the insolvency of one group member jeopardizing the future of other members of the group.*”¹³⁸ For example, the Members provided that “*a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law*”¹³⁹.

In addition, according to the Members, group coordination proceedings may be brought by an insolvency representative in any court having jurisdiction over the insolvency proceedings of a member of the group. The court opening group coordination proceedings shall appoint an independent coordinator with three tasks. Specifically, the first is to identify and outline procedural and substantive recommendations for the coordinated conduct of the insolvency proceedings. The second is to mediate in disputes arising between two or more insolvency

¹³⁷ See Art.2 letter i). Accordingly, even the concept of “*parent company*” has been further amended, and simplified, meaning now “*a company which controls one or more subsidiary companies.*” In addition, “*A company which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the EU Parliament and of the Council shall be deemed to be a parent company*”.

¹³⁸ Recital (20a).

¹³⁹ Recital (20a).

representatives of group members. The third is to present a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies.

In any case, the group coordination plan requires court approval.

Finally, it is worth mentioning that insolvency representatives appointed may comment on the draft of the group coordination plan before approval. An insolvency representative may deviate from measures or actions proposed in the group coordination plan.

It is also specified that the coordinator shall perform his duties with due care. He shall be liable the estates of the insolvency proceedings covered by the group coordination proceedings for damage reasonably attributable to breaches of those duties.

4. CONCLUSIONS

Although it is certainly hasty to draw definitive conclusions on the Proposal, as the process of modification is still ongoing¹⁴⁰, yet it is possible to express a provisional judgment. What can be pointed out to date is that, overall, three principles turn out to be strengthened. First, legal certainty is pursued more intensely through the clarification of some concepts (like the COMI), the introduction of some disciplines that were lacking (for example the one regarding groups), new rights conferred to creditors at EU-level (for example by Art.41) and stronger powers conferred to liquidators (see Articles 39, 41 and 42b). Second, the publicity of procedures is finally a concrete and fundamental element within the Regulation. As pointed out, this innovation aims at a two-fold objective: avoiding parallel procedures (a court opening insolvency proceedings needs to know whether the debtor is already subject to insolvency proceedings in another Member State) and informing foreign creditors about the opening of procedures concerning their debtor. Third, coordination and cooperation within the various

¹⁴⁰ After being approved by the Parliament, the proposal is now awaiting for the approval of the Council.

authorities in the different Member States are also strengthened in order to ensure the prominence of the main proceedings over the secondary proceedings.

However, even under this new version, the Regulation keeps presenting some serious deficiencies. Some of them, such as the problem of the Annexes' exhaustiveness, could be solved with simple corrections. Others, in turn, appear to be more structural, as they are related to the deeper problem of the differences in the legislations of the Member States.

It will be precisely this lack of harmonization, and the chances of addressing it in the future, the principal objectives of our analysis in Chapter III.

CHAPTER III

NEW TRENDS

The main objective of this whole work is to outline the possible new trends of an extremely mutable subject like the cross-border insolvency. After all, the study of the Regulation (Chapter I) and of the Proposal for its modification (Chapter II) would remain somewhat isolated if not used to pursue that objective.

However, anticipating future trends is never easy in the field of law: the latter is by its very nature strictly connected to the socio-economic circumstances that occur in a given historic moment, and as such rather unpredictable. This holds true to a greater degree for the specific branch of insolvency law, which is updated continuously by national lawmakers to respond to continuous economic

necessities. Furthermore, here we deal with insolvency law applied at EU level and this is a complicating factor because the European lawmaker has to take into account the disparities of twenty-eight Member States to elaborate a single effective discipline.

Despite this, to imagine future scenarios of the subject might turn out to be less difficult if we base our reasoning on the analysis carried out in the first two Chapters. The latter has in fact shown that, even under its proposed new version, the Regulation retains numerous weaknesses. It seems therefore obvious that, for our purposes, the starting point cannot be but these weaknesses and especially their possible remedies. In any case, since not all of them have the same weight, a distinction has to be made. More precisely, some of these issues can be considered as “minor” lacunae, in the sense that they could be easily addressed with small corrections. Some others, in turn, are definitely more problematic, as they are rooted in the differences among Member States’ legislations, hence cannot be solved without some invasive interventions at EU legislation level.

From a methodological point of view, it seems more appropriate to start our discussion with the more immediate analysis of the former criticalities (previously defined as “minor” lacunae”), to dedicate the greater part of this Chapter to the latter- and more problematic- ones.

1. MINOR ADJUSTMENTS FOR MINOR WEAKNESSES

For the sake of clarity, all these “minor” criticalities recognized in the Proposal will be highlighted and categorized according to the part of the Regulation they refer to, in order to follow the methodological approach used in Chapters II and I.

Starting with the controversial relationship between Art.1 (1) and Annex A, we have to remark that this problem has been only partially solved by the Proposal. Indeed, on the one hand, all the ambiguities about the nature of Annex A have been cleared up by establishing that the list of national proceedings is exhaustive. On the other hand, however, it is precisely that exhaustiveness which is the source of the serious problems analyzed in Chapter II, namely the paradoxical exclusion

of national procedures that fulfill the requirements set by Art.1 but are not listed in the Annex.

A possible solution could be the one already proposed by the Reporters in the External Evaluation:

It seems advisable to improve the coordination between the Annexes and Art.1 (1) of the Regulation. One option is to provide for a clear hierarchy between the Annexes and the definition in the sense that the definition of Art.1 (1) of the Regulation prevails over the information in the Annexes. In this respect, Art.2 (a) should clarify that annex A exemplifies procedures falling within the scope of the Regulation.

In short, the Reporters call for the establishment of a hierarchy between Art.1 and the Annex, whereby any national procedure fulfilling the requirements set by Art.1 falls under the Regulation, regardless of its inclusion in Annex A. In this way, the list contained in Annex A would only serve as an example.

This solution is clearly in favor of a substantial approach: according to the External Evaluation, the principle of exhaustiveness cannot be accepted.

Other problems arise from COMI changing-related issues. In order to explain them it is first necessary to distinguish between two hypothesis. The first occurs when these changings are made in the time lapse between the proposed request to open insolvency proceedings and the opening itself, while the second occurs when these changings are made even before the request itself. While the former hypothesis has been analyzed by the Court of Justice¹⁴¹, stating that the COMI cannot be moved in that period, in order to dissuade parties from forum shopping, the latter hypothesis has not been considered by the Court nor by the Proposal. Therefore, it is still possible for a debtor to move his COMI before the request to open insolvency proceedings is made. However, although this can cause uncertainty for creditors, denying such a possibility would result in an infringement of the fundamental freedom of establishment¹⁴² that cannot be tolerated under EU law. Hence, the initial silence of the Proposal.

¹⁴¹ In *Staubitz-Schreibe*, C-1/04.

¹⁴² Art.49 and 54 TFEU.

However, when amending the latter, the Parliament decided to intervene against forum shopping with the establishment of a period preceding the request to open insolvency proceedings during which any COMI changing would not be effective for creditors.

Specifically, in the Members' version of the Proposal, the COMI is described as the place where the debtor conducts the administration of his interests on a regular basis "*at least three months prior to the opening of insolvency proceedings*".

Such a solution appears in line both with the freedom of establishment and with what some national legislations already provide. In fact, under Italian¹⁴³ and Spanish law, a term of one year is established, whereas under French law, this term is even shorter, precisely six months. Conversely, German and English law do not provide for an equivalent rule. However, on the one hand, traditionally German courts have been suspicious about migration in the vicinity of an insolvency. On the other hand, English law is interpreted in such a way that a debtor who has carried on business in England is treated as continuing the business for the purposes of bankruptcy jurisdiction until he has made arrangements to settle his business debts¹⁴⁴.

As far as the interplay between main and secondary proceedings is concerned, one significant deficiency is that the Proposal does not establish any time limits for the opening of secondary proceedings. This is unfortunate, because the liquidator in the main proceedings runs the risk at all times that important assets may be taken over by secondary proceedings. Therefore, in order to avoid this, the only thing that the liquidator can do is to move, as soon as possible, all assets to his own

¹⁴³ See Art.9 of the Italian Insolvency Law, according to which "il trasferimento della sede intervenuto nell'anno antecedente all'esercizio dell'iniziativa per la dichiarazione di fallimento non rileva ai fini della competenza". Currently this rule is derogated by paragraph 4 of the same article when the Regulation applies.

¹⁴⁴ MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford. EIDENMULLER H. (2005) Free Choice in International Company Insolvency Law in Europe. *European Business Organization Law Review* (6). p. 423-447. RINGE W.G. (2008) Forum Shopping under the EU Insolvency Regulation. *University of Oxford_Legal Research Paper Series, Paper No. 33/2008*. [Online]. Available from: <http://ssrn.com/abstract=1209822>. See also MARSHALL A. and PARDIWALA C. (2007) Changing COMI prior to Insolvency is Fair Game! *International Corporate Rescue* (4). p.318. MACRI P. (2006) Trasferimento del centro di interessi principali e competenza giurisdizionale nel Reg. 1346/2000. *Fallimento* (7). p.912.

country. In any case, regardless of his choice of action, he will find it difficult to negotiate the sale of a whole enterprise, with establishments and assets in several Member States, as going concern.

Another unfair aspect is that while there is a provision (Art.35) whereby any surplus in the secondary proceedings should be passed over to the main proceedings, there is no rule governing the opposite situation, and this can cause injustice. For example, if the main proceedings excludes the claims of certain creditors, and they can only claim in the secondary proceedings, the surplus in the main proceedings will go to the debtor and not to the creditors in the secondary proceedings. The introduction of such a rule seems therefore necessary.

In addition, the Regulation lacks any provision to solve conflicts of jurisdiction between courts in different Member States in an orderly and cost-efficient manner while proceedings are still at a relatively early stage. *“This is in marked contrast to the approach of the Brussels Convention (and now Regulation) on jurisdiction and recognition of judgments¹⁴⁵”*. Therefore, some authors suggest that the Regulation be amended in line with Art.27 of the Convention/Regulation. Pursuant to the latter, a doctrine of *lis pendens* could be imposed to prevent any court other than “the court first seized” from exercising jurisdiction to open insolvency proceedings until such time as the jurisdiction of the court first seized of an application for the opening of insolvency proceedings is established¹⁴⁶.

In any case, all these problems concerning the relationship between main and secondary proceedings could be easily solved at their roots should a more radical approach be adopted, namely to completely abolish secondary proceedings (see below).

¹⁴⁵ MOSS G., FLETCHER F. and ISAACS S. (2009) *The EC Regulation on Insolvency Proceedings*, Oxford, p.223.

¹⁴⁶ According to Moss, Isaacs, Fletcher, for this purpose, the presentation of a petition for a winding-up by the court, combined with an application for the appointment of a provisional liquidator, could be regarded as a step whereby the court in question becomes “seized” of the matter. It would be essential, the authors continue, to include a provision requiring the court first seized to make the determination as to its own jurisdictional competence at the earliest possible time, and in fidelity to the principle of mutual trust mentioned in Recital (22), given the special factors of urgency that are attendant upon cases of insolvency. There is a powerful need for national courts to be scrupulous and conscientious in approaching their exercise of jurisdiction, mindful of the impact of their decision in an EU-wide dimension. The principle of mutual trust alluded to in Recital (22) is fundamental to ensuring that the Regulation operates in a way that is fair, and lacking in oppressive side effects.

As regards the publicity of procedures, an important but potentially problematic provision is the one contained in Art.41 (4), whereby foreign creditors are given at least 45 days following the publication of the opening of proceedings in the insolvency register to lodge their claims, irrespective of any shorter periods applicable under national law. The problem is that the provision seems to refer exclusively to insolvency proceedings, and therefore is not well coordinated with the new Art.1. The latter has in fact expanded the scope of the Regulation to hybrid and pre-insolvency proceedings, and so communication duties like the one in Art.41 should be expanded to these procedures as well.

Finally, many concerns arise from the newly introduced discipline for groups of companies.

As already seen, the Parliament tried to address the first criticality concerning groups, namely the definition itself of the concept. Effectively, the Members expanded the definition originally provided by the Commission, which was considered too restrictive, and defined a “*group of companies*” as “*a parent company and all its subsidiary companies*”. However, some scholars¹⁴⁷ think that even this clarification may leave room for uncertainties and that it would have been better to adopt the so-called “control criterion”. *Inter alia*, the latter follows the guidelines set by the UNCITRAL¹⁴⁸ Legislative Guide on Insolvency Law¹⁴⁹,

¹⁴⁷ See, for example, FAZZINI P. and WINKLER M. (2013) La proposta di modifica del regolamento sulle procedure di insolvenza. *Diritto del commercio internazionale*, Anno XXVII (fascicolo 1) p.141-165.

¹⁴⁸ United Nation Commission on International Trade Law. The Commission was established in 1966 with the objective of promoting the progressive unification of international trade law. In 1997, it drafted the Model Law on Cross-Border Insolvency, a tool of great help for States willing to legislate on transnational insolvency. As the name itself suggests, the Law serves as a model and its objective is to regulate the recognition of foreign insolvency proceedings worldwide. To this extent, it has exercised a strong influence on many States around the world, and, most importantly for the purposes of this study, on the European legislator in the drafting of the Regulation. In fact, the Model Law has anticipated many of the Regulation’s fundamental principles. For example, the former has first introduced the mechanism of “limited universalism” (although with some variants respect to the final version of the Regulation) and the duty of cooperation and mutual information between the national liquidators and courts involved in the insolvency. Despite this, there are also some important differences between the two, for example the lack in the Model Law of any referral to the “subordination” of the secondary proceedings to the main proceedings.

The Law is available from www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. For a general description of its main features, see ESPLUGUES C.A. (1998) The UNCITRAL Model Law on Cross-Border Insolvency: an approach. *Diritto del commercio internazionale*. p.657ff.

which defines the “*enterprise group*” as “*two or more enterprises that are interconnected by control or significant ownership*”¹⁵⁰. In addition, this definition appears more in line with the multinationals’ dimension, being more flexible and fit to represent the various forms of groups, hence favoring the application of the Regulation to a wider number of cases.

However, as concerns groups, the gravest “fault” of European institutions¹⁵¹ is certainly not having introduced any rule for the determination of the G-COMI, which therefore remains subject to a discipline that was conceived for a single entity. Studying the problem of the G-COMI determination, the UNCITRAL Working Group V¹⁵² has proposed several possible solutions to this serious omission, although without vouching for any of them. Among these, the one based on the “controlling entity criterion” is of particular interest, being based on the typical presumption already used by the Regulation for the individual debtor. Indeed, according to it, the place where the registered office of the controlling entity is located is presumed to be also the “coordination center of the enterprise group”, in the absence of proof to the contrary.

Summing up the above results, the Proposal criticalities recognized as “minor lacunae” could be solved as follows:

1. In order to clarify the controversial relationship between them, a hierarchy between Art.1 and Annex A should be established, so as to avoid the paradoxical exclusion of national procedures that fulfill the requirements set by Art.1 but are not listed in the Annex;
2. In order to facilitate the work of the liquidator in the main proceedings, a time limit for the opening of secondary proceedings should be set;

¹⁴⁹ The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State’s insolvency law, and its Part 3 specifically deals with the Treatment of Enterprise Groups in Insolvency. Available from www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf.

¹⁵⁰ P.83.

¹⁵¹ The Commission first and surprisingly even the Parliament later. In fact, Parliament’s responsibilities are even greater, especially if we consider that the latter had always pushed for a unique procedure, which would suspend or incorporate all the others, to be held in the State where the registered office of the group is located. See Report part 3, 1.a and b, p.12.

¹⁵² The one dealing with Insolvency Law.

3. In order to avoid unfair discriminations in favor of main proceedings, a provision like that contained in Art.35 should be introduced in respect to secondary proceedings as well;
4. In order to solve initial conflicts of jurisdiction between courts in different Member States in an orderly and cost-efficient manner, the adoption of a rule like that contained in Art.27 of the Brussels Regulation would seem wise;
5. In order to avoid problems of interpretation, Art.41 (4) should refer to hybrid and pre-insolvency proceedings as well, so as to be consistent with the expansion of the scope of the Regulation;
6. In order to make the Regulation's discipline more precise and modern, and favor its application to a wider number of cases, the definition of "group" should be reconsidered. In addition, the introduction of a discipline for the determination of the G-COMI seems of the utmost importance.

2. *HARMONIZATION: IS THE TIME RIPE?*

A part from the specific shortcomings of its discipline- shortcomings that, as seen, are more or less easy to address- the real, structural weakness of the Regulation lies in the fact that national insolvency legislations are still too deeply diverse.

As explained in Chapter I, the first actual attempt to provide a transnational discipline for cross-border insolvencies at EU level dates back to 1959: since then, the differences in national laws constitute the biggest concern of the European institutions. To eliminate them has always turned out to be extremely complicated, because of the Member States' reluctance to relinquish important portions of sovereignty in a sensitive area as insolvency law. Therefore, when the Regulation was drafted in 2000, a harmonizing action had not been even taken into account simply because it appeared as unattainable. Hence, as seen in Chapter I, the Commission opted for a discipline which aimed rather at providing the effective criteria for determining the State with jurisdiction to open insolvency proceedings, and having the effects of these proceedings recognized in all the

other Member States¹⁵³. However, during these fourteen years, many things have changed considerably, and this leads one to think that maybe today to mitigate those differences is no longer as impossible as it has been up to now¹⁵⁴. Amongst the major changes that occurred lately, we can mention, in loose order: the fact that thirteen new Member States joined the Union¹⁵⁵, which entailed a large expansion of the Internal Market and a consequent increase of opportunities to do business cross-border.

Secondly, the onset of the financial crisis in 2008, which has literally upset Member States economies¹⁵⁶, leading to a soaring number of failing businesses. To illustrate this, the data provided by the European institutions are indeed quite alarming: *“from 2009-2011, an average of 200000 firms went bankrupt per year in the EU. About one-quarter of these bankruptcies have a cross-border element. About 50% of all new businesses do not survive the first years of their life, and 1.7 million jobs are estimated to be lost due to insolvencies every year”*.

Thirdly, the development of the Court of Justice case law. More precisely, in the last decade the Court furthered the possibility of a company with registered office in one Member State having its COMI in another Member State¹⁵⁷, as well as the possibility of moving its registered office to another Member State¹⁵⁸. These

¹⁵³ See Recital (11).

¹⁵⁴ SUSSMAN O. (2008) The economics of the EU's corporate-insolvency law and the quest for harmonization by market forces. In FREIXAS X. et al. (eds.) *Handbook of European Financial Markets and Institutions*, Oxford.

¹⁵⁵ In three steps. Precisely, on May 1 2004 Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia entered the EU. With ten countries joining the EU, this has been the largest enlargement so far. On January 1 2007, Romania and Bulgaria joined. On July 1 2013, Croatia joined.

¹⁵⁶ See Chapter II.

¹⁵⁷ See *Centros*, where the Court held that where a company exercises its freedom of establishment under the EC Treaty, the Member States are prohibited from discriminating against this company on the ground that it was formed in accordance with the law of another Member State in which it has its registered office but does not carry out any business. See in particular paragraphs 17-30. See also *Inspire Art*, where the Court continued its tendency of deciding in favor of freedom of establishment by holding that rules submitting pseudo-foreign companies to the company law of the host State are inadmissible. It also held that a foreign company is not only to be respected as a legal entity having the right to be a part to legal proceedings, but as such. That it, it has to be respected as a foreign company, subject to the company law of the State of incorporation. Any adjustment to the company law of the host state is, hence, incompatible with EU law.

¹⁵⁸ See *Cartesio*, where the Court essentially reaffirmed what it held in a previous landmark case (*Daily Mail*), i.e. because of the absence of harmonization in Member States' company laws, Member States enjoy the power to put some restrictions upon the freedom of establishment. In particular, the Court held that EU law does not preclude “legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to

implementations of the freedom of establishment made it easier to change the applicable insolvency regime for a given company and indirectly facilitated forum shopping.

In the light of these reasons, the time for a harmonizing action seems now ripe, and indications in this sense have come from the European institutions as well.

In fact, in 2011, the European Parliament elaborated a resolution¹⁵⁹ in which it urged the Commission “*to submit, on the basis of Art.50, Art.81 (2) or Art.114 of the Treaty on the Functioning of the European Union, one or more proposals relating to an EU corporate insolvency framework [...] in order to ensure a level playing field*”¹⁶⁰.

More specifically, the Parliament acknowledged that:

[...] disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies; whereas those disparities favor forum-shopping; whereas the internal market would benefit from a level playing field;

[...] steps must be taken to prevent abuse and any spread of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided;

[...] even if the creation of a body of substantive insolvency law at EU level is not possible, there are certain areas of insolvency law where harmonization is worthwhile and achievable;

[...] there is a progressive convergence in the national insolvency laws of the Member States;

[...] since the entry into force of the Regulation many changes have taken place, 12 new Member States have joined the Union and the phenomenon of groups of companies has increased enormously;

another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.”

¹⁵⁹ “Insolvency proceedings in the context of EU company law”. European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law. Available at www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-484.

¹⁶⁰ In particular, the referral to Art.114 TFEU is of great importance, this being the provision that empowers the European institutions to harmonize national laws dealing with the establishment and the functioning of the Internal Market.

[...] the approach in relation to insolvency proceedings is now centered more on corporate rescue as an alternative to liquidation;

[...] where groups of companies become insolvent, a recovery is currently difficult to achieve in the EU, due to the differences in Member States' rules, thus endangering thousands of jobs;

[...] the current lack of harmonization with regard to the ranking of creditors reduces predictability of outcomes of judicial proceeding.

Undoubtedly, these words confirm that harmonization in the fields of company law and insolvency law is not as unconceivable as it was fifteen years ago.

This seems to be somewhat confirmed also by the proposed amendment of Recital (6) of the Regulation, whose current version represents a potential obstacle to any harmonizing action. Indeed, providing that "*in accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings*", Recital (6) seems to leave no room for a more intrusive action by the European institutions.

However, under its new version proposed by the Commission, the referral to the principle of proportionality disappears¹⁶¹, and this seems to allow some kind of harmonizing intervention in the future.

In any case, probably the strongest confirm that the approximation of national insolvency laws can be the real solution to the problems of the Regulation comes from the Impact Assessment.

As briefly explained in Chapter II, the document enumerates a list of problems affecting the Regulation¹⁶², indicates the operational objectives for its revision¹⁶³

¹⁶¹ Not that proportionality does not have to be taken into account anymore. However, the Explanatory Memorandum reads "*the content and form of the proposed action does not exceed what is necessary to achieve the objectives of the Treaty.*"

¹⁶² See Chapter II.

¹⁶³ Namely:

- To address the problem of scope of the Regulation that does not take into account the increased use of non-liquidation oriented proceedings (e.g. pre-insolvency and hybrid proceedings);
- To set up a process that enables the Regulation better to adapt to the evolution of national insolvency law and to allow secondary proceedings to be restructuring, pre-insolvency and hybrid proceedings;
- To clarify the rules relating to jurisdiction for opening insolvency proceedings without prejudice to the rights of companies' and natural persons' legitimate exercise of the freedom of establishment and movement in the Union;

and proposes some solutions to tackle these problems. More precisely, three policy options are identified:

- 1) Status Quo, or baseline scenario;
- 2) Option A, modernizing the existing Regulation while preserving the current balance between creditors and debtors and between universality versus territoriality; and
- 3) Option B, modifying the fundamentals of the Regulation and requiring some approximation or convergence of national insolvency laws and proceedings.

While the Status Quo could not be accepted because it would have left things as they were, the Commission had to decide between Option A and B. The former was a softer option, essentially aimed at updating the Regulation rather than modifying it too much; the latter was a more radical option because based on the “*approximation of national insolvency laws and proceedings*”. Both presented advantages and disadvantages and with respect to some problems, they coincided. The table on the following page has been inserted as a helpful guide to understand this framework.

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- To reduce the number of cases where the determination of jurisdiction has been an issue;
 - To improve the procedural framework for taking the decision on jurisdiction and ensuring the possibility for judicial review for interested parties;
 - To reduce the number of secondary proceedings opened outside of the main jurisdiction;
 - To improve coordination between courts and practitioners, both prior to the opening of and during the proceedings;
 - To increase transparency by requesting mandatory publication of all relevant decisions in each Member State;
 - To increase number of insolvency related decisions that have been made public;
 - To improve access to justice, in particular for SMEs, by devising measures to facilitate the lodging of claims;
 - To create a specific legal framework for group insolvency.

Problem	Status Quo (Baseline scenario)	Option A ‘Updating the framework for cross-border insolvency proceedings’	Option B ‘Towards approximation of national insolvency laws and proceedings’
Limited scope of the Insolvency Regulation	The scope and definition of the EIR do not cover pre-insolvency, hybrid and most personal insolvency proceedings.	Extend the scope of the EIR to include hybrid proceedings, pre-insolvency proceedings and personal insolvency proceedings and do away with the requirement that secondary proceedings have to be winding-up proceedings.	
	No rules for groups of companies.	Coordination of main proceedings through general cooperation mechanisms, with the option, when appropriate, to nominate a lead insolvency practitioner.	Single court competent for all main proceedings; single insolvency administrator appointed for all members of the group (‘Procedural consolidation’).
Difficulties in implementing the Insolvency Regulation	No obligation to publish and not all MS have an electronic insolvency register.	Require Member States to publish all relevant decisions of insolvency proceedings in a national electronic register and define common categories to be able to link national registers in the e-justice portal.	
	No standard forms for lodging claims. The procedures are entirely left to national law.	Introduce procedures and a standardized form at EU level for lodging claims and encourage Member States to set-up electronic means for lodging claims.	
	Jurisdiction remains at the COMI, which is defined by case law.	Improve the procedural framework and train judges on the EIR.	Harmonize elements of national insolvency laws.
	Coordination is limited to coordination between practitioners.	Maintain secondary proceedings but improve coordination with the main proceedings prior to and during secondary proceedings.	Abolish secondary proceedings.

Eventually, the Commission chose Option A and based its Proposal on it. Therefore, while there is no need to go into the details of its specific solutions¹⁶⁴, it seems well worth devoting a few words to the ones specific to Option B.

The latter proposes three important changes. The first one concerns groups and is called “*procedural consolidation*”. According to it, the insolvency proceedings for all members of the group would be consolidated in a single court at the place of the COMI of the parent company, and a single insolvency administrator appointed for all of them. According to the Commission, this measure would have the advantage of ensuring “*efficient handling of the insolvency proceedings because they would be consolidated before a single judge, administered by a single insolvency practitioner and governed by a single law, that of the state of the opening of proceedings. There would be no efficiency losses due to multiple proceedings being opened in different jurisdictions or divergences of opinion between different liquidators involved*”. The only weakness of this procedural consolidation is its negative impact on creditors of establishment or subsidiaries, who “*would lose all possibility to open a local insolvency proceedings governed by the law of the state of the establishment/subsidiary.*” Therefore, the Commission proposes that this measure be accompanied by provisions allowing the fair treatment of all creditors, “*such as harmonized European provisions on the treatment of foreign creditors (of an establishment or subsidiary in another Member State)*”.

The second change suggested is the “*harmonization of certain elements of national insolvency laws*”, and in particular of debt discharge periods, conditions and rules for opening proceedings, rules on hearing of creditors and effective remedy. In the opinion of the Commission, this measure shows many benefits. First, it “*will considerably increase legal certainty for creditors, take away a large part of the incentives for abusive forum-shopping, which will contribute to improving conditions for investment in Member States and benefit the Single Market*”. In addition, harmonized rules may also facilitate investments from third countries, and benefit businesses in general.

¹⁶⁴ As they have been widely analyzed in Chapter II.

Indeed, according to the Commission, they should have “*a positive effect on cross-border transactions in the Single Market, whether contracts, partnerships, acquisitions, developments of new branches/subsidiaries. SMEs would particularly benefit from the harmonization of discharge periods throughout the EU. The great divergence of discharge periods, and in particular the excessive length of discharge periods in certain Member States, has been identified as a major obstacle to providing a second chance to SMEs.*” The “only” problem with this option is that, requiring such a substantial element of harmonization, it may have “*an important impact on Member States’ insolvency laws and on national judicial systems*”.

The third and last big change proposed by Option B is the complete abolition of secondary proceedings, which would mean having a single main insolvency proceeding with EU-wide effects dealing with the parent company and all the branches and establishments. Such a radical innovation would be at the same time extremely beneficial for the principle of legal certainty and predictability, but also highly detrimental for foreign creditors (especially small ones). Therefore, for the moment it seems to most problematic one to adopt.

As previously said, the Commission eventually chose Option A and discarded Option B, even though the latter presented enormous advantages and a very few disadvantages. This might seem surprising, so to understand this passage fully we need to make a small digression on the economic context in which the Proposal was conceived, notably that of a continent which in 2012 was still recovering from the biggest economic crisis in its history.

At the Lisbon summit in March 2000, the Union set itself an ambitious strategic goal “*to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*”. In particular, and among other targets¹⁶⁵, the Lisbon European Council set the Union the objective of reaching an overall employment rate of 70% by 2010.

¹⁶⁵ More specifically, the strategy had three, mutually interdependent limbs: an economic limb (making the EU more competitive while sustaining a stable economy), an environmental limb (especially sustainable development) and a social limb (modernizing the European social model, investing in people, and combating social exclusion).

However, in its 2005 mid-term review of the Lisbon strategy, the Brussels European Council recognized that there were significant delays in reaching these targets. In addition, the Lisbon European Council certainly did not anticipate the financial crash of 2008 and the crisis that followed. The latter revealed that Europe was in fact far from being the most dynamic knowledge-based economy in the world in 2010, and the whole strategy turned out to be a failure. Indeed, it was acknowledged that the goals set were too many and too ambitious and that the Commission had no real powers to use against defaulting states. Hence, the original Lisbon strategy was replaced by the Europe 2020 strategy, which, containing a fewer number of targets, had to respond to the crisis by setting new objectives of growth¹⁶⁶.

In this scenario, the revision of the Regulation constituted an urgent, additional measure to face the financial emergency and to respect the benchmarks set in the Europe 2020 strategy. As it reads in the “Background and Policy Context” section of the IA:

At a time where the EU is facing the biggest economic crisis in its history, [...] the revision links in with the EU’s current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy.

Therefore, it is easy to understand why the European institutions opted for a solution, that is Option A, which resulted much easier to enact although considerably less effective. In fact, the Commission itself described Option B as a more efficient solution “*in reaching the objectives and providing economic and social benefits for the Single Market*”. In addition, the Commission was well aware that Option B, more than Option A, would have increased “*the efficiency of insolvency proceedings in the EU as a whole*” and would have created “*elements of a fully universal system, going towards features of the regulation of insolvency in the 50 States of the US under the US Insolvency Act*”. Not to mention the fact that Option A did not address “*one major cause of the problems, namely the differences in national insolvency laws*” and that Option B would have more

¹⁶⁶ For a complete analysis of the change of strategy adopted by the Union after the onset of the crisis, see BARNARD C. (2012), *EU Employment Law*, Oxford. p.111-132.

completely addressed the Parliament Resolution of November 2011 (see above). Despite all these positive elements, Option B would have represented a “radical” solution to the problems of the Regulation, much more invasive in the Member States’ perspective, and would have also required an “*in-depth comparative analysis of national insolvency law*” that the Commission did not have time to carry out¹⁶⁷.

Conversely, Option A, entailed no “*intrusion in national legislation or policies*”, other than being somewhat effective too and having an “*overall positive impacts with respect to the baseline*”. These factors were considered decisive by the Commission: Option A was more easily attainable, so it better satisfied the urgency to find a solution to the problems of the Regulation.

In the light of these considerations, we can say that the choice of the Commission, even though influenced- at least partially- by the worsening of the crisis and the need to curb it, has been based on a short-term vision and constitutes just a temporary remedy. In a long-term perspective though, there is no doubt that harmonization represents the only possible way to finally have an effective discipline to deal with cross-border insolvency situations at EU level.

3. A CONCRETE PROPOSAL

Despite what has just been said about the discarded harmonizing option, saying that a harmonizing action by the European institutions is required does not mean much. The concept of harmonization is a very vast one and needs therefore to be specified. Indeed, although having acknowledged that the path to follow is the one leading to an approximation of national legislations, it is likewise obvious that a total harmonization of national insolvency laws is - at least for the moment - unconceivable. Insolvency laws are almost symbiotically connected to other areas of laws (such as company law, contract law, employment law, property law etc.) and a full harmonization is not achievable until all those areas are harmonized as well. Therefore, the question that needs to be answered is not whether

¹⁶⁷ As it reads in Summary of the preferred option “*in the meantime* [i.e. the time needed to carry out that comparative analysis], *the current problems would persist, and could even worsen.*”

harmonization *per se* is desirable, but rather to which extent is it achievable, if at all.

For this purpose, we can refer to a study¹⁶⁸ carried out by the Directorate General for Internal Policies of the European Parliament¹⁶⁹, whose aim is precisely to “*assess whether the harmonization of insolvency law at EU level is necessary or worthwhile*”.

First of all the study explains that disparities between national insolvency laws can create obstacles to a successful restructuring of insolvent companies and additionally stand in a way of a level playing field. Then, it enumerates the potential benefits of a harmonizing action¹⁷⁰.

Finally, it points out that EU Member States’ legislations differ for almost¹⁷¹ every aspect of insolvency law. More precisely, strong divergences have been identified in the following aspects:

1. Criteria for opening insolvency proceedings;
2. Extent of the general stay of creditors;
3. Management of the insolvency proceedings;
4. Different ranking of creditors;
5. Process of filing and verification of claims;
6. Responsibility for the proposal, verification, adoption, modification and contents of reorganization plan;

¹⁶⁸ EUROPEAN UNION. DIRECTORATE-GENERAL FOR INTERNAL POLICIES. POLICY DEPARTMENT C: CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS (2010) *Harmonization of Insolvency Law at EU Level*.

¹⁶⁹ However, as it reads in the Disclaimer, the study expresses the opinion of the authors and do not necessarily represent the official position of the European Parliament.

¹⁷⁰ Namely:

- Protect the value of the assets of the estate, thereby returning greater value to creditors and shareholders;
- Increase predictability on the parts of creditors and shareholders;
- Increase the confidence that the commercial and financial sectors have in the insolvency systems of EU Member States;
- Increase the efficiency of the insolvency and business reorganization processes in the EU and consequently increase the return to creditors where it is decided to liquidate the assets or the prospects of reorganization by getting a greater number of creditors to support plans for restructuring.
- Reduce the migration of financially troubled companies to jurisdictions with more workable restructuring provisions (forum shopping);
- Promote a level playing field;
- Offer benefits in other respects, such as the preservation of employment.

¹⁷¹ The only aspect where the position of Member State is actually similar concerns the rules on the scope of the insolvency estate and on the disposal or sale of assets.

7. Termination of contracts and mandatory continuation of performance under contracts;
8. Liability of directors, shadow directors, shareholders, lenders and other parties involved with the debt;
9. Qualifications and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives.

Of course, all these divergences have a detrimental impact on the efficiency of the European discipline, because in a way or in another they all undermine creditors' predictability and facilitate forum shopping. However, as said above, it seems hasty to think that a complete harmonization action can be achieved for all these aspects, at least in the near future. It is therefore well worth analyzing each of these aspects to identify where harmonization is already concretely achievable, other than merely desirable.

For example, many problematic issues arise from the first aspect, namely the different criteria adopted by the Member States for the opening of insolvency proceedings. First, some Member States apply the liquidity test¹⁷² whereas some others the balance sheets tests¹⁷³. Because of this difference, companies are in some cases unable to open main proceedings but they may open territorial proceedings, whereas in some other they may open subsequent territorial proceedings in Member States where they do not meet the domestic insolvency test. Another issue concerns the creditor's ability to commence insolvency proceedings. The question of whether indebtedness only applies to current debts or even to future ones is solved differently throughout the Union¹⁷⁴. In addition, there are often preconditions on the ability to commence insolvency proceedings or minimum levels of debt involved for the liquidity test to apply¹⁷⁵.

Moreover, existing restrictions on the ability of particular entities and persons to invoke the bankruptcies laws have severe consequences on the relief that insolvency law should represent. Not to mention the fact that there are different

¹⁷² The ability to pay debts as and when they fall due.

¹⁷³ The surplus of assets over liabilities.

¹⁷⁴ For example, German and Spanish law provide explicitly that future debts are included.

¹⁷⁵ For example, under English law a creditor must be owed at least 750£ to petition for compulsory winding-up proceedings to be commenced.

requirements for the timescales within which the debtor is obliged to commence the bankruptcy¹⁷⁶.

In the light of all these differences, a harmonizing action seems necessary with respect to the test to be applied for the opening of the insolvency proceedings; the entities that are eligible as debtor in insolvency proceedings; the entities that may file for bankruptcy; and the rules on mandatory filing for bankruptcy by the debtor.

In turn, the aspect concerning the extent of the stay of creditors offers an example of an area where harmonization is just desirable, but not (yet) achievable. Indeed, the study found that “*all Member States determine the appropriate classes of creditors whose claims are given priority or preferential status*”. However, “*the most important inconsistencies result from different approaches to the right of creditors holding rights in rem and are therefore a result of differences in secured transactions laws*”. Because of this, harmonization seems not yet possible with regard to the general stay period.

Almost the same holds true for the third aspect listed, namely the different rules concerning the management of insolvency proceedings.

Depending on the jurisdiction, the management may play a leading or limited role in the proceedings¹⁷⁷. Nevertheless, the study found that there are such substantial and structural differences between the roles of the management of the insolvency proceedings in the different Member States and even in the different proceedings under the general insolvency laws in those States that “*it is not advisable to attempt to harmonize these rules until there is greater harmony in the underlying proceedings*”.

The fourth aspect, that is the different rankings of creditors, is a very serious one because although the creditors that are allowed to participate in the proceedings are almost the same throughout the Member States, the fact of having different

¹⁷⁶ For example, under Polish law the debtor has two weeks after he becomes insolvent in which to file for bankruptcy; under Spanish law, the debtor has two months from the date he becomes aware or should have become aware of the insolvency situation.

¹⁷⁷ For example, under German law the management remains formally in place until the final liquidation of the legal entity; under Polish law, the management is not dismissed, but its role is limited to representing the bankrupt in the course of the proceedings, supporting the bankruptcy receiver as regards information on the business.

rankings can strongly reduce their predictability, jeopardize the principle of equal treatment and encourage forum shopping. Unfortunately though, in addition to these disparities in the ranking of creditors, the rules on set-off, retention of title and on creditors with the right of recession differ as well. As a result, according to the study, under these conditions “*any attempt at harmonization is destined to fail*”.

The fifth aspect concerns the differences on the process of filing and verification of claims, which increase the inefficiency of proceedings¹⁷⁸. Although Art.40 of the Regulation provides that the court of the State that opened the proceedings or the liquidator appointed have a duty to inform all known creditors located in that State, “*experience suggests that not all creditors are properly informed*”. Therefore, in the opinion of the authors, “*in order to reduce uncertainty and create equal treatment among the creditors in the different EU Member States, there is an urgent need to harmonize*” these rules.

The Member States laws contain different rules on who can propose a reorganization plan¹⁷⁹ and on the required majorities needed to have a plan accepted¹⁸⁰. These factors reduce the chances of success for companies to restructure their business effectively and encourage forum shopping. In addition, diverging rules constitute an obstacle to the adoption of coherent plans in both main and secondary proceedings with respect to the same legal entity. Therefore, the study identifies some issues as “*suitable candidates for harmonization*”. These are, for example: the parties that can act as proponents of the plan; the nature and extent of the creditors that can be bound by the plan (ordinary, preferred, secured); the composition of classes of shareholders and creditors; the voting rules; the

¹⁷⁸ For example, under Polish law the deadline for filing claims can be between one to three months from the moment of publication of the judgment. Under Italian law, the time is usually thirty days before the hearing of the verification of claims. Under English law, there is no limit fixed until the liquidator is in a position to declare a dividend.

¹⁷⁹ For example, under German law the plan can be proposed by the debtor or by the liquidator. Under Polish law, the plan can be proposed by the debtor, the court supervisor, the liquidator or the creditor that submitted the initial arrangement proposals. Under French law, only the debtor can draw up the plan.

¹⁸⁰ For example, under Swedish law, a majority of 60% of the value of the debt is required; under UK law, the acceptance of a Scheme of Arrangement requires a majority of 75%.

possible contents of the plan; the rules on appeal, amendment and rescission of the plan.

Another major problem is represented by the differing rules on termination of contracts, mandatory continuation of performance under contracts¹⁸¹, and employment contracts¹⁸². According to the study, it is desirable that all these rules are harmonized not only to discourage forum shopping, but also to obtain greater transparency by enhancing a level playing field. In addition, harmonization would “*decrease the need for secondary proceedings aimed at seeking a local advantage for a few creditors rather than promoting restructuring and/or efficient distribution to all creditors*”.

With respect to the differences in liability of directors and all the other parties involved with the debtor, the study has found that the extent of the liability and the persons who may bring claims against these parties differ from jurisdiction to jurisdiction¹⁸³. This can result in forum shopping and cause a reduction of good corporate governance. Therefore, it would be desirable that national laws be approximated with respect to issues concerning: who can bring claims; who can be liable; the instances in which parties can be liable; amounts and penalties for which parties can be liable.

As far as the last aspect is concerned, the study found that the use of different systems concerning insolvency representatives (for what concerns the

¹⁸¹ For example, under Spanish law the court may declare such contracts terminated upon the request of the liquidator or the debtor. Under UK law, the liquidator may generally repudiate any contract. Under French law, the other party may not terminate contracts during insolvency proceedings because of the non-performance by the debtor of its pre-insolvency obligations.

¹⁸² For example, under Spanish law employment agreements usually continue to be in force. Under Swedish law, the liquidator can terminate the agreement, but if he does not terminate it within one month after the commencement of the bankruptcy, the bankruptcy estate becomes liable for the employee’s rights under the agreement.

¹⁸³ For example, under UK law only a director may be liable for wrongful trading (i.e. the directors continued the company’s trading and knew or should have known at the time that there was no reasonable prospect that the company would avoid going into liquidation) but both directors and outsiders may be liable for fraudulent trading (i.e. trading with the purpose to defraud the company or its creditors). Under Italian law, liability for the acts or omissions of directors does not extend to a director who, being without fault, had expressed dissent in the resolutions of the board of directors and has immediately given notice of this dissent to the chairperson of the board.

appointment, professional ethics etc.) “*has not caused any difficulty in practice*”¹⁸⁴. Therefore, there seems to be no need to harmonize.

In conclusion, we can distinguish three situations as follow:

1. There are areas such as that concerning insolvency representatives, where there is no need for harmonization;
2. There are others where harmonization does not appear possible yet. As seen, these concern the general stay of creditors, the rules on the management of insolvency proceedings and on the ranking of creditors;
3. There are however others where harmonization is not only desirable but also concretely achievable. These are the process of filing and verification of claims, the criteria for opening insolvency proceedings, the reorganization plans, the termination of contracts and the liability of directors.

¹⁸⁴ A part from the fact that reserving certain functions to lawyers admitted to local courts only constitutes a *de facto* restriction on the freedom to provide services.

CONCLUSION

The great merit of Regulation 1346/2000 has been the establishment of a long awaited legal framework regulating the phenomenon of cross border insolvency within the European Union.

The utility of this framework has over the years proven twofold, in its protection of the particular interests involved in singular insolvency situations, and the good functioning of the Internal Market as a whole. As seen, it is precisely because of the demands of the Internal Market that the Regulation has adopted a hostile approach to the issue of forum shopping.

Notwithstanding the clear position of the European institutions against the issue, the debate over the actual danger posed by and possible advantages of forum shopping remains unsettled. Indeed, international doctrine is not uniform on the point.

Forum shopping works to the detriment of the lawful rights of creditors, especially small ones, who may face difficulties in 'chasing' the debtor around the Union. In addition, the inability to know with certainty which jurisdiction, and which insolvency regime, will apply forces creditors to factor uncertainty into their credit costs, creating an overall welfare loss. Furthermore, the legal rules contained in both company and insolvency laws that a company is subject to may become separated by pre-insolvency migration, making it more difficult to obtain an efficient restructuring procedure.

However, there are also potential advantages to forum shopping. Namely, in many cases only a pre-insolvency migration may allow a successful restructuring of the business, which would benefit not only the debtor but also the creditors themselves and the overall economy of the Internal Market by safeguarding employment. In addition, forum shopping enables companies to choose a bankruptcy forum where the judge is predictable, fast and competent in handling

the reorganization of the firm, which stimulates beneficial competition or a ‘race to the top’ to raise standards and efficiency. Besides, some authors go so far as to say that impeding forum shopping jeopardizes the freedom of establishment.

Beyond the doctrinal debates, however, one thing is certain: as long as there remains such discrepancies between national laws, it will be difficult to prevent the migration of insolvent debtors to jurisdictions that are more favorable. From this perspective the Proposal, whilst improving the Regulation on many points, has not shown itself to have great utility. Indeed, as explained in Chapter III, in order to have a truly effective legal framework, especially one capable of combating forum shopping, the very approach to cross border insolvency is what must be changed.

Rather than continuously adjusting the current discipline, which is based on the mere avoidance of conflicts of law, it would appear to make more sense to intervene into the profound differences existing between national legislations, and not just on an insolvency level. Without true action on harmonization, these differences will continue to create problems in the application of the Regulation, and especially it will remain convenient for insolvent debtors to transfer the proceedings against them abroad, in search of a forum that guarantees them the best possible economic result.

The way forward would thus seem clear.

In fact, even at the time of the Proposal, the Commission, urged on by the Parliament, had itself considered a policy of harmonization (Option B of the Impact Assessment, as was discussed in Chapter III), and in doing so demonstrated its awareness of the benefits that such a policy could have on the regulation of cross border insolvency and the Union’s economy in general. Eventually, this policy was abandoned because, being necessarily very intrusive for Member States sovereignty, it would have required a level of in-depth comparative analysis and debate that the European institutions, bound by the urgent need to face the crisis, did not think they had time to carry out in 2010.

In a longer-term perspective though, there is no doubt that harmonization represents the only possible way to finally have an effective discipline to deal with cross border insolvency situations at European level.

After all, the elimination of disparities between Member States has always represented the ideal solution to many of the problems afflicting the Union and the end to pursue to realize finally that social and economic dimension that the Union was supposed to be.

In the light of all this, it remains apparent that the future trends of cross border insolvency cannot go but forward: towards a stronger legislative cohesion within the Union. Of course, such a process cannot be immediate: true harmonization in any field could take years, even decades. Yet, it seems the natural endpoint of integration.

Since its conception, indeed, the construction of the Union has proved to be a long and arduous process: at times accelerated, at times arrested, but in any case irreversible.

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