

THE RECAST EUROPEAN INSOLVENCY REGULATION: A MISSED OPPORTUNITY FOR RESTRUCTURING BUSINESS IN EUROPE

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Abstract: The purpose of this article is to critically revisit the European Insolvency Regulation on the occasion of its recasting, in Regulation (EU) 2015/848, which enters into force, for the most part, in June 2017. The article first considers the circumstances underlying the Regulation’s adoption, highlighting the fact that a new approach to business failure has been an indispensable part of the EU’s response to the financial crisis, thus placing business rescue on the agenda. An endeavour to examine provisions purportedly targeted at creating a business rescue-friendly culture follows, including an attempt at an early appraisal of whether this objective will be achieved by these amendments. The Regulation is found to be a praiseworthy effort in upgrading the cross-border insolvency regime given the limited time frame and the fragility of the political status quo. Nonetheless, the Commission missed the opportunity to embark upon the quest of harmonisation to fully establish a rescue culture, despite the prevailing need to do so. For the time being the Regulation, being the culmination of complex review and sensitive compromise, remains a conflict of laws and jurisdiction Regulation.

A. INTRODUCTION

The European Insolvency Regulation¹ ‘arose like a phoenix’² out of the ashes of the negotiations for a Bankruptcy Convention.³ It entered into force on 31 May 2002,⁴ having acquired the necessary political consensus. Ever since it has transformed cross-border insolvency within the European Union (‘EU’) from a fragmented and unpredictable state of affairs to a recognisable framework for proceedings opened in one of the member states (‘MS(s)’).⁵ It has even been capable of sometimes claiming an overseas effect.⁶ On 20 May 2015, a recast version of the EIR was adopted by the European Parliament (‘Parliament’) and

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¹ This article refers to ‘EIR’ as the piece of European legislation purported to achieve cross-border insolvency cooperation across the EU. The terms ‘OR’ and ‘RR’, as later defined, will refer to the current and new version of the Regulation respectively.

² Richard Sheldon (ed), *Cross-Border Insolvency* (4th edn, Bloomsbury 2015) [2.2].

³ Gabriel Moss, Ian Fletcher and Stuart Isaacs, *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) vii, [1.01]–[1.23] for a historical overview; Manfred Balz, ‘The European Union Convention on Insolvency Proceedings’ (1996) 70 ABLJ 485.

⁴ Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1.

⁵ Bob Wessels, ‘Revision of the EU Insolvency Regulation: What Type of Facelift?’ (2011) <www.eir-reform.eu/uploads/papers/PAPER%205-1.pdf> accessed 20 February 2016.

⁶ Gabriel Moss, ‘ECJ Takes Worldwide Jurisdiction Schmid v Hertel’ (2015) 28(1) *Insolv Int* 6.

the Council of European Union ('Council'), namely Regulation (EU) 2015/848 ('RR'),⁷ constituting the culmination of complex review and sensitive compromise.

Given the RR's coming into effect in June 2017, the purpose of this article is to critically revisit the EIR, a milestone in the history of multinational arrangements for cross-border insolvencies. This article does not seek to provide general instruction into the RR. Rather it focuses on one of its main aims, that of embracing and establishing a rescue-friendly culture, namely a social rather than economic approach to insolvency,⁸ which prioritises the preservation of viable commercial business as a going concern.⁹

This characteristic is the main reason for dealing with this topic. While insolvency law has traditionally been one of the gloomier areas of law, this time the adoption of a binding, insolvency-related piece of legislation was accompanied by numerous studies and reports arguing for and declaring 'a new approach to business failure'.¹⁰ This policy shift was mainly triggered by the fact that, while most corporate insolvencies presume that the business itself is not viable and aim at maximizing creditors' returns,¹¹ this was not always the case in the EU; the majority of debt-burdened companies struggling under over-leveraged balance sheets were forced to the brink of insolvency, despite being fundamentally viable. The Commission, acknowledging the devastating results of massive liquidations on the roadmap to economic recovery, shifted towards a rescue-friendly culture, by encouraging drastic response to business failure either by means of formal or informal proceedings, usually involving multilateral inter-creditor agreements, debt for equity swaps and injection of new financing.¹² This article endeavours to examine whether this objective of creating a rescue-friendly culture will be achieved by the latest amendments introduced in the RR.

This attempt cannot take place in a vacuum. This analysis should take place within its appropriate context. Thus, section B sets the common understanding under which the RR was adopted, establishing that a recurring point in relevant official documents and reports is that an effective insolvency regime plays a key role in achieving the overarching aim of financial

⁷ Council Regulation (EC) 2015/848 of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L41/19.

⁸ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (1st edn, CUP 2010) 189.

⁹ *Insolvency Law and Practice: Report of the (Cork) Review Committee* (Cmnd 8558 HMSO 1982) [198]. On different conceptions see Vanessa Finch, 'Corporate Rescue: A Game of Three Halves' (2012) 32 LS 302. For the historical development see Insolvency Service, *A Review of Company Rescue and Business Reconstruction Mechanisms*, Report by the Review Group, (DTI, 2000), [38ff]; Ian Fletcher, *The Law of Insolvency* (4th edn, Sweet and Maxwell 2009) [1-039ff].

¹⁰ Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New European Approach to Business Failure and Insolvency' COM (2012) 742 final.

¹¹ Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet and Maxwell 2011) [1.32].

¹² Finch, *Corporate Insolvency Law* (n 8) 18.

rehabilitation within the European Economic Area, by alleviating debt overhang and non-performing loans ('NPLs').¹³ Adopting a rescue-friendly policy was of pivotal importance to the post-crisis European agenda.¹⁴

Section C will cast light on the amendments brought by the RR with particular regard to whether they managed to fulfil the Commission's commitment to create a rescue-friendly regime. It will focus on issues such as the scope of the RR (C.2.a), the clarification of the Centre of Main Interests ('COMI') concept (C.2.b), the introduction of synthetic secondary proceedings and the refining of the relationship between main and secondary proceedings (C.2.c) and, finally, on proceedings regarding insolvencies of groups of companies (C.2.d). Provisions regarding the applicable law will not be examined, because they have largely not been reviewed to the same extent. Likewise, the provisions referring to publicity of the insolvency process will not be examined, since these focus on creditors' protection rather than business rescue. Overall, it will be argued that there are some laudable improvements, either by way of clarification or introduction of certain innovations. Nonetheless, the RR seems to have fallen short of the Commission's pursuit of comprehensive solutions.

Finally, section D asserts that, despite having both the opportunity and the legislative tools to optimise the effectiveness and efficiency of the insolvency regime across the EU, the Commission did not seize the opportunity. As such, the RR remains a Regulation primarily focused on the questions of conflict of laws and jurisdiction whereas substantive harmonisation has only been attempted by way of 'soft law' tools.

B. REVIEWING THE EUROPEAN INSOLVENCY REGULATION: A STATUTORY DEMAND OR A COMPELLING REALITY?

This section will establish that the RR has not been a mere bureaucratic exercise of compliance with article 46 Council Regulation (EC) No 1346/2000 on Insolvency Proceedings ('OR'); it has instead been part of the EU's response to the latest financial turmoil. This response included shifting policy priorities and embracing a rescue-friendly insolvency regime. In the end, European institutional organs reached the same conclusion:

¹³ Commission, 'Commission Staff Working Document: Impact Assessment accompanying the document "Commission Recommendation on a New Approach to Business Failure and Insolvency"' SWD (2014) 61 final, 24.

¹⁴ COM (2012) 742 final (n 10) 3.

‘the more efficient the national insolvency systems, the better the internal market will function’.¹⁵

1. The aftermath of the financial crisis

The recent financial crisis revealed many structural challenges for the European economy. Firstly, it resulted in many MSs dealing with a legacy of high private sector debt.¹⁶ Secondly, the spillover effects of the crisis revealed the interdependence between the 28 national economies and urged for stronger fiscal consolidation and discipline.¹⁷ Thirdly, despite the single market ambition, businesses face persisting barriers to cross-border activity mostly due to the lack of a level playing field.¹⁸

Despite the recession, the EU keeps moving towards the inauguration of a supervisory framework which would absorb inefficiencies and develop the necessary safeguards for a future shock.¹⁹ Financial recovery and sustainable growth were elevated to top priorities in Europe’s agenda with institutions launching a multileveled framework accompanied by a series of subsequent guidelines.²⁰

That a state’s economic performance and growth is also reliant on a well-functioning market is a matter so firmly established that it does not need further elaboration. Orderly functioning financial markets are in turn reliant on other factors, including robust underlying institutional frameworks. Judiciary integrity and legislative certainty, as well as the existence of special sets of rules and best practice can provide for competitive advantages and economic growth.²¹ This is why, in line with the growth strategy Europe 2020 and the recent Single Market Act II, justice has been put at the heart of Commission’s agenda as well.²²

¹⁵ Paul Wright, ‘Challenges to the Harmonisation of Business Law: Domestic and Cross-border Insolvency’ 2015 <ssrn.com/abstract=2658230> last accessed 19 March 2017.

¹⁶ ‘Real GDP projected to shrink by some 4% in 2009, the sharpest contraction in the history of the EU [...] public debt in the euro area is projected to reach 100% of GDP by 2014’ as cited Commission (EC) (2009a), ‘Economic crisis in Europe: Causes, Consequences and Responses’ (2009), DG Economic and Financial Affairs, European Economy 7/2009.

¹⁷ Commission, Communication from the Commission ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’ COM (2010) 2020 final.

¹⁸ *ibid.*

¹⁹ *ibid* José Manuel Barroso’s preface statement.

²⁰ SWD (2014) 61 (n 13) 3; see indicatively Commission, Communication from the Commission to the European Council, ‘A European Economic Recovery Plan’ COM (2008) 800 final, launched in 2008 to restore market confidence, followed by Commission’s 2010 plan for EUROPE 2020 COM (2010) 2020 final (n 17) and initiatives such as the Single Market Strategy MEMO/15/5910 <europa.eu/rapid/press-release_MEMO-15-5910_en.htm> accessed 20 May 2016.

²¹ Gerard McCormack, ‘Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies’ (2014) 63(4) ICLQ 815; Association for Financial Markets in Europe (AFME) Report, ‘Potential Economic Gains from Reforming Insolvency Law in Europe’ (February 2016) <www.afme.eu/globalassets/downloads/publications/afme-insolvency-reform-report-2016-english.pdf> accessed 22 February 2017.

²² ‘Justice for Growth’, COM (2012) 742 final (n 10).

The insolvency and bankruptcy regime is one of the relevant institutional frameworks.²³ In that regard, it is noted that the European organs included the recast of the EIR to the judicial reforms as an indispensable part of the economic recovery programme.²⁴

2. Business insolvency regime as a key policy area for economic growth

Business exit is nowadays an inherent process in the life cycle of companies, significantly affecting European economic life. Eurozone bankruptcy-related percentages have crossed the redlines afforded by developed economies,²⁵ with theatrical headlines like the Lehman Brothers' collapse drawing public attention. One quarter of these involve creditors or debtors in more than one MS.²⁶ Although the momentum has slowed,²⁷ the insolvency scene in Western Europe continues to reflect a recovering yet stagnating economy.

Notwithstanding the scope of this article, the social repercussions are of relevance. Business failure has been a plague for employment with the total number of insolvency related job losses in Europe estimated at 5.1 million over three years.²⁸ While statistics help us realize the extent of the problem, a brief explanation of how a revision of the EIR could contribute to alleviating these consequences follows.

Almost all MSs share provisions for formal in-court proceedings; however, the options for restructuring and informal, hybrid proceedings are limited.²⁹ Despite the praiseworthy efforts of some MSs of keeping in pace with new trends and approaches in business rescue, the availability of out-of-court and restructuring procedures across the EU is not of sufficient frequency across the board. Notwithstanding that a considerable amount of literature and research concludes that failed entrepreneurs that re-start show lower rates of failure and faster

²³ Sergei A Davydenko and Julia R Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK' (2008) 63(2) *Journal of Finance* 565.

²⁴ Council of the European Union, 'Press Release, New Rules to Promote Economic Recovery' (4 December 2014)

<www.consilium.europa.eu/en/press/pressreleases/?q=insolvency&frDt=&frDt_submit=&toDt=&toDt_submit=&cc%5B%5D=610&stDt=20150722/> accessed 12 June 2016.

²⁵ Today in Europe about 50 percent of new businesses do not survive the first five years of their existence as cited in COM (2012) 742 final (n 10) 1; see also Commission, DG Enterprise and Industry, 'Report of the Expert Group: "A Second Chance for Entrepreneurs: Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start"' (January 2011)

<ec.europa.eu/DocsRoom/documents/10451/attachments/1/translations/en/renditions/native> accessed 10 June 2016.

²⁶ Commission, 'Commission Staff Working Document: Executive Summary of the Impact Assessment accompanying the document "Commission Recommendation on a New Approach to Business Failure and Insolvency"' SWD (2014) 62 final.

²⁷ Credit Reform Economic Research Unit, 'Corporate Insolvencies in Europe 2014/15' <www.creditreform.com/fileadmin/user_upload/CR-International/local_documents/Analysen/Insolvencies_in_Europe_2014-15.pdf> accessed 3 June 2016.

²⁸ SWD (2014) 61 final (n 13) 2.

²⁹ Commission, 'The Economic Impact of Rescue and Recovery Frameworks in the EU', European Economy Discussion Papers (September 2015) <ec.europa.eu/economy_finance/publications/> accessed 1 July 2016; SWD (2014) 62 final (n 23) 2.

growth³⁰ and although only 4-6% of bankruptcies are fraudulent, business failure is still not unanimously perceived as an opportunity for more reinvigorated entrepreneurship and business activity.³¹ Sustained by the lack of a framework addressing recognition and enforcement of this kind of proceedings,³² business rehabilitation is currently inflexible, time-consuming, costly and value-destructive, with SMEs disproportionately bearing its effects.³³

Inefficiencies in national hybrid and insolvency procedures prevent deleveraging, delay loss recognition and impede credit flows to solvent corporations and individuals.³⁴ As a result, this incomplete legal framework forces distressed but solvent firms into premature liquidation, adding to financial and social losses and ultimately undermines economic growth.

An efficient insolvency regime is a catalyst for promoting and encouraging economic growth. The improvement and effective construction of an insolvency regime could encourage early and cost-effective rescue of viable businesses in order to avoid subsequent liquidation,³⁵ also restricting the economic and social consequences of bankruptcy for entrepreneurs, provided that these business failures occurred in good faith.³⁶ It would also mitigate the adverse legal consequences of personal insolvency and consequently promote entrepreneurship by providing for partial reassurance against the consequences of failure.³⁷ These advantages may also be felt on a larger, macroeconomic scale; an efficient insolvency regime fosters better *ex ante* assessment of the risks involved in lending and borrowing

³⁰ Empirical studies show that a ‘forgiving’ bankruptcy law allows entrepreneurs to re-enter economy after a business failure. See inter alia Nicholas L Georgakopoulos, ‘Bankruptcy Law for Productivity’ [2002] Wake Forest Law Review 51; Augustin Landier, ‘Entrepreneurship and the Stigma of Failure’ <pages.stern.nyu.edu/~alandier/pdfs/stigma9.pdf> accessed 10 December 2015. For a challenge on the soundness of pursuing business rescue in every case see Horst Eidenmüller, ‘A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond’ (March 2013) ECGI - Law Working Paper No 199/2013 <papers.ssrn.com/sol3/papers2.cfm?abstract_id=2230690> accessed 10 December 2015.

³¹ Commission, ‘Report of the Expert Group’ (n 25).

³² Commission, ‘Inception Impact Assessment on Initiative on Insolvency’ DG JUST (A1), 2016/JUST/025–INSOLVENCY II <ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_025_insolvency_en.pdf>, accessed 12 July 2016 acknowledging the disparity of insolvency legal systems in EU. The 2015 World Bank ‘Doing Business Report’ ranks countries on the strength of their insolvency frameworks. The EU is 5% below the OECD average for high income countries, while recovery rates vary between 30% in Croatia and Romania and 90% in Belgium and Finland. In contrast, according to IMF Country Report No. 15/205, July 2015, US and Japan are making progress towards an efficient insolvency regime.

³³ Davydenko and Franks (n 23) 603–604.

³⁴ Commission, ‘The Economic Impact of Rescue and Recovery Frameworks in the EU’ (n 29) 3.

³⁵ Simeon Djankov and others, ‘Debt Enforcement around the World’ (2008) 116(6) Journal of Political Economy 1105.

³⁶ Wei Fan and Michelle J White, ‘Personal Bankruptcy and the Level of Entrepreneurial Activity’ (2003) 46 Journal of Law and Economics 543.

³⁷ Thomas H Jackson, ‘The Fresh-Start Policy in Bankruptcy Law’ (1985) 98 Harvard LR 1393; Lee Seung-Hyun and others, ‘Bankruptcy Law and Entrepreneurship Development: A Real Options Perspective’, (2007) 32(1) Academy of Management Review 257.

decisions by creditors and businesses, leading to the overall healthier development of credit markets,³⁸ as well as the deleveraging and reallocation of capital.³⁹ Moreover, insolvency frameworks are crucial to smoothing out debt adjustment and minimizing the economic and social costs of the EU's private debt overhang,⁴⁰ since slow recognition of bad loans leads to upwards-drifting NPL rates and deteriorates the outcomes of deleveraging episodes, generating economic uncertainty. Therefore, insolvency regulatory frameworks have an indirect effect on the leveraging of entrepreneurship and consequently on economic growth.⁴¹

Modernising and harmonising the EU's insolvency rules to facilitate the survival of businesses and offering a second chance for entrepreneurs is a key policy area in the roadmap to improve the functioning of the internal market.⁴² The 2009 Stockholm Programme for the European area of justice,⁴³ and other studies thereafter,⁴⁴ highlighted the importance of efficient insolvency rules in supporting economic activity.⁴⁵

In conclusion, there exists a strong positive correlation between the availability of an effective insolvency framework providing for preventive restructuring solutions and high levels of entrepreneurship and economic growth across the EU. This is why the RR should be examined within the context of the EU's current agenda to promote economic recovery and sustainable growth, as set out in the Europe 2020 strategy for jobs and growth.

3. The EU's competence to act – a snapshot of the review process

The global financial crisis brought temptations of economic nationalism resulting in signs of integration exhaustion and retreat regarding the single market objective.⁴⁶ The Commission's vigilance and multileveled cooperation among MSs were indispensable in preventing a drift towards disintegration; legislative tools can contribute to that task.

³⁸ Simeon Djankov and others, 'Private Credit in 129 Countries' (2007) 84 *Journal of Financial Economics* 299.

³⁹ Commission, 'Inception Impact Assessment on Initiative on Insolvency' (n 32).

⁴⁰ IMF (2013b), 'Global Financial Stability Report: Transition Challenges to Stability' (October 2013); Commission, 'The Economic Impact of Rescue and Recovery Frameworks in the EU' (n 29).

⁴¹ See Joseph A Schumpeter, *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (Harvard Economic Studies 1934); Sander Wenekers and Roy Thurik, 'Linking Entrepreneurship and Economic Growth' (1999) 13 *Small Business Economics* 27. For an economic analysis in Europe see Commission, 'Report of the Expert Group' (n 25).

⁴² COM (2012) 742 final (n 10). Although entrepreneurship and growth are not in a direct relationship, legislation aimed to facilitate entrepreneurship dynamics could, through the channels of increased competition, ultimately enhance economic growth. See further John Armour and Douglas Cumming, 'Bankruptcy Law and Entrepreneurship' (2008) 10(2) *ALER* 303.

⁴³ 'The Stockholm Programme — An open and secure Europe serving and protecting citizens' [2010] OJ C 115/1.

⁴⁴ AFME Report (n 21).

⁴⁵ According to AFME Report (n 21), applied across the economy this could add 0.3% to 0.55% to EU GDP over the long-term.

⁴⁶ COM (2010) 2020 (n 17).

As already established, the proper functioning of the internal market requires that insolvency proceedings operate efficiently and effectively. According to articles 81(2)(a), (c) and (f) Treaty on the Functioning of the European Union ('TFEU'), judicial cooperation in civil matters falls within EU objectives; thus the EU is empowered to adopt measures 'particularly when necessary for the proper functioning of the internal market' and concerned with the progressive establishment of an 'area of freedom, security and justice'.⁴⁷ Moreover, article 81 TFEU does not prescribe a particular form for relevant measures, thus leaving the Commission with wide discretion on how to act, in compliance with the principles of subsidiarity and proportionality.⁴⁸

In matters of cross-border insolvency, the way had already been paved by the OR. According to article 46 OR, the Commission ought to provide the Parliament, the Council and the Economic and Social Committee with a report on the application of the EIR no later than 1 June 2012 and every five years thereafter; this report should be accompanied by a proposal for adaptation, if necessary.

The report was finally published in December 2012 and, in line with what had already been highlighted by the majority of the academic community and practitioners,⁴⁹ it concluded that while the OR is functioning well in general and is 'largely supported by stakeholders',⁵⁰ there was a number of contentious areas identified that needed to be addressed.⁵¹ In addition, the persisting disparities between national insolvency laws together with the overwhelming changes in business reality that took place within ten years of EIR's enforcement urged for its reappraisal.⁵²

Extensive tripartite discussions between the Commission, the Parliament and the Council of Europe were held,⁵³ with numerous proposals and large-scale studies.⁵⁴

⁴⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), Title V.

⁴⁸ *ibid* art 5.

⁴⁹ See Vanessa Finch, 'The Recasting of Insolvency Law', (2005) 68(5) MLR 713; Gabriel Moss and Christoph G Paulus, 'The European Insolvency Regulation – the Case for Urgent Reform' [2006] 1 *Insolv Int* 1; Gerard McCormack, 'Reconstructing European Insolvency Law – Putting in Place a New Paradigm' (2010) 30(1) *LS* 126.

⁵⁰ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings' COM (2012) 743.

⁵¹ *ibid*.

⁵² COM (2012) 742 final (n 10).

⁵³ See Moss, Fletcher and Isaacs (n 3) [1.26]–[1.27]; Ian Fletcher, 'The European Insolvency Regulation Recast: the Main Features of the New Law' (2015) 28(7) *Insolv Int* 100; Michael Weiss, 'Bridge Over Troubled Water: the Revised Insolvency Regulation' (2015) 24 *Int Insol Rev* 192, 194.

⁵⁴ See for example Burkhard Hess and others, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' JUST/2011/JCIV/PR/0049/A4 (Heidelberg-Luxembourg-Vienna Report) <ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf> accessed 1 June 2016; Robert van Galen and

Ultimately, in an unusual display of unity, a consensus among the European institutions was reached, hailed by the Commission's approval of a final draft of the RR in March 2015 and the Parliament's support on 20 May 2015.⁵⁵ Since the EIR was not completely changed and in view of further amendments in the future, the regulation was recast, incorporating thus 'in a single text both the amendments that it makes to an earlier act and the unchanged provisions of that act'.⁵⁶

Fuelled by article 81 TFEU⁵⁷ and reliant on its predecessor, the RR aims at modernizing cross-border insolvency cases by way of promoting economic recovery, setting an end date to the OR.⁵⁸ Its legal basis forms part of the set goals⁵⁹ and a basis for the RR's interpretation and legal effects.⁶⁰ As a Regulation, the RR claims for 'general application' and is 'directly applicable' in MSs and 'binding in its entirety', ie without transposition.⁶¹

C. THE RECAST REGULATION: (R)EVOLUTION

This section critically analyses the amendments brought by the RR, focusing on how and whether the new regime achieves the goal of a rescue-friendly strategy as promulgated by Commission's official report.⁶² It is argued that the RR does not alter the insolvency landscape in its entirety; the outcome is a 'text that is evolutionary, rather than revolutionary'.⁶³ Especially when it comes to establishing a rescue-friendly regime, the solutions it provides are rather fragmentary, addressing isolated cases.

1. *General observations*

The net effect of the recasting is evidenced by the length of RR, which has almost doubled in size compared to the OR.⁶⁴ This is to some extent due to the inclusion of a new chapter

others, 'Revision of the European Insolvency Regulation - Proposals by INSOL Europe' <<https://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe>> accessed 1 June 2016 (Robert van Galen Report); Parliament, Committee on Legal Affairs, 'Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI))' (Klaus-Heiner Lehne Report).

⁵⁵ Commission, 'Insolvency: European Parliament backs Commission proposal to give viable businesses a 'second chance'' MEMO/12/969 (5 February 2014) according to which Parliament has backed with an overwhelming majority (580 for) the Commission's proposal to modernize rules on cross-border insolvency.

⁵⁶ Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77/1, 28 March 2002 [2]

⁵⁷ RR, Recital 3.

⁵⁸ The OR will be replaced on 26 June 2017 according to Art 92 RR.

⁵⁹ RR, Recital 8, 81.

⁶⁰ Moss, Fletcher and Isaacs (n 3) [2.04], [2.20]; Miguel Virgos and Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 7.

⁶¹ TFEU, art 288; Virgos and Garcimartin (n 60) 4. *Mutatis mutandis* for the RR.

⁶² COM (2012) 742 final (n 10); COM (2012) 743 (n 50) final.

⁶³ Fletcher (n 53) 105.

⁶⁴ *ibid* 100.

introducing provisions for coordinating group insolvencies. Equally remarkable is the replacement of some terms and the introduction of new ones; in a display of the change of mindset, the term ‘liquidator’ has been replaced by the more neutral ‘insolvency practitioner’ (‘IP’), while terms such as ‘hybrid proceedings’ and ‘undertaking’ denote a policy shift.

Apart from that, there is a place reserved for basic notions such as ‘COMI’, ‘establishment’, ‘main’ and ‘secondary’ proceedings. The core principles of the OR have been retained in the RR,⁶⁵ since, according to the Commission’s report, the OR ‘is generally regarded as a successful instrument’.⁶⁶ The RR seizes the opportunity to clarify contentious areas of interpretation,⁶⁷ mainly by incorporating the fruits of the Court of Justice of the European Union’s (‘CJEU’) jurisprudence with special consideration to EIR’s scope, forum shopping and the COMI concept, and to fit developments undergone by national insolvency laws into the EIR by embracing business restructuring.⁶⁸

Overall, the RR remains a private international law tool providing for conflict of laws rules and the allocation of jurisdiction.⁶⁹

2. Focusing on the RR

a) Scope of the RR

The scope of the EIR’s application is a significant principal consideration, both *rationae materiae*, namely which proceedings fall within the scope of the Regulation,⁷⁰ and *rationae personae*, namely who can be considered a debtor.⁷¹ With the latter being relatively uncontroversial,⁷² the scope *rationae materiae* concerned the Commission. Relying on larger-scale studies and public consultations, the Commission admitted that the OR reflects a traditional concept of insolvency⁷³ that requires a lack of liquidity or a negative balance

⁶⁵ *ibid* 101; Francisco Garcimartin, ‘The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction’ (March 2016) <ssrn.com/abstract= 2752412> accessed 2 May 2016.

⁶⁶ COM (2012) 743 final (n 50); Heidelberg-Luxembourg-Vienna Report (n 54) [2.1].

⁶⁷ Christoph Thole and Manuel Dueñas, ‘Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation’ (2015) 24(3) *Int Insolv Rev* 214.

⁶⁸ Laura Carballo-Piñeiro, ‘Towards the Reform of the European Insolvency Regulation: Codification Rather than Modification’ [2014] *Nederland Internationaal Privaatrecht* (2) 207 <<http://ssrn.com/abstract =2482014>> accessed 10 July 2016.

⁶⁹ Gerard McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (2016) 79(1) *MLR* 121, 123.

⁷⁰ OR, art 1(1).

⁷¹ RR, art 1(2).

⁷² Mainly due to Council Directive 2009/138/EC of 17 December 2009 on the taking up and pursuit of the business of insurance and re-insurance (Solvency II) [2009] OJ L 335/1; Council Directive 2001/24/EC of 5 May 2001 on the reorganisation and winding-up of credit institutions [2001] OJ L 125/15. However, the cross-reference in RR, art 1(2)(c) is creditable.

⁷³ COM (2012) 743 final (n 50); ‘The elements of this definition correspond to the model of typical insolvency proceedings in the late 1980s’ as cited by Hess in Heidelberg-Luxembourg-Vienna Report (n 54) [3.2.1].

sheet, thus leaving aside developments in national insolvency laws.⁷⁴ As a result, restructuring proceedings were not given recognition and enforcement across the EU, jeopardizing their success.⁷⁵ There are limited cases that have managed to overcome such impediments, outreaching the bounds of the drafters' wording which are attributable to national insolvency tools and manoeuvring.⁷⁶

The RR maintained the fundamental limitations already set by the OR. However, modernising the EIR in pursuit of sustainable growth⁷⁷ required extending its scope of application.⁷⁸ The change in the EU's policy is visible in the redrafted article 1 RR, which along with Recital 10 proclaims a broader scope. By including pre-insolvency⁷⁹ and hybrid proceedings,⁸⁰ which were not initially covered by the OR, the RR attempts to encompass 'new trends and approaches' in the MSs⁸¹ and aims at mitigating the problem of holding-out insolvency related proceedings. By bringing within its scope debtor-in-possession and interim proceedings⁸² as well as debt adjustment and reorganization, the RR seems to be openly embracing a rescue-friendly policy⁸³ as part of the EU's policy to give a second chance to both companies and individuals.⁸⁴

Another point addressed by the RR is the interplay between the criteria enshrined in the definition provided by article 1 and the listing of procedures in Annex A. The misalignment between the procedures listed in the annex and the conditions in article 1 OR resulted in the annex being over-inclusive and under-inclusive at the same time.⁸⁵ The Commission, acknowledging the concerns raised by extensive studies and public consultations, admitted the problems and the legal uncertainty it created.⁸⁶ This uncertainty,

⁷⁴ For a detailed list for each country see Commission, 'Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member's State relevant provisions and practices' by INSOL Europe <ec.europa.eu/justice/civil/files/insol_europe_report_2014_en.pdf> accessed 12 December 2015.

⁷⁵ Carballo-Piñeiro (n 68) 207.

⁷⁶ See *Re Christophorus 3 Limited* [2014] EWHC 1162 (Ch); Gillian Tett and Ivar Simensen, 'Schefenacker Navigates to UK' *Financial Times* (London, 16 October 2006) <www.ft.com/cms/s/0/eee08c7a-5d5d-11db-9d15-0000779e2340.html> accessed 1 August 2016. Schefenacker AG moved its COMI in the UK and profited from a Company Voluntary Arrangement, achieving thus a €930m turnover.

⁷⁷ COM (2010) 2020 final (n 17).

⁷⁸ *ibid.*

⁷⁹ For a definition see COM (2012) 743 final (n 50) [2.1.1].

⁸⁰ *ibid.* It is submitted that this term corresponds to debtor-in-possession proceedings.

⁸¹ COM (2012) 743 final (n 50).

⁸² RR, Recital 15.

⁸³ Fletcher (n 52) 101.

⁸⁴ RR, Recital 10, referring to consumers and self-employed persons.

⁸⁵ Case C-116/11 *Bank Handlowy v Warszawie SA, PPHU 'ADAX'/Ryszard Adaniak v Christianapol sp. Zoo* (22 November 2012), paras 33–35; *ibid.*, Opinion of AG Kokott, para 49; cf Case C-461/11 *Ulf Kazimierz Radziejewski* [2013] ECR I-00000 181; McCormack, 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) JPIL 41, 46; Heidelberg-Luxembourg-Vienna Report (n 53) [2.2.1.1].

⁸⁶ COM (2012) 743 final (n 50) 6-7.

though robustly circumvented by CJEU's ruling⁸⁷ – which held that the inclusion of a process in Annex A is conclusive evidence of it falling within the scope of the Regulation – needed to be clarified.

The Annex mechanism is retained in the RR. However, a hierarchy has been provided, stating with admirable clarity in Recital 9 RR that proceedings falling within RR's scope are listed exhaustively.⁸⁸ Accordingly, Annex A has been updated and aligned with developments in MSs.⁸⁹

i) Criticism

Despite a detailed definition of the scope and the updated annex, which ultimately formalises the wider approach of the RR and declares a policy diverging from the stigma of insolvency,⁹⁰ there is a lurking fear of increased complexity⁹¹ and 'tightening' of the scope which could lead to inflexible results which subvert the establishment of a rescue-friendly culture.

This definition still spreads over articles 1 and 2 RR.⁹² Moreover, the 'tightening' effect is evidenced by a series of safeguards, such as the one in article 2(1), which confines its scope to proceedings affecting only the claims of involved creditors, excluding from its scope procedures that might entail a cramdown effect similar to the one in Chapter 11 US Bankruptcy Code. Another significant caveat is the fact that art 1 RR refers to public proceedings. This leaves confidential and unapproved conciliation procedures outside the scope of the RR, despite the fact that such proceedings are usually expeditious, less costly and available in many MSs.⁹³ Equally controversial is the fact that the proceedings brought within the RR's scope must be provided exclusively by insolvency law.⁹⁴ This amendment may be counterproductive, resulting in MSs simply re-characterising insolvency procedures as company law procedures, thus excluding them from the RR.

According to Recital 9 RR, the annex mechanism plays a triggering role. However, it does not list all national proceedings granting debt relief or debt restructuring, thus enabling

⁸⁷ *Bank Handlowy v Warszawie* (n 85).

⁸⁸ McCormack (n 69) 127.

⁸⁹ Weiss (n 54) 196.

⁹⁰ Carballo-Piñero (n 68) 207.

⁹¹ Garcimartin (n 65) 4.

⁹² Geert van Calster, 'COMIng, and here to stay: The Review of the European Insolvency Regulation' 2015 <ssrn.com/abstract=2637003> accessed 20 June 2016.

⁹³ Commission, 'Study on a new approach to business failure and insolvency' (n 72) 22.

⁹⁴ For details see p 28.

forum shopping on the part of individuals.⁹⁵ Of greater concern is the fact that the annex can no longer be easily amended since article 45 OR has no equivalent in the RR.⁹⁶ The proceedings to be listed in the annex is in MSs' discretion and there is no longer any prescribed review process. This approach may put forum-shopping prevention goals at stake.

Overall, the RR seems to be heading in two different directions, namely modernising the cross-border insolvency regime by adopting a broadened definition of insolvency proceedings, but also ensuring legal certainty by listing the type of procedures under the RR. The exhaustive listing solution freezes the status quo until the next review and risks the RR being outdated by the time it enters force. The result for the moment is that, while defining the scope was vital for the establishment of a rescue-friendly regime, the opportunity was not taken to fully embrace restructuring procedures across Europe.

b) COMI concept and forum shopping

In its report, the Commission affirms⁹⁷ that the COMI concept holds a central role for allocating jurisdiction and for separating main from secondary proceedings. Meanwhile, it acknowledges the criticism COMI has attracted,⁹⁸ mainly because of its variable and fact-sensitive nature causing problems of interpretation and undermining creditor protection.⁹⁹

The most important drawback of COMI in the OR is its ambiguity, caused by the attempt to compromise between the 'real seat' and 'incorporation' theories, and its desire to bridge the gap between civil law and common law jurisdictions.¹⁰⁰ The presumption of article 3(1) is in favour of the latter, while the possibility of rebuttal favours the first. However, without any express definition¹⁰¹ or any guidance as to how the presumption is rebutted, creditors have to deal with uncertainties regarding the COMI of their debtors. In addition, COMI has been 'an entirely artificial term without precedence'¹⁰² creating many problems in

⁹⁵ Weiss (n 53) 196. For non-included debt relief procedures, see the UK Debt Relief Orders, Pt 7A Insolvency Act 1986; cf the Swedish 'Skuldsanering' proceedings.

⁹⁶ RR, Annex D.

⁹⁷ COM (2012) 743 (n 50) final.

⁹⁸ See H Eidenmüller (n 30); Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 EBOLR 579; Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68 CLJ 169.

⁹⁹ COM (2012) 743 final (n 50); Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701; Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813; Case C-112/10 *Procureur-generaal, Antwerpen v Zaza Retail BV* [2011] ECR I-11525.

¹⁰⁰ McCormack (n 69), 129; John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' (2005) 58(1) Current Legal Problems 369.

¹⁰¹ Apart from a reference in RR, Recital 13.

¹⁰² Balz (n 3) 504.

interpretation. Despite the CJEU's efforts to mitigate legal uncertainty with a series of judgments,¹⁰³ its jurisprudence does not provide the needed clarifications.

Due to its volatile nature, COMI has also been vulnerable to manipulation. Sustained by the lack of a level playing field among MSs, COMI offers debtors the possibility of legitimising their efforts to pursue an optimum regime by simply shifting their COMI and racing to the court to file for insolvency. Once the court is seized, it is granted unqualified recognition of jurisdiction. Consequently, it encourages opportunistic behaviour and forum shopping.

Commentators proposed replacing COMI with the incorporation doctrine,¹⁰⁴ since it provides for firmer results and accords with the principle of freedom of establishment in EU company law, as reaffirmed by the *Centros*, *Überseeing* and *Inspire Art* cases.¹⁰⁵ Nonetheless, according to the Commission's findings, COMI enjoys general support.¹⁰⁶ As a result, the RR maintains COMI's key role as a master condition for the RR's application.¹⁰⁷ The Commission's choice is wise for three reasons: firstly, the COMI concept has surpassed EU's frontiers by means of the UNCITRAL Model Law;¹⁰⁸ secondly, there is evidence that the incorporation doctrine is equally vulnerable to forum shopping and manipulation;¹⁰⁹ thirdly, since jurisdiction is ascertained on the date of filing for insolvency proceedings, transferring COMI is feasible and does not contradict freedom of establishment, provided that third parties' rights are effectively protected and that the COMI is readily ascertainable.¹¹⁰

The Commission also responded to the other concerns raised. The RR includes measures and safeguards in order to foster legal certainty regarding the allocation of jurisdiction and the opening of proceedings on one hand, and preventing manipulation on the other. More specifically, by way of clarification, the RR takes advantage of CJEU's meaningful case law, especially with regard to the ascertainability requirement,¹¹¹ and provides for a definition of COMI¹¹² applying equally to natural persons, without, however,

¹⁰³ See n 97.

¹⁰⁴ Eidenmüller (n 30); Ringe (n 98); McCormack (n 49).

¹⁰⁵ Case C-212/97 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] E.C.R. I-1459; Case C-208/00, *Überseeing BV v Nordic Construction Company Baumanagement GmbH* [2002] E.C.R. I-9919; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* [2003] E.C.R. I-10155.

¹⁰⁶ COM (2012) 743 final (n 50); Heidelberg-Luxembourg-Vienna Report (n 54) 16.

¹⁰⁷ RR, Recital 25.

¹⁰⁸ UNCITRAL Model Law on Cross-Border Insolvency (1997); *Re Stanford International Bank Ltd* (in liquidation) [2010] EWCA Civ 137.

¹⁰⁹ Jay L Westbrook, 'Locating the Eye of the Financial Storm' (2007) 32 *Brook Journal of International Law* 1019, 1028.

¹¹⁰ Carballo-Piñeiro (n 68) 209.

¹¹¹ Heidelberg-Luxembourg-Vienna Report (n 54) 17

¹¹² RR, art 3(1), Recital 28.

fundamentally deviating from its thrust.¹¹³ In the same vein, there is an innovation introduced by means of an express provision that COMI is fastened for a three-month period prior to filing a request to open proceedings.¹¹⁴

Even more drastic are the safeguards introduced to curtail COMI manipulation and forum shopping; apart from recalling that forum shopping prevention is within its goals, the RR imposes on courts the duty to examine *ex officio* whether they share jurisdiction on the particular case and to specify the grounds of their jurisdiction.¹¹⁵ Furthermore, the RR introduces the opportunity to challenge a jurisdiction-related decision¹¹⁶ and addresses the unease caused by the race-to-the-court strategy of many distressed businesses.

i) Criticism

The RR remains loyal to the COMI concept and purports at the same time to clarify ambiguities. Despite the Commission's goals being clear, it is not clear that legal uncertainties have been eliminated. There are still some controversial elements. For instance, defining COMI clarifies and strengthens the presumption in favour of the place of registered office. Meanwhile, refining the presumption by means of incorporating in the RR guidelines¹¹⁷ when the presumption is to be rebutted, may result into it being exposed to manipulation and abuse.

Setting aside the debate about COMI's adequacy as a jurisdictional trigger and its alleged misalignment with the freedom of establishment, it is suggested that clarifying COMI was clearly not intended to be a priority among the initiatives towards a rescue-friendly regime. The text of the RR reflects that the main concern of the Commission was to prevent abusive forum shopping.

Consequently, the RR has tightened the COMI concept by introducing ascertainability and time-related safeguards in favour of creditors and third parties. It is the case that the incorporation theory or a more lenient choice of COMI could improve the chances for corporate rescue within the EU, since the debtor could simply increase the availability of restructuring options through 'COMI shifting'. However, this time the balance has shifted in favour of creditor protection.

Nonetheless, legal certainty could by way of a side-effect contribute to creating conditions favourable to business rescue. Insolvency is a foreseeable risk for investors and a

¹¹³ Garcimartin (n 65) 13.

¹¹⁴ RR, art 3(1).

¹¹⁵ *ibid* art 4.

¹¹⁶ *ibid* art 5.

¹¹⁷ *ibid* Recitals 29–33.

major part of their decision-making process. Therefore, a forum that allows investors to plan and estimate cost can be attractive for accommodating new financing, even if the latter is channelled to insolvent companies. Similarly, it allows distressed companies to devise a rescue plan, without the fear of being subverted by adverse court decisions relocating the COMI of the company. After all, both the OR¹¹⁸ and the RR¹¹⁹ do not forbid shifting of COMIs, provided the decision is timely and protects creditors' rights.¹²⁰

c) Secondary and synthetic proceedings

Another drawback of the OR is the fact that secondary proceedings would have to be liquidation proceedings. This restriction, though irrational at first sight, was part of the 'horse-trading' process¹²¹ in order for the EIR to gain the necessary political consensus by providing to MSs the possibility to ring-fence local creditors' interests.¹²² Nowadays it reflects an obsolete perception of insolvency and prevents any pragmatic rescue-friendly compromise brokered by an IP, leading to forceful liquidation of other solvent subsidiaries.¹²³ Absent any objection mechanism and any specific duties for the liquidators to cooperate, the Commission admits that the opening of secondary proceedings has been abused by local creditors in an effort to ring-fence their claims.¹²⁴ Besides that, the opening of secondary proceedings generally complicates the task of the IP in the main proceedings, since the IP needs to cooperate and bargain with other independent officers.

The RR remains loyal to modified universalism¹²⁵ as adopted by its predecessor and reserves a role for secondary proceedings by refining the prerequisites for opening them.¹²⁶ After all, the positive effects of these proceedings regarding local creditors' protection should not be overlooked.¹²⁷ Notwithstanding this, steps forward have been taken: firstly, the RR

¹¹⁸ *Re Hellas Telecommunications (Luxembourg) II SCA* [2010] BCC 295.

¹¹⁹ RR, Recital 28.

¹²⁰ For a distinction on good and bad forum shopping see *Staubitz-Schreiber* (n 99), Opinion of AG Ruiz-Jarabo Colomer, paras 7–77.

¹²¹ McCormack (n 69) 132.

¹²² Balz (n 3).

¹²³ Bob Wessels, 'Themes of the Future: Rescue Businesses and Cross-Border Cooperation' (2014) *Insolv Int* 27(1) 4; McCormack (n 67) 132; Robert Arts, 'Main and Secondary Proceedings in the Recast of the European Insolvency Regulation: The Only Good Secondary Proceeding is a Synthetic Secondary Proceeding' <www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf> accessed 26 March 2016.

¹²⁴ COM (2012) 742 final (n 10); see also Arts (n 123) 7.

¹²⁵ For a discussion on universalism v territorialism see Jay L Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 *American Bankruptcy Law Journal* 457; McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32 *OJLS* 325.

¹²⁶ The definition of establishment in art 2(10) RR removed the doubts raised in *Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2013] EWCA Civ 643; see also the substitution of the term 'goods' for the more appropriate 'assets'.

¹²⁷ Arts (n 123) 12.

removes the requirement of secondary proceedings being liquidations;¹²⁸ secondly it gives power both to the courts¹²⁹ and the IP¹³⁰ to prevent the opening of secondary proceedings; thirdly, it introduces synthetic secondary proceedings.¹³¹

The removal of the restriction on the nature of secondary proceedings is more than welcome; combined with the possibility to stay or object to the opening of secondary proceedings,¹³² the chances of a restructuring plan being approved in both jurisdictions are significantly increased.

Regarding the synthetic secondary proceedings, the concept was first conceived by the English courts¹³³ in an effort to minimize the disruptive effects of secondary proceedings. The IP appointed in the main proceedings undertakes a promise to respect local priorities, provided that they do not open secondary proceedings. This imaginative solution has been ‘Europeanised’ thanks to the Commission’s initiative.¹³⁴ Given the detailed framework, it could be the most value-maximizing tool of the RR and despite its clearly rescue-friendly orientated purpose, it is equally applicable to liquidation-type proceedings.¹³⁵

i) Criticism

It is submitted that the amendments on secondary proceedings in the RR’s provisions are sensible and timely, epitomising the Commission’s initiatives to adopt a rescue-friendly regime although, regrettably, the only promising one.

Synthetic proceedings could be a powerful tool for the implementation of a restructuring plan, provided that it is matched with the IP’s expertise in business restructuring. Even prior to the required approval, an ‘undertaking’ may be used as a shield against the lodging of a claim to open secondary proceedings.¹³⁶ Meanwhile, the RR provides for safeguards by enabling the creditors to ask the court for provisional and preventive measures.¹³⁷ Another revolutionary feature of the ‘undertaking’ is that by virtue of its inclusion in the RR, it is automatically part of the applicable law of MSs bound by the

¹²⁸ Deletion of final sentence from art 3(2) OR and omission from Recital 27 OR that all secondary proceedings be opened under art 3(2) OR.

¹²⁹ RR, Recitals 41, 45, art 39.

¹³⁰ *ibid* art 8.

¹³¹ *ibid* Recital 42.

¹³² *ibid* arts 38, 39.

¹³³ *Re Collins and Aikman Europe SA* [2006] EWHC 1343, [2006] BCC 861; *Re Nortel Networks SA* [2009] EWHC 206, [2009] BCC 343.

¹³⁴ McCormack (n 88) 53.

¹³⁵ Fletcher (n 53) 103.

¹³⁶ Weiss (n 53) 206.

¹³⁷ RR, art 36(9).

Regulation and overrides any contrary provision, creating an important exception to the national version of the *pari passu* principle.¹³⁸

However, the main drawback is that it is doubtful whether IPs coming from a forum unfamiliar with the procedure of undertakings would be willing to take advantage of this new tool. In addition, the vagueness regarding IPs' liability and the legal consequences in the case of a breach could deter the appointment of IPs by the company, or the IPs themselves accepting appointments. Moreover, the approval of an undertaking is subject to creditors' approval and to national law reservations,¹³⁹ which could be used as a means of resistance by local creditors. Should an undertaking be disapproved, it will be up to the IP to resort to the alternative of objecting to the opening of secondary proceedings in defence of a unified approach towards the debtor's insolvency.

Bound by a political concession to localism, the RR chose to implement 'undertakings' to mitigate otherwise disruptive effects and overhauled the relationship between main and secondary proceedings. Unfortunately, this left a lot to be desired and given the questions raised in view of this innovation,¹⁴⁰ it would be impossible to avoid interpretational calamities. A possible solution could be that the amendment be accompanied by its own rules, thus excluding external influences of applicable law.¹⁴¹

d) Groups of companies

The notion of 'groups of companies' ('GoCs') includes different forms of economic organisations, whose size, degree of integration, and structure may vary,¹⁴² requiring delicate legislative treatment. In addition to the disparity (or often absence) of rules treating GoCs, the separate legal personality doctrine prevents legislators from reaching a comprehensive approach, especially when it comes to insolvency.

The OR does not contain any special provisions for GoCs' insolvencies.¹⁴³ However, reality of modern corporate groups could not be confined to the OR's wording.¹⁴⁴ Recent

¹³⁸ Fletcher (n 53) 103.

¹³⁹ RR, art 36(5).

¹⁴⁰ See Arts (n 123) 19.

¹⁴¹ Bob Wessels, 'Contracting Out of Secondary Insolvency Proceedings: the Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation' (2014) 9(1) Brooklyn Journal of Corporate, Financial and Commercial Law 236.

¹⁴² UNCITRAL Legislative Guide, Part Three: Treatment of Enterprise Groups in Insolvency 2012, 2; Irit Mevorach, 'Appropriate Treatment of Corporate Groups in Insolvency: a Universal View' (2007) EBOLR 8(2) 179.

¹⁴³ See Irit Mevorach, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57 ICLQ 427.

¹⁴⁴ COM (2012) 743 final (n 50).

group insolvencies¹⁴⁵ that took advantage of partial and ad hoc solutions and achieved centralisation demonstrate the cost-saving and value-maximizing advantages of placing financially distressed corporate groups in a single location under the supervision of a single insolvency regime, thus avoiding the unpredictable application of uncoordinated approaches.¹⁴⁶ However, such flexible solutions are limited to companies whose COMI is within the same state.¹⁴⁷ The *Eurofood* case¹⁴⁸ affirmed the basic premise of the OR:¹⁴⁹ ‘one company, one insolvency, one proceeding’.¹⁵⁰ Consequently, *Eurofood* considerably reduced the possibility of procedural consolidation.¹⁵¹ Although *Interedil* mitigated the latter stricter approach,¹⁵² it was not sufficient to overcome the registered office presumption. The absence of specific provisions for group insolvencies in the OR in addition to the lack of consistent interpretation, caused significant problems in practice,¹⁵³ resulting in inadequate and unfair approaches by disappointing creditors’ expectations.¹⁵⁴ In the context of restructuring in particular, the fragmented approach significantly hampers business rescue.¹⁵⁵ Therefore, as the Commission admitted, the absence of any relative framework creates obstacles,¹⁵⁶ particularly when it comes to achieving a rescue-friendly regime.

The RR filled the gap of its predecessor by introducing a definition for GoCs¹⁵⁷ and specific provisions for GoCs insolvencies, wisely respecting the separate legal personality doctrine and the entity-by-entity approach expressed in *Eurofood’s* dictum.¹⁵⁹ Accordingly, the RR provides neither for substantive consolidation¹⁵⁸ nor for a main-secondary proceedings approach reflecting a parent-subsidiary relationship, since subsidiaries cannot be considered as ‘establishments’.¹⁵⁹ It rather adopts a milder and more complex approach based

¹⁴⁵ See *Daisytek-ISA Ltd, Re* [2003] BCC 562; *Re Crisscross Telecommunications Group* (unreported, 20 May 2003).

¹⁴⁶ Irit Mevorach, ‘Centralising Insolvencies of Pan-European Corporate Groups: A Creditor’s Dream or Nightmare?’ [2006] JBL 468.

¹⁴⁷ *ibid* 486; Fletcher (n 53) 105.

¹⁴⁸ *Re Eurofood* (n 99), Opinion of AG Jacobs paras 106–126.

¹⁴⁹ Virgos-Schmit Report (VS Report) (EC Council Document 6500/96, DRS 8 CFC) [76] <aei.pitt.edu/952> last accessed 19 March 2017.

¹⁵⁰ Carballo-Piñeiro (n 68) 211.

¹⁵¹ COM (2012) 743 final (n 50).

¹⁵² Case C-396/09 *Interedil Srl v Fallimento Interedil Srl* [2011] ECR I-9915.

¹⁵³ See Heidelberg-Luxembourg-Vienna Report (n 54), [5.2.1.1]–[5.2.1.3]; Robert van Galen Report (n 54).

¹⁵⁴ Mevorach (n 146) 476; McCormack (n 49) 131.

¹⁵⁵ UNCITRAL Legislative Guide, Part Three (n 140), 83; Robert van Galen Report (n 54) 91–101; Mevorach (n 146), 180.

¹⁵⁶ COM (2012) 743 final (n 50).

¹⁵⁷ RR, art 2(13).

¹⁵⁸ *ibid* art 72(3); Commission, ‘Commission Staff Working Document: Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings’ SWD (2012) 416 final, 31.

¹⁵⁹ Heidelberg-Luxembourg-Vienna Report (n 54) [5.3.3].

on two pillars: enhanced cooperation and communication on the one hand (arts 56–60 RR), and procedural coordination on the other (arts 61–70 RR).

Specifically, the RR, clearly influenced by the UNCITRAL Guidelines, encourages cooperation and communication between IPs by means of protocols and risk allocation agreements.¹⁶⁰ In the same vein, courts can take advantage of various tools and establish communication between them.¹⁶¹ Although belated compared to other ‘soft law’ instruments,¹⁶² it is worth mentioning that court communication and authority to act beyond their usual limits is for the first time backed by ‘hard law’ provisions.

In addition, group coordination is introduced by means of a specific voluntary procedure.¹⁶³ Notably, the RR acknowledges the possibility that the COMI of several companies of the group is in the same MS and allows for the same IP to be appointed.¹⁶⁴ In all other cases, the RR offers to an appointed IP the possibility to file a group coordination request before any court competent to initiate insolvency proceedings for a member of the group in accordance with the local insolvency rules of the jurisdiction,¹⁶⁵ and provides for a separate regime of priority rules and objections.¹⁶⁶ Should the request be upheld, the RR introduces a new role, the ‘coordinator’, who is granted several rights and duties attributed to the position of a general administrator.¹⁶⁷

i) Criticism

The introduction of provisions for group insolvencies is undoubtedly an improvement. However, being limited to matters of an administrative nature, it falls short of boosting a rescue-friendly regime.

The main problem is that without any actual binding effect, group coordination is a ‘blunt sword’.¹⁶⁸ Although an explicit framework is finally set for cooperation and communication, it is subject to procedural limits and reservations¹⁶⁹ in favour of the law of

¹⁶⁰ RR, arts 56–58.

¹⁶¹ *ibid* art 57(3).

¹⁶² American Law Institute Principles of Cooperation among the North American Free Trade Association (USA, Canada, Mexico) 2000 (‘ALI NAFTA Principles’); UNCITRAL Legislative Guide, Part Three (n 136); European Communication and Cooperation Guidelines on Cross-Border Insolvency <bobwessels.nl/wp/wp-content/uploads/2016/08/CoCo-Text-October-2007.pdf> last accessed 19 March 2017.

¹⁶³ RR, Recitals 52–54, art 61(1).

¹⁶⁴ *ibid* Recital 53.

¹⁶⁵ *ibid* art 61.

¹⁶⁶ *ibid* arts 62, 66 and 64, 67 respectively.

¹⁶⁷ *ibid* arts 70, 72.

¹⁶⁸ Stephan Madaus, ‘Koordination ohne Koordinationsverfahren? – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen’ [2014] 7 ZRP 192-196; McCormack (n 69) 59.

¹⁶⁹ H. Phillip Esser, ‘Reform of the EU Regulation: New Framework for Insolvent Company Groups, Part I’ (2015) 34(3) ABIJ 38, 39.

the MS to which courts and IPs are subject,¹⁷⁰ leaving room for recalcitrant jurisdictions to refuse cooperation.¹⁷¹ In the same manner, procedural coordination reliant on the IPs' initiatives and a liberal opt-in mechanism does not effectively prevent IPs from ring-fencing local creditors at the cost of value-maximisation.¹⁷² It is submitted, however, that the 'comply-or-explain' obligation set out in article 70(2) RR and the revocation mechanism provided in article 75 RR could deter any abuse of powers. Furthermore, the RR fails to clarify to what extent a court can scrutinise the appropriateness of a restructuring plan¹⁷³ and does not address actions for disputes arising from the coordination.¹⁷⁴ This uncertainty, along with the aforementioned points, could seriously hamper the restructuring of GoCs.

This article argues that procedural coordination is the least interventionist and ambitious approach, protecting the Commission from exposure to the difficulties of substantive or procedural consolidation.¹⁷⁵ It could be understood as an extrapolation of the cooperation principles governing the concept of main and secondary insolvency proceedings. Group insolvencies will probably not achieve meaningful outcomes, since they fail to mirror the reality of economically integrated groups and interrelated business activities.¹⁷⁶ Moreover, the complexity of the procedure adds to the overall cost. Given that the remuneration of the coordinator is calculated in accordance with the law of the MS in which coordination proceedings have been opened¹⁷⁷ and borne by each member of the group proportionately, the reimbursement of the coordinator as well as the extra cost borne by each IP will probably constitute a deterrent for opening coordination proceedings.

Although substantial consolidation has been almost unanimously rejected,¹⁷⁸ procedural consolidation is the nearest feasible alternative. It is much more resource-effective to align parallel proceedings by having the same individual in charge of them,¹⁷⁹ besides also facilitating the implementation of a rescue plan. The difficulty of the task is not a convincing argument as to why the Commission restrained itself from such an initiative.¹⁸⁰ In fact, the

¹⁷⁰ RR, arts 56(1), 57(1).

¹⁷¹ van Calster (n 92) [5.2].

¹⁷² RR, art 69.

¹⁷³ Weiss (n 53) 209.

¹⁷⁴ Thole and Dueñas (n 67) 225.

¹⁷⁵ *ibid* 215.

¹⁷⁶ Mevorach (n 146) 480; McCormack (n 69) 57.

¹⁷⁷ RR, Recital 58.

¹⁷⁸ UNCITRAL Legislative Guide, Part Three (n 136) 59-60; Heidelberg-Luxembourg-Vienna Report (n 54) 225-226; cf Ioanna Chaika, 'Insolvency of Group of Companies through the prism of the Recast Insolvency Regulation (EU) 2015/848' (August 2015) <ssrn.com/abstract=2687623> accessed 10 December 2016.

¹⁷⁹ Eidenmüller (n 30) 20.

¹⁸⁰ Cf Thole and Dueñas (n 67) 215.

RR explicitly dismissed any form of consolidation.¹⁸¹ The approach of procedural consolidation has probably been the outcome of compromise between Parliament and the Commission.¹⁸²

Generally, the new provisions are formalistic and fail to provide viable solutions with regards to group restructuring, despite a range of solutions being put forward.¹⁸³ Taking into consideration the exclusion of horizontally integrated groups¹⁸⁴ and the aforementioned concerns, the new provisions could be useful in limited cases and provided mutual respect of parties involved exists. In all other cases, opening group proceedings is of marginal value, since they only offer some leverage to the IP against the creditors with regard to the legitimacy of his decisions.¹⁸⁵

D. ONE STEP FORWARD, ONE STEP BACK

This section casts further light on the fact that RR is confined to maintaining the status quo, constituting a modest attempt towards establishing a rescue-friendly regime. For this purpose, the aim of harmonising insolvency law across the EU, which, although explored by the Commission as an option, did not make it through to the RR. The second part will refer to other steps that should have been taken to contribute to implementing business rescue more efficiently.

1. The golden thread: substantive harmonisation

The failure of a company affects a wide range of interests, touching upon and drawing from many other areas of law.¹⁸⁶ As a result, it attaches firmly to and pulls the strings of sovereignty and policy issues. On the other side, the recent financial crisis has demonstrated that national economies are members of one global arena and therefore increasingly interconnected.¹⁸⁷ The spillover effects of an insolvent company cannot be restricted to and dealt with within geographical frontiers. However, even though there are some common fundamental elements of insolvency law, national attitudes are extremely diverse, particularly when it comes to the consequences for the distressed entity.¹⁸⁸ Dealing with the overarching

¹⁸¹ RR, art 72(3).

¹⁸² Thole and Dueñas (n 67) 215.

¹⁸³ See the proposal for a European Rescue Plan in INSOL Europe [Robert van Galen Report] (n 54) 102.

¹⁸⁴ RR, art 2(13); Stephan Madaus, 'Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation' [2015] 6 IILR 235.

¹⁸⁵ Thole and Dueñas (n 67) 220.

¹⁸⁶ Finch (n 8) 1; Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (HUP 1986); Samantha Bewick, 'The EU Insolvency Regulation, Revisited' (2015) 24 Int Insol Rev 172, 173.

¹⁸⁷ COM (2012) 742 final (n 10).

¹⁸⁸ Ian Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2007) [1.03], [1.08]–[1.10].

aims of insolvency and the variability of interests and stakes surrounding an insolvent estate¹⁸⁹ is a challenging task by itself, let alone when the creditors and assets are highly dispersed, involving more than one jurisdiction. The EIR recognises and respects the substantive diversity among national laws.¹⁹⁰ In addition, the principles of subsidiarity and proportionality¹⁹¹ which call for limited intervention of the EU legislator, suggest a modest regime of certain procedural and substantive rules in private international law¹⁹²

The inefficiencies of this legislative choice minimise any potential benefits of the Commission's efforts to establish a rescue-friendly regime. Parties' opportunistic behaviour in searching for the most favourable forum to lodge their claims is sustained or even reinforced by the possibility of taking advantage of the gaps in the EIR.¹⁹³ Consequently, MSs may continue to participate in this race to the court, and in an effort to ring-fence creditors' claims, each state may claim competency over assets located in its territory.¹⁹⁴ When it comes to secured creditors and rights in rem in particular, immunity rules¹⁹⁵ may contradict fairness and encourage stalemates that may ultimately jeopardise the outcome of a restructuring.¹⁹⁶

These conflicts are further enhanced by legislative competition among MSs.¹⁹⁷ The disparities of substantive insolvency rules among MSs hamper the coordination of different proceedings. As a result, these hurdles make restructuring an excessively costly procedure, disproportionately burdening SMEs.¹⁹⁸ The ensuing problems cause losses for both cross-border creditors and debtors.

This impact also takes place on a macroeconomic scale. Although insolvency is a foreseeable risk for investors, reservations in favour of national laws undermine certainty. This piecemeal regime could disincentivise financial institutions from investing in companies located in a MS¹⁹⁹ in the first place and from supporting their rescue by providing new financing in the second. In addition, the absence of a uniform approach to discharging

¹⁸⁹ *ibid* 178–185.

¹⁹⁰ RR, Recital 11; VS Report (n 149) [8].

¹⁹¹ RR, Recital 6.

¹⁹² Virgos and Garcimartin (n 60).

¹⁹³ Federico M Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 *EBOLR* 175, 191; Ringe (n 98); Eidenmüller (n 30) 13.

¹⁹⁴ See the *Eurofood* saga (n 99).

¹⁹⁵ RR, arts 5–15.

¹⁹⁶ Carballo-Piñeiro (n 68) 212.

¹⁹⁷ Commission, 'Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency' COM(2014) 1500 final, OJ L 74/65 [The Recommendation].

¹⁹⁸ COM (2012) 742 (n 10); AFME Report (n 21).

¹⁹⁹ SWD (2014) 61 (n 13).

distressed companies and offering an actual second chance leads to loss of entrepreneurship opportunities and maintenance of the debt overhang.

Harmonisation of cross-border insolvencies would be of assistance to mitigate or even eliminate negative externalities produced by domestic legislation²⁰⁰ and create a level playing field.²⁰¹ Therefore, it is a solution worth exploring and justifiable under the principle of subsidiarity, if insolvency is better regulated at the EU level.²⁰² It needs to be emphasised that such an attempt cannot be isolated from the web of relationships and legal issues that exists. Underlying entrenched ideological differences deter harmonisation²⁰³ and if pursued too quickly and in an unstructured manner, could prove to be destabilising.²⁰⁴

Despite the predicaments and difficulties of a harmonisation process, the Parliament, backed by INSOL's support,²⁰⁵ was the first to engage with this alternative, concluding that there were certain areas of insolvency law conducive to harmonisation.²⁰⁶ According to this report, regulating the opening of insolvency proceedings, avoidance actions and liability of directors, and providing for uniform rules on termination of contracts, proposals for restructuring plans and insolvencies of GOCs is desirable and achievable. This could ultimately increase the efficiency of rescue procedures and the returns to creditors. It also implied that priority rules should be reconsidered. Unsurprisingly, however, the harmonisation of asset distribution rules, set-off and in rem rights were removed from the resolution.²⁰⁷

The Commission embraced several of these points by highlighting certain areas of law where disparity could sabotage internal market.²⁰⁸ Meanwhile, the proposal to review the EIR was launched, accompanied by proposals to partially harmonise MSs' insolvency regimes.²⁰⁹ However, instead of incorporating these initiatives into the review proposals, the Commission surrendered prior to the political debate that would arise during negotiations. Having

²⁰⁰ Mucciarelli (n 193) 197.

²⁰¹ Cf Armour (n 100); R K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1; Alan Schwartz, 'Contracting About Bankruptcy' (1997) 13 *Journal of Law, Economics and Organization* 127.

²⁰² *ibid.*

²⁰³ Wright (n 15) 1.

²⁰⁴ Moss, Fletcher and Isaacs (n 3) vii.

²⁰⁵ Directorate-General for Internal Policies, *Harmonisation of Insolvency Law at EU Level* (European Parliament, 2010) <http://www.eesc.europa.eu/resources/docs/ipol-juri_nt2010419633_en.pdf> last accessed 27 March 2017.

²⁰⁶ Lehne Report (n 54).

²⁰⁷ European Parliament, 'Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI))'.

²⁰⁸ COM (2012) 742 final (n 10) 5.

²⁰⁹ 'Businesses, as debtors and creditors, will benefit from more harmonised rules' as in SWD (2012) 416 final (n 158).

overstated the lack of common ground,²¹⁰ the Commission took a different route of a non-binding ‘Recommendation’.²¹¹ Being more of a spontaneous response to the problems of surmounting NPLs and distressed companies, the Recommendation advocates for MSs to adopt best practice procedures by introducing, among others, debtor-in-possession and out-of-court restructurings, cramming down mechanisms, discharge periods and moratoria. The Commission also invited MSs to review their existing restructuring proceedings or introduce new ones.

Only 18 months after the Recommendation, the Commission published the evaluation of its implementation and admitted that it had not succeeded in facilitating the rescue of distressed businesses across the EU because of the absence of any substantial conformity by the MSs.²¹² Following this evaluation, and while awaiting for the RR to be implemented, the Commission again called for public consultation and commended an expert group towards to an initiative on insolvency.²¹³

In conclusion, despite the EU’s organs taking a positive view on the effects of increased harmonisation, the RR falls short of expectations and carries ‘the whiff of political compromise’.²¹⁴ There is no convincing explanation as to why the Commission disregarded previous suggestions and reports. It is difficult to explain why the discrete areas conducive to substantial harmonisation, as previously identified, did not make it to the RR. By way of reasoning, the EU pointed out the calamities of this task. However, it would certainly not be the first time that the EU consolidated differing national laws. Apart from that, amendments could be achieved in a less interventionist manner, by means of introducing minimum standards and basic frameworks. Similarly, the ‘democratic deficit’ argument do not pardon the Commission’s idleness, since the consent needed could be given by means of article 294 TFEU.²¹⁵

At this point, this article underlines that the RR is a missed opportunity with regard to harmonisation. The Commission’s ‘carrot and stick’ approach to promote harmonisation seems unreasonable, given the social and financial benefits that could have been obtained by a more radical approach.²¹⁶

²¹⁰ SWD (2012) 416 final (n 158) 44.

²¹¹ The Recommendation (n 197).

²¹² Commission, ‘Evaluation of the Implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency’ <ec.europa.eu/justice/civil/files/evaluationrecommendation_final.pdf> accessed 30 September 2015.

²¹³ Commission, ‘Inception Impact Assessment on Initiative on Insolvency’ (n 32).

²¹⁴ McCormack (n 69) 122.

²¹⁵ Mucciarelli (n 193) 198.

²¹⁶ AFME Report (n 21); COM (2012) 742 final (n 10).

2. *The devil is in the detail*

This section reflects briefly on amendments and clarifications that could have been made in order to optimise the business rescue culture. A number of these were part of the recasting agenda but did not make it to the final version of the RR. Although minor in relation to the quest for harmonisation, they could contribute to creating an EU rescue-friendly regime.

More specifically, despite new financing being identified as one of the main features of an efficient restructuring procedure²¹⁷ and the Commission's recommendation that new financing agreed upon in a restructuring plan 'should not be declared void, voidable or unenforceable',²¹⁸ there is a striking absence of an explicit reference as to how financing for distressed companies should be dealt with. This could lead to new financing being exposed to avoidance and claw-back actions, ultimately jeopardising the viability of a rescue plan.

Another point is the granting of stays of proceedings and enforcement actions. The RR restricts itself by embracing temporary stays of proceedings within its scope and providing the IP with the possibility of requesting stays of proceedings or enforcement actions before the court.²¹⁹ Although this step is welcome, important reservations apply, of which the most notable is the caveat for rights in rem.²²⁰ In addition, the heterogeneity of national law provisions regarding both the extent of the stay and the prerequisites of obtaining a stay²²¹ does not guarantee that staying proceedings can solve stalemates and enhance the effectiveness of cross-border hybrid proceedings.²²² Granting an automatic recognition of stay of proceedings across the MSs along with a minimum period of 'breathing space' could standardise procedures without impinging on matters of substantive law.²²³

Despite not expressly incorporating UNCITRAL Model Law, the RR is clearly influenced by it, especially with regard to the definition of its scope. In line with it, the RR is now expressly confined to collective proceedings 'based on laws relating to insolvency';²²⁴ accordingly, Recital 16 RR clarifies that the tools of 'general company law that are not designated exclusively for insolvency situations' are left outside the scope of the RR. This wording seems to exclude the English Schemes of Arrangement ('SoAs'),²²⁵ the use of which

²¹⁷ SWD (2014) 61 (n 13) 10; AFME Report (n 21) 5.

²¹⁸ The Recommendation (n 197).

²¹⁹ RR, art 1(1)(c) and arts 38(3), 46 respectively.

²²⁰ *ibid* Recital 69; see *inter alia*, *ibid* arts 20(2), 38(3)(2), 47(2).

²²¹ Commission, 'Study on a New Approach to Business Failure and Insolvency' (n 72).

²²² SWD (2014) 61 (n 13) 7.

²²³ Robert van Galen Report and others (n 54) 49; AFME Report (n 21).

²²⁴ RR, art 1(1).

²²⁵ Moss, Fletcher and Isaacs (n 3) 424; Garcimartin (n 63) 8.

as a restructuring tool has witnessed a particular increase across Europe.²²⁶ Its versatility, however, leaves them outside the scope of the RR and they are deprived of automatic effect and recognition.

This could be acknowledged as a victory for UK practitioners, who have lobbied hard to keep SoAs out of the RR's scope,²²⁷ since inclusion of SoAs within the RR's scope could further result in the creation of comparable procedures among MSs, which would undermine the UK's attractiveness as Europe's primary restructuring venue.²²⁸ Nonetheless, this outward victory for the lobbyists comes at a cost. Despite English courts' discretion to sanction SoAs irrespective of the jurisdictional conditions set by the EIR, SoAs' recognition is not guaranteed under Rome I²²⁹ nor under the Brussels Regulation ('BR').²³⁰ Particularly when it comes to the BR, views in English jurisprudence are conflicting and there is no appellate court decision reviewing the relevant case law.²³¹ Despite current developments arguing for the recognition of SoAs under the BR, there is an important caveat,²³² according to which the BR is ill-equipped to deal with the hybrid nature of SoAs. Uncertainty regarding recognition could ultimately lead to a court declining to sanction a SoA to avoid unfair results and to the loss of the contributions of SoAs in restructurings.²³³

The case of SoAs further demonstrates that the lack of any reference to the interplay between the RR and the BR can only be interpreted as another missed opportunity for legal certainty. As acknowledged by the Commission, the delimitation between the two

²²⁶ See Geoff O'Dea and others, *Schemes of Arrangement Law and Practice* (OUP 2012); Jennifer Payne, *Schemes of Arrangement; Theory, Structure and Operation* (CUP 2014).

²²⁷ See the Insolvency Lawyers Association (ILA), 'City of London Law Society Insolvency Law Committee and Association of Business Recovery Professionals joint response of 25/02/2013 to the UK Government consultation for the Insolvency Regulation' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279289/insolvency-lawyers-association-evidence.pdf> accessed 22 February 2017.

²²⁸ This eventuality, however, will probably be realized for the cause of cost-effective corporate restructuring given the latest proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM (2016) 723 final.

²²⁹ Council Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/1.

²³⁰ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

²³¹ *Re DAP Holding NV and others* [2005] EWHC 2092 (Ch); cf *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch). *Rodenstock* which appears to represent the current approach; cf Anne Gallacher, 'Scheme Jurisdiction: No Revolution Here' (2015) 5 CRI 187, with particular reference to Snowden J's reservations regarding whether SoAs fall within the scope of the JR, as expressed in *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046.

²³² See the German's court dictum in *8 U 46/09*, OLG Celle (8 September 2009); cf *2 O 501/07*, LG Potsdam (22 October 2010); Reinhard Bork, 'Recognizing Schemes of Arrangement in Germany – Back to Square One' (2013) 26 *Insolv Int* 10.

²³³ Jennifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2014) 14 *EBOR* 563, 581.

Regulations is ‘one of the most controversial issues’.²³⁴ The incorporation of the *Seagon v Deko* case in article 6 RR, which now expressly confers jurisdiction for related actions, is welcome.²³⁵ However, it is submitted that it only alleviates the IPs’ task of navigating between two parallel set of rules,²³⁶ mainly by centralising the legal actions related to an insolvent estate. IPs will once again have to deal with issues of interpretation, such as the breadth of the term ‘actions deriving directly from insolvency’. On that matter, the CJEU has adopted a restrictive approach for insolvency matters.²³⁷ Nevertheless, regulatory overlaps and gaps have not been thoroughly eliminated. Recital 7 RR simply expresses a noble sentiment of avoiding regulatory loopholes, while conceding the possibility of gaps.²³⁸ The eventual text creates frictions, proving that absolute parallels cannot be maintained in practice.²³⁹

E. CONCLUSION

‘Capitalism without bankruptcy is like Christianity without hell.’²⁴⁰

This quote encapsulates the traditional concept of insolvency. An entrepreneur is either successful or he has failed and should therefore bear the consequences of a series of unfortunate events. The recent economic crisis proved that forceful liquidations and their spillover effects is a luxury no longer afforded in the roadmap towards economic growth. Thus, in order to retain the pool of entrepreneurs in the economy, it is essential to adopt a business rescue approach by scrutinising existing insolvency regimes. The EU purported to align with this ‘reforming mania’ by way of a timely recast of the EIR.

Although the real impact of this recast is to be observed in the future and depends on a number of factors, this article attempted an early review of the RR based on its provisions. It concludes that the outcome has not been as far-reaching as the language of the Commission’s proposals implied. While the RR is a step forward, it does not go down the road of harmonisation; it remains a jurisdiction and conflict of laws regulation and it only partially alleviates the negative externalities of restructurings. It does this by codifying the

²³⁴ COM (2012) 743 final (n 54) 10.

²³⁵ Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] All ER (D) 112 supported also by the *travaux préparatoires*, namely: VS Report (n 149); Peter Schlosser, ‘Schlosser Report No C 59/71 ‘ (1978) Official Journal of the European Communities <http://aei.pitt.edu/1467/1/commercial_reports_schlosser_C_59_79.pdf> last accessed 27 March 2017.

²³⁶ McCormack (n 69) 135.

²³⁷ Case C-292/08 *German Graphics Graphische Maschinen GmbH* [2009] ECR I-08421.

²³⁸ McCormack (n 69) 136; Moss, Fletcher and Isaacs (n 3) 53.

²³⁹ Geert van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) [5.4.5].

²⁴⁰ Frank Borman (1928–), astronaut, former Chairman, CEO of Eastern Airlines, a major American airline from 1926 to 1991 that filed for Chapter 11 and was dissolved.

CJEU's jurisprudence coupled with a meagre attempt at some innovations. In the end, entrepreneurs and companies may ultimately not be granted the much-desired second chance to 'paradise'. In conclusion, it is argued that the RR falls short of overturning the traditional approach to insolvency matters. Sustained by the disparity of national insolvency legislation, it is an ambitious yet modest attempt for an efficient and rescue-friendly EU insolvency regime.

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