Consultation on the future of European Insolvency Law

The Commission has put the revision of the Insolvency Regulation in its Work Programme for 2012. The revision is one of the measures in the field of "Justice for Growth" set out in the Commission's Action Plan implementing the Stockholm Programme. 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, and to ensure a smooth development and the survival of businesses, as stated in the Small Business Act.

Insolvencies are an important issue for the European economy. About fifty percent of enterprises do not survive the first five years of their life. In 2010, a total of 220 000 businesses went into liquidation in the EU. This means that some 600 companies in Europe went bust every day. This trend continued in 2011. Given these figures, it is essential that insolvencies in Europe are governed by modern laws and efficient procedures. A modern insolvency law helps good companies to survive, encourages entrepreneurs to take risks and permits lenders to lend on more favourable terms. A modern insolvency law allows entrepreneurs to get a second chance. And if necessary, it provides an orderly way for businesses to close down.

European Insolvency Law is laid down in Regulation (EC) No 1346/2000 on insolvency proceedings (the "Insolvency Regulation") which applies since 31 May 2002. The Regulation contains rules on jurisdiction, recognition and applicable law and provides for the coordination of insolvency proceedings opened in several Member States. The Regulation applies whenever the debtor has assets or creditors in more than one Member State.

In general, the Insolvency Regulation has improved legal certainty and facilitated judicial cooperation in the treatment of cross-border insolvency cases. However, after ten years of application, important developments in national insolvency law and considerable changes in the economic and political environment call for a review of the Regulation:

Firstly, in most Member States bankruptcy laws have been modernised: besides traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, various pre-insolvency or hybrid schemes have been put in place. These protect the debtor from its creditors and allow the business to continue to operate. These procedures are also considered to be more effective at preserving jobs.

Furthermore, companies and the economic environment have changed. Companies are incorporated in international groups (parent company and subsidiaries), apply corporate governance rules and have access to capital in the global financial markets. Small companies increasingly operate cross-border. European companies have to adapt continuously to a changing business environment (globalisation, relocation of businesses, financial crisis), which increases the risk of financial difficulties.

Moreover, case-law and a number of academic publications point to certain difficulties in the practical application of the Insolvency Regulation. These difficulties result from the imprecision of some of the legal concepts and criteria in the text of the Regulation, the difficulty to strike a balance between the universality of the debtor's insolvency and the territoriality of proceedings, the variety and disparity of national bankruptcy laws, the relationship between insolvency law and other branches of law (procedural civil law, securities law, company law, labour law) and the limits of the coordination of proceedings.

In addition, in October 2011, the European Parliament published a report with recommendations on the revision of the Insolvency Regulation, in particular to improve the coordination of insolvency proceedings involving a group of companies. The report also recommends the harmonisation of specific aspects of insolvency law and company law and the creation of an EU register for insolvency cases.

Your answers to this questionnaire will help the Commission to determine whether and how the existing legal framework should be improved and modernised.

Questions marked with an asterisk * require an answer to be given.
Background Information

This consultation is addressed to the broadest public possible, as it is important to get views and input from all interested parties and stakeholders. In order to best analyse the responses received, there is a need for a limited amount of background information about you as a respondent.

Please indicate your role for the purpose of this consultation:

- Private individual or self-employed
- Company
- Bank, credit institution or investment fund
- Judge
- Insolvency practitioner
- Other legal practitioner
- Public authority
- Academic
- Other

Please indicate the size of your company:

- Large (more than 250 employees)
- Medium (less than 250 employees)
- Small (less than 50 employees)
- Micro (less than 10 employees)

Please specify:

The Insolvency Lawyers’ Association in the UK is a membership organisation comprising approximately 400 UK and overseas lawyers practising in the field of restructuring and insolvency.
Have you had practical experience with cross-border insolvencies and if so, in what capacity?

☐ Yes

☐ No

If so, *

☐ as a creditor

☐ as an employee in a case of insolvency of my employer

☐ as an insolvent debtor

☐ as an over-indebted private individual or self-employed person

☐ as a judge

☐ as an insolvency practitioner

☐ as other legal practitioner

☐ other

Please specify *

Our members act for and provide legal advice to participants in cross-border restructurings and insolvencies of all sizes. It should be noted that our members have real, practical experience of the issues that can arise in cross-border restructuring and insolvency cases, and approach these issues not just from an academic or theoretical perspective. This is important because there may be areas where a particular change to the Insolvency Regulation may seem like a good idea in theory but in practice such a change could damage the chances of achieving a successful rescue or restructuring and result in a higher level of insolvencies.

Please indicate the country where you are located *

☐ Austria ☐ Greece ☐ Portugal

☐ Belgium ☐ Hungary ☐ Romania

☐ Bulgaria ☐ Ireland ☐ Slovakia

☐ Cyprus ☐ Italy ☐ Slovenia

☐ Czech Republic ☐ Latvia ☐ Spain

☐ Denmark ☐ Lithuania ☐ Sweden
Please specify

Please provide your contact information (name, address and email-address)

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General Assessment

In your view, does the Insolvency Regulation operate effectively and efficiently to coordinate cross-border insolvency proceedings?

☐ Yes
☐ No
If so, which main problems have you faced or noticed?

The Insolvency Regulation, although not perfect, functions reasonably well to co-ordinate cross-border insolvency proceedings. Guidance provided by the CJEU is beginning to provide a more settled interpretation of certain areas of the Insolvency Regulation, for example on the issue of determining CoMI where a framework of principles has emerged. We are concerned that some of the proposed changes would impair the level of certainty which we currently have by introducing new guidance or concepts, with unforeseen (and unintended) consequences.

Furthermore, it is important that there is flexibility under the Insolvency Regulation, to deal with new legal issues, insolvency procedures and corporate structures. We consider that this is best achieved by keeping the Insolvency Regulation as a set of outline rules and leaving it to market practice to develop the detailed practical application and to fill in any gaps. Otherwise, the Insolvency Regulation may become too rigid and prescriptive which could be damaging to the rescue of companies.

Having said that, there are a few areas where we would recommend some relatively minor changes as set out below.

Which principal changes, if any, would you suggest to improve the existing legal framework for cross-border insolvency in the EU?

As set out in the relevant sections of this response below, we would suggest three changes to improve the existing legal framework:

(a) a qualification that secondary proceedings (where the applicant is not the administrator or the liquidator of the main proceedings) can only be commenced where there would be prejudice to local creditors if such proceedings were not commenced;

(b) clarification that UK schemes of arrangement fall within the Brussels I Regulation (as defined below) so that there is no gap between the Brussels I Regulation and the Insolvency Regulation in this regard; and

(c) clarification of the scope of some of the choice of law provisions, although we would not recommend any substantive changes to the apparent objectives of these provisions.

Scope of the Insolvency Regulation

1. Types of proceedings covered
The Insolvency Regulation applies to collective insolvency proceedings which entail the partial or total loss of the debtor's control over his affairs and the appointment of a liquidator or administrator ("insolvency practitioner"). It contains a list of national procedures which fulfil these criteria. The Insolvency Regulation does not, in principle, cover national procedures which provide for the restructuring of a company at a pre-insolvency stage ("pre-insolvency proceedings") or leave the existing management in place ("hybrid proceedings"). However, such proceedings have recently been introduced in several Member States because they are considered to increase the chances of successful restructuring of businesses. Some of these proceedings are nevertheless listed in the Insolvency Regulation but the extent to which they are covered by it is subject to controversy. When the Insolvency Regulation does not apply, companies do not benefit from the automatic recognition of the effects of the procedure, for example, the suspension of payment obligations, throughout the EU. There is also no coordination with proceedings in other Member States.
In your view, has it created problems that the Insolvency Regulation does not, in principle, apply to pre-insolvency or hybrid proceedings and that the effects of such proceedings are therefore not recognised EU-wide?

☐ Yes ☒ No ☐ No opinion

If so, please give examples of cases where problems have arisen or could arise

In large restructurings in the UK, the primary corporate procedure that is used in a pre-insolvency (and sometimes an insolvency) context is a scheme of arrangement under the UK Companies Act 2006. In our experience, there is some uncertainty regarding the basis on which UK schemes are recognised on an EU-wide basis (although we note that this has not prevented the successful restructurings of various companies using a UK scheme. Examples include La Seda, Rodenstock and Primacom). We do not consider, however, that this is an issue with the Insolvency Regulation and for various reasons outlined below, we would oppose listing schemes in the Annexes to the Insolvency Regulation or including them within its scope. It is important that UK schemes of arrangement retain their flexibility outside of that structure.

Schemes are used in a variety of circumstances, including in relation to solvent companies. It is therefore not appropriate to include all schemes within the Insolvency Regulation, and we think it would lead to confusion if schemes in respect of insolvent or distressed companies were to be covered by the Insolvency Regulation, whereas schemes in respect of solvent companies were not. The whole question of determining whether a scheme is a solvent or insolvent scheme would also likely be a complex issue which may hinder the putting in place of a restructuring, and add to time and costs and in some cases could lead to satellite litigation. For example, it was important in the Primacom case that the English scheme of arrangement was not equated to an insolvency proceeding and there may have been difficulties for the directors in pursing a restructuring (and instead having to pursue a value-destructive liquidation type proceeding) if schemes had been listed in Annex A.

Further, and importantly, and has been demonstrated in a number of cases, including the examples above, there can be a real advantage, in having a UK scheme of a European company with its CoMI outside of the UK in circumstances where the debt is governed by English law as this may provide a restructuring solution where none is otherwise available and, moreover, an outcome enjoying the support of the affected creditor constituencies.

We note that, despite the existing wording of the Insolvency Regulation, some member states have listed what might be described as pre-insolvency proceedings (an example being the French safeguard proceedings). This does not appear to be creating a problem in practice provided that it is clear that the Annexes to the Insolvency Regulation are definitive as to whether a particular proceeding falls within the scope of the Insolvency Regulation and it is not open to other Member States to look behind the lists in the Annexes and to take their own view as to whether the proceedings in question are insolvency proceedings.

Should the Insolvency Regulation accommodate national legal procedures which provide for the restructuring of a company at a pre-insolvency stage or which leave the existing management in place?

☐ Yes ☐ No ☐ No opinion
If so, which type of pre-insolvency or hybrid proceedings should be covered by the Insolvency Regulation and recognised in other Member States?

There are arguments both ways, but on balance we are in favour of retaining the status quo where Member States are able to decide whether to include certain procedures in the Annexes to the Insolvency Regulation, based on their own national considerations. As mentioned above, we note that there are examples where a pre-insolvency proceeding (e.g. the French safeguard proceeding) or a proceeding which leaves the existing management in place (e.g. the German self-management, commenced as part of the unified insolvency proceeding under the Insolvency Code) have been listed under the current wording of the Insolvency Regulation.

It is essential that the Annexes are treated as being definitive for the reason given above. Although many of the national courts are reaching this view in any event (see, for example, Eurotunnel, Court of Appeal of Paris, 3rd court, Section B, 29 November 2007 and Fabryka Mebli Tapicerowanych Christianapol Sp. Z.o.o., Polish Supreme Court, 16 February 2011), there have been some contrary views expressed (see, for example, the Rhodes Multi Member Court of First Instance decision (Judgment 83/2007, DEE 2007/942, EPISKEPMPD 2007/580, DEE 2007/1197, Rhodes Multi Member Court of First Instance)) and so we would be in favour of a clarificatory change in this regard.

In recent years, new procedures for dealing with over-indebtedness of private individuals and self-employed persons have been put in place in many countries. Most of these schemes are not covered by the Insolvency Regulation because they do not fulfil the Regulation's conditions for insolvency proceedings because the debtor often maintains full control over its assets and not all Member States provide for the appointment of an insolvency practitioner. Moreover, certain of the Insolvency Regulation's provisions are not adapted to deal with "private bankruptcy".

Should the Insolvency Regulation be applicable to over-indebted private individuals and self-employed persons?

- [ ] Yes
- [ ] No
- [ ] No opinion

If so, how could the Insolvency Regulation be amended to accommodate the recognition and coordination of civil bankruptcy procedures in different Member States?

UK personal bankruptcy proceedings (for both consumers and sole traders) are already within the scope of the Insolvency Regulation and they operate satisfactorily. We note, however, that these proceedings do involve the appointment of a bankruptcy trustee and therefore the divestment of assets. If, in other Member States, the relevant bankruptcy proceedings are debtor in possession ones, we do not see any reason in principle why these proceedings should be excluded from the scope of the Insolvency Regulation, provided that there is some form of supervision of the proceedings (for example, a right for a disgruntled creditor to apply to the court). This should, however, be the decision of the relevant Member State.

In our view, with the possible exception of CoMI migrations resulting in what has become known as "bankruptcy tourism" (see below), there are no particular issues under the Insolvency Regulation in respect of "private bankruptcy".

2. International dimension of insolvency proceedings

In geographical terms, the Insolvency Regulation is limited to the recognition and coordination of cases within the European Union. It contains no provisions on the recognition of or coordination with insolvency proceedings commenced outside the European Union if there are assets located or litigation pending in a Member State.
Likewise, the Insolvency Regulation does not govern the coordination of insolvency proceedings commenced in parallel inside and outside the EU. The effects of the foreign proceedings in these cases are currently determined solely by national law.

In your view, has it created problems in practice that the Insolvency Regulation does not contain provisions for the recognition of insolvency proceedings outside the EU or the coordination between proceedings inside and outside the EU?

- [ ] Yes
- [x] No
- [ ] No opinion

If so, should the Regulation be amended to address these problems?

It is our experience that other cross-border legislation, such as the UNCITRAL Model Law (as implemented in Great Britain through the Cross Border Insolvency Regulations and in the US through Chapter 15 of the US Bankruptcy Code) or section 426 of the UK Insolvency Act 1986 or English national common law principles generally provide adequate solutions in these cases.

Competent court to open insolvency proceedings

The Insolvency Regulation provides that only the courts of the Member State in which the debtor has the centre of its main interests ("COMI") have jurisdiction to open main insolvency proceedings. In the case of a company or a legal person, the centre of its main interests is presumed to be at the place of the debtor's registered office unless it can be shown that the debtor "conducts the administration of its interest on a regular basis and in a manner ascertainable by third parties" in a different Member State. The concept of "COMI" has given rise to controversy and is a frequent source of litigation. There have also been cases where debtors have transferred their COMI in order to benefit from a more favourable insolvency regime.

In your view, is it appropriate that jurisdiction for opening main insolvency proceedings is determined by the location of the debtor's centre of its main interests ("COMI")?

- [x] Yes
- [ ] No
- [ ] No opinion

If so, how should it be amended?
### Does the interpretation of the term “COMI” by case-law cause any practical problems?

- [ ] Yes
- [x] No

If so, please describe these problems

Over the ten years since its introduction, our collective understanding of the term CoMI has developed through transactional experience and guidance handed down by the CJEU in the cases of *Re Eurofood IFSC Ltd CJEU C-341/04* (2 May 2006), *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another [2011] CJEU C-396/09* (20 October 2011) and *Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre International CJEU C-191/10 (15 December 2011)*. Consequently, some of the problems encountered in the early years, such as conflicting CoMI decisions from courts in different Member States, are now less prevalent. We would be very reluctant to disrupt the level of judicial certainty that exists in relation to the term CoMI by introducing changes, and have to start developing our understanding all over again.

Furthermore, it is important that there is a common meaning for the expression CoMI as between the Insolvency Regulation and the UNCITRAL Model Law. It would be unfortunate if changes made to the definition of this expression in the Insolvency Regulation resulted in a divergence in the case law regarding the meaning of the expression in each piece of legislation.

In the UK CoMI migration has been more of a problem in personal insolvency cases than in corporate insolvency. There have been some instances of insolvent persons seeking to transfer their CoMI to the UK in order to benefit from a more favourable insolvency regime, sometimes to the detriment of their creditors (so-called “bankruptcy tourism”). In our experience, the UK courts are very aware of these issues and have been willing to find that the CoMI shift was a sham in appropriate cases (see for example *Shierson v Vlieland-Boddy* [2005] All ER 391). We consider that the courts are best placed to deal with this issue, rather than introducing changes to the definition of CoMI which may end up being too prescriptive and could prevent genuine movements in CoMI, contrary to principles of freedom of establishment.

By contrast, the instances of corporate CoMI migration to the UK of which we are aware have usually been for the purpose of accessing a more flexible restructuring procedure to provide a better outcome for the benefit of creditors, employees and stakeholders as a whole. CoMI migration in this latter sense is not problematic but beneficial, and any proposals to prevent it would cause losses to creditors and lost employment opportunities.

### Is there any evidence of abusive relocation of "COMI" by the debtor to obtain a more favourable insolvency regime?

- [x] Yes
- [ ] No

If so, please give examples, and suggest how such abuse could be prevented.

The onus should be on Member States’ courts to identify cases of genuine CoMI migration and discard the non-genuine cases. The courts in the UK have developed two practices to address the issue in cases where the debtor himself applies to open proceedings. The first is to require the debtor to file more detailed evidence in order to establish that his CoMI really is in England & Wales. The second is for the court to adjourn the hearing of the debtor’s application and require notice to be given to creditors so that they can appear and make representations in opposition to the opening of proceedings if they wish to do so.
The Insolvency Regulation is silent on whether the court competent for opening insolvency proceedings also has jurisdiction for insolvency-related proceedings. Case-law has established that the court opening proceedings also has competence to hear and determine actions that "derive directly from insolvency proceedings and are closely linked to them", Jurisdiction for all other actions is not determined by the Insolvency Regulation but by Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called "Brussels I Regulation").

Are there problems with the interaction of the Insolvency Regulation with the Brussels I Regulation which have not been solved satisfactorily by case-law?

- Yes
- No

If so, how should the Regulation be amended?

Our understanding of the interaction between the Insolvency Regulation and the Brussels I Regulation is still evolving (see, for example, Seagon v Deko Martin Belgium NV (C-339/07) and the recent F-Tex case (C-213/10)). However, as with our understanding of CoMI, the delineation between the two Regulations is becoming progressively clearer with each decision of the CJEU and so no amendments are required in this regard. In our view, the dividing line should be as follows. Where the claim is one that only an insolvency officeholder could bring (and thus is dependent on insolvency proceedings having been opened), jurisdiction to hear the claim should be governed by the Insolvency Regulation. Where, however, the claim is one arising under general law (i.e. the claim does not require insolvency proceedings to have been opened in order for it to be brought) then the Brussels I Regulation should govern the jurisdiction to hear the claim. We consider that this is where the courts will end up following the CJEU decisions.

There is a further issue regarding the relationship between the Insolvency Regulation and the Brussels I Regulation and this is in respect of UK schemes of arrangement (see also our previous reference to schemes in the scope question above). As schemes are not listed in the Annexes to the Regulation and are not "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator", we do not consider that schemes fall within the Insolvency Regulation (except for schemes that are implemented during UK administration proceedings, which we consider would fall within the scope of Art 25 of the Insolvency Regulation as a composition approved by the UK court). However, although it might be expected that schemes would therefore fall within the Brussels I Regulation (on the basis that these two pieces of legislation should dovetail so as to cover all proceedings and judgments), there is an exclusion in the Brussels I Regulation for "bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". We consider that it would be very helpful if this exclusion in the Brussels I Regulation could be clarified so as to refer expressly to insolvency and reorganisation proceedings covered by the Insolvency Regulation. This would confirm the dovetailing point, and make it clear that the recognition of schemes does fall within the Brussels I Regulation thus assisting in cross-border rescues and reorganisations using UK schemes of arrangement.

Group of companies

Although a large number of cross-border insolvencies involve groups of companies, the Insolvency Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group. The Insolvency Regulation treats each individual member of the group as an independent entity for which main proceedings can be opened. There is no compulsory coordination of the independent insolvency proceedings opened for a parent company and its subsidiaries which would allow maximising both the value of the group’s assets and the prospects for successful restructuring.
Several recommendations have been put forward in legal literature to cater for the insolvency of groups of companies in the Insolvency Regulation. Some suggest to maintain the principle that main insolvency proceedings can be opened for every member of the group, but want to improve the communication and coordination of the independent insolvency proceedings, and/or strengthen the powers of the insolvency practitioner in the insolvency proceedings of the parent company to intervene in the proceedings of the subsidiaries, for example, by proposing a restructuring plan. Others advocate a more far-reaching modification of the Insolvency Regulation by recommending that there be only a single insolvency proceeding for the entire group at the place of the parent’s registered office.

In your view, does the Insolvency Regulation work efficiently and effectively for the insolvency of a multinational group of companies?

☑ Yes ☐ No

If so, how could the insolvency of a multinational group of companies be dealt with in the Insolvency Regulation?

Even though there is no provision in the Insolvency Regulation for dealing with a multinational group of companies, the cross-border insolvency profession has become efficient at developing pragmatic solutions to work around the problem, for example appointing the same officeholder to each of the companies if their CoMIs are located in the Member State of the parent company.

Once again, we are concerned that any changes to the Insolvency Regulation to attempt to deal with this problem would introduce unintended new problems and/or not fit very well with the various different ways in which such multinational groups are organised. For example, it is not uncommon for a group of companies to have more than one “hub” or central place of management which could lead to disputes as to which jurisdiction should take the lead and slow down the commencement of proceedings. Furthermore, the parent company may be outside the EU or its place of incorporation may have been decided for tax and/or regulatory reasons, meaning that the jurisdiction of the parent company may not be the best place to co-ordinate any proceedings in respect of the rest of the group. The insolvency solution needs to fit the model under which the group of companies was actually operated, and not the other way round. The suggestion of a single insolvency proceeding for the entire group at the place of the parent’s registered office is far too inflexible, and will likely result in more insolvencies and fewer rescues.

There is also a risk that, if any changes are made to the Insolvency Regulation in this regard, these may be inconsistent with UNCITRAL’s work on groups (including Part 3 of its Legislative Guide on Insolvency Law regarding the Treatment of Enterprise Groups in Insolvency). The fact that it took UNCITRAL so long just to agree on a definition of an enterprise group shows how difficult this issue is.

Another benefit of the absence of any formal group companies provision in the Insolvency Regulation is that it encourages out of court, pre-insolvency restructurings to avoid insolvency altogether, which will almost always provide an improved outcome for all the stakeholders.

Coordination between Main and Secondary proceedings

Under the Insolvency Regulation, main insolvency proceedings have EU-wide effect and aim at encompassing all of the debtor’s assets. In addition, the Insolvency Regulation permits the opening of secondary proceedings which run in parallel with the main proceedings in order to protect the interests of local creditors or to facilitate the administration of complex cases. Secondary proceedings can be opened in any other Member State where the debtor has an establishment.

The Insolvency Regulation provides for the coordination of proceedings opened in several Member States by obliging the insolvency practitioners to communicate information and cooperate with each other. It does not contain a duty of communication and cooperation between insolvency practitioners and the courts involved in a case or
between the courts themselves. Such communication could be useful, for example, in order to ensure that the judge in the main proceedings is informed of relevant developments in the secondary proceedings before deciding on further actions.

Finally, the Insolvency Regulation grants the insolvency practitioner in the main proceedings certain powers, for example, to request a stay of liquidation in the secondary proceedings or to propose the closure of the proceedings by a rescue plan. Some commentators argue that these powers should be strengthened.

Has the system of secondary proceedings in general been helpful to protect the interests of local creditors or to facilitate the administration of complex cases?

☐ Yes  ☒ No

If so, how could it be changed?

Secondary proceedings are often viewed from the point of view of the main proceedings officeholder as obstructive to a restructuring solution and adding to the overall costs without providing a commensurate benefit. However they have proved useful on occasions for protecting the interests of local creditors. An example in the UK is the case of Connock & Anor v Fantozzi (Re Alitalia Linee Aeree Italiane S.p.A) [2011] EWHC 15 (Ch) in which it was necessary to open secondary proceedings in the UK in order to create a qualifying insolvency event for the purposes of triggering protection under UK pension legislation for the pension fund members. Similarly, secondary proceedings are sometimes necessary to trigger payments by employee guarantee funds. Hence we would not propose the abolition of secondary proceedings altogether.

Having said that, we do consider that secondary proceedings should be limited to cases where there is some real benefit to the creditors. This appears to be the approach that some of the courts are taking in any event (see for example Trillium (Nelson) Properties Limited v Office Metro Limited [2012] EWHC 1191 (Ch), MG Rover, unreported, Versailles Court of Appeal, 15 December 2005 and NV Interstore/Megapool BV TGR 2009, 176 Ghent Court of Appeal, 19 January 2009) but it would be helpful if the Insolvency Regulation could include a provision expressly qualifying the right to open secondary proceedings to appropriate circumstances, as we presume that not all of the Member States’ national insolvency laws permit or require the exercise of a discretion concerning the opening of secondary proceedings. We consider that the test should be (in all cases where the applicant is not the officeholder in the main proceedings) that the court of the Member State in which the establishment is situated should only open secondary proceedings where it is satisfied that there would be some prejudice to local creditors if secondary proceedings were not opened.

Does the coordination between main and secondary proceedings work satisfactorily overall?

☐ Yes  ☒ No

If so, how could it be improved?

We are aware of practical examples where the co-ordination between main and secondary proceedings has not worked satisfactorily but we consider that officeholders are better qualified to answer this question.
Does the duty to cooperate between insolvency practitioners work efficiently and effectively?

☐ Yes  ☑ No

If so, how could cooperation be improved?

See above.

Has it created any problems that the Insolvency Regulation does not contain a duty of cooperation between the insolvency practitioners and the foreign court or between the relevant courts themselves?

☐ Yes  ☑ No

If so, on which issues and how should communication take place?

We are not aware of any particular problems in this regard. Even in the absence of any provisions in the Insolvency Regulation to this effect, we are aware of cases where a protocol or other initiative has been adopted to provide appropriate communication to suit the courts of the Member States concerned. Examples include Zvonko Stojevic 8 Ob 135/4t. March 17, 2005 (Austria and the UK), Ben Q Mobile Holdings BV 1503 IE 437/06, Local Court of Munich, February 5 2007 (Germany and the Netherlands) and EMTEC, Commercial Court of Nanterre, February 1 2006 (France and Austria).

If it is considered that further guidance is required in this regard, it may be worth including a reference in the recitals to the Insolvency Regulation to the European Communication and Cooperation Guidelines for Cross-Border Insolvency produced by Professor Bob Wessels and Professor Miguel Virgos, under the aegis of the Academic Wing of INSOL Europe (2007). We think it is important, however, that these proposals are merely treated as guidance (and not part of the body of the Insolvency Regulation) so that they can remain flexible and can be adapted to meet the requirements of the courts of particular Member States, all of which will have their own customs, rules and procedures for such matters.

Applicable Law

As a general rule, the applicable law is that of the State where the insolvency proceedings in question are being conducted. However, certain legal relationships are governed by a different law. For example, in order to protect employees and jobs, the effects of insolvency proceedings on the rights and obligations arising out of employment contracts are determined by the law applicable to the contract.

Similarly, the opening of insolvency proceedings in one Member State does not affect creditors with security interests in moveable or immovable property (rights in rem) located in another Member State. Rights in rem continue to be governed by the law of the State where the property is situated. This rule protects the value of security interests in property, thereby enabling companies and individuals to obtain credit under conditions which

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could not be offered without this kind of guarantee. However, the rule has been criticised for causing a somewhat imbalanced situation between the interests of secured creditors and other creditors because it may in certain situations protect secured creditors not only from the effects of a foreign insolvency law but also from the effects of their domestic law.

The law of the State of the opening of proceedings also determines the conditions under which the insolvency practitioner can attack transactions at an undervalue (so-called “detrimental acts”). However, the person benefitting from the detrimental act can, under certain circumstances, oblige the court to apply the law applicable to the transaction instead. This rule has been criticised as creating significant legal uncertainty.

Do you consider that the Insolvency Regulation’s provisions on applicable law are in general satisfactory?

☐ Yes ☐ No

If so, what are the main problems?

As a general observation, we consider that Articles 5 to 15 serve an important purpose in protecting the legitimate expectations of the parties to commercial transactions. Without these exceptions to the general choice of law rule in Article 4, it would be much more difficult to give clear legal advice to the parties when entering into transactions and this could have an adverse impact on those providing credit or entering into derivatives transactions to give just two examples. Articles 5 to 15 were the product of almost 40 years of discussion and negotiation between the various Member States regarding where the balance should lie as between the law of the insolvency proceedings and another applicable law and so we do not consider that this balance, or the objectives behind the relevant articles, should be changed.

Having said that, there are certain aspects of Articles 5 to 15 which are unclear at present and this is causing difficulties in giving clear advice regarding their application. While there have been a large number of cases (including decisions of the CJEU) regarding jurisdiction and CoMI, there have been very few cases on the applicable law provisions and so, at present, there is little judicial guidance at the CJEU level regarding the meaning of these articles. We have listed below some of the main points.

1. Article 5 (Third parties’ rights in rem): see below.

2. Article 6 (Set-off)

Which set-off provisions of the law applicable to the insolvent debtor’s claim apply? For example, if the debtor has a right to a bank deposit and the deposit agreement is governed by English law, would it be the English insolvency set-off rules or the English contractual set-off rules or the English statutory set-off rules outside an insolvency that would apply (each of which may give a different answer as to whether there is a right of set-off)? Does the answer to this question depend on whether there are any secondary insolvency proceedings in England? If it is the insolvency set-off rules that apply, how do you determine which insolvency proceedings are relevant and which cut-off date to use for certain purposes (in England there are different insolvency set-off rules that apply in a liquidation and an administration and the date on which the insolvency set-off rules come into play is different in each case)?

Another issue that arises is whether there should be a netting safe-harbour as there is under Article 25 of the Credit Institutions Winding Up Directive (Directive 2001/24/EC). Although the point has been made that this is more appropriate for credit institutions, in our experience, many corporates enter into netting agreements with other corporate (non-bank) counterparties and we consider it unhelpful that there is a mis-match between the Insolvency Regulation and the Credit Institutions Winding Up Directive in this regard.

3. Article 13 (Detrimental Acts): see below
In particular, are the exceptions to the general rule justified by the need to protect legitimate expectations and the legal certainty of transactions?

☑ Yes  ☐ No

If so, what would need to be amended?

See our general comment above.

Does the provision on rights in rem operate satisfactorily in practice?

☐ Yes  ☑ No

If so, how should it be amended?

The following areas (among others) require clarification:

(i) What does the word “affect” mean? For example, does Art 5 prevent a stay on proceedings applying to a secured creditors’ right to enforce his security (we consider that this must be the case but the Article is not clear)?

(ii) How do you determine where the rights in rem are situated (within the meaning of Art 2(g)) for the purposes of determining whether or not they are located in the Member State in which the insolvency proceedings have been commenced (in which case Art.5 would not apply to the security interests) or whether the rights are located in another Member State? For example, if a bank account were to be construed as a “claim” for these purposes, and the insolvent debtor had a deposit account with the German branch of an Irish bank, Art.2(g) would suggest that, for the purposes of the Insolvency Regulation, the bank account should be treated as being situated in Ireland (i.e. the Member State in which the bank holding the account had its centre of main interests) even though the account was being held through the German branch of that bank. Or in the case of a contractual claim against an individual, Art.2(g) indicates that the claim is located in the place of the centre of main interests of the individual regardless of the governing law of the contract.

(iii) Does Art 5 protect the secured debt as well as the security interest per se? Neither the Insolvency Regulation nor the Virgos-Schmit Report contains any guidance on this issue. Insolvency proceedings in a number of Member States can give rise to a compromise or discharge of claims (including secured claims) provided that the requisite majority of creditors votes in favour of the compromise. If a secured creditor’s claim is reduced (by 10% or even 99%) as a consequence of a main insolvency proceeding, the question arises as to whether the secured creditor can rely on Art.5 to enforce its security over assets in another Member State in respect of the full amount of its (original) secured claim or whether
the security interest would only stand as security for the reduced claim (as compromised through the main insolvency proceeding).

Does the provision on detrimental acts operate satisfactorily in practice?

☐ Yes   ☒ No

If so, how should it be amended?

The following areas (among others) require clarification:

(i) How do you determine to which law the act in question will be subject and which Member State determines this? For example, consider the giving of security to a lender for prior indebtedness which might be vulnerable as a preference as a matter of UK insolvency law. Is the giving of security “subject” to English law if this is the governing law of the security agreement or is it necessary to look at where the secured assets are located? A different example would be a payment made under a contract in circumstances where there are insufficient assets to pay all the creditors pro rata. Is this “act” subject to the law governing the contract under which the right to payment arose or does it depend on where the payee is located or the place of performance?

(ii) How does the expression “any means” in Art.13 relate to the expression “in the relevant case”? For example, if a transaction is governed by English law, and would be challengeable by a liquidator or administrator of the debtor in England (but is not challengeable outside of such insolvency proceedings), is there a “means” of challenging the transaction “in the relevant case” where, in the relevant case, it might not be possible to commence English insolvency proceedings? The Virgos-Schmit Report suggests that regard must be had to the insolvency and general rules of the applicable law (para.137) but this may require some juggling to decide when the “deemed” English proceedings would have been commenced in order to determine whether the transaction is within the relevant claw-back period.

There have been some rather surprising Italian decisions on Art.13 (see for example Grandis Grandi Magazzini Discount S.r.l. v Allgauland Kasereine GmbH N. 17706/2006, Corte di Cassazione, 4 August 2006, Soc. Volare Airlines v Tramp Oil Aviation Ltd N. 594, Court of Busto Arsizio, 27 June 2008 and Soc. Volare Airlines v Compania Espanola De Petroleos S.A. N. 594, Court of Busto Arsizio, 21 January 2008) which show that some of the Member States are struggling with these concepts.

Recognition and enforcement

The Insolvency Regulation provides that the decision opening main insolvency proceedings is recognised in the other Member States without further formalities; Member States can only refuse recognition of this decision on grounds of public policy. Decisions concerning the course and closure of proceedings are enforced according to the procedure for the recognition and enforcement of foreign decisions set out in Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels I Regulation” as amended) which specifies additional grounds on which recognition and enforcement of a foreign decision can be refused.
The Insolvency Regulation presumes that insolvency proceedings are always opened by a court's decision. However, there are certain insolvency proceedings under national law where the effects of insolvency are set in place upon the filing of the case and there is not necessarily a court order intervening. Some national procedures also provide for the nomination of a provisional administrator prior to the opening of insolvency proceedings. In such cases, it is currently unclear whether and at what time the opening of such proceedings is to be recognised in the other EU Member States.

Are there any problems of recognition of the decision opening the proceedings or with the recognition and enforcement of further decisions during the proceedings?

☐ Yes ☑ No

Please specify

Although there were some "teething problems" when the Insolvency Regulation first came into force (for example Daisytek and Eurofood), we consider that these issues have now largely been resolved and the courts of the Member States are respecting the principle of mutual trust built into the Insolvency Regulation.

Are you aware of cases where a Member State has refused to recognise insolvency proceedings or to enforce a decision on the grounds of public policy?

☑ Yes ☐ No

Please specify

We are aware of some first instance decisions, but often they are overturned on appeal, in accordance with the CJEU decision in Eurofood. In one German first instance decision, however, the German court refused to recognise English administrators appointed via the out of court route on (amongst others) public policy grounds (see Hans Brochier Holdings Limited, 8004 IN 1326 1331/06, Local Court of Nuremberg, 15 August 2006).

Should the definition of the decision "opening insolvency proceedings" be amended to take into account national legal regimes where there is not or not always an actual court decision opening the proceedings?

☐ Yes ☐ No
If so, how could this be done?

This already is the case in respect of UK administration proceedings where the administrator’s appointment is made “out of court” by filing the relevant papers at court, or in relation to a company voluntary arrangement where the decision to “open” the proceedings is taken by the creditors at the creditors’ meeting called to consider the company voluntary arrangement. The Member States appear to be taking a flexible approach to what the opening of insolvency proceedings entails in each case.

Provided that the Annexes to the Insolvency Regulation are taken as being definitive regarding what insolvency proceedings are within the scope of the Insolvency Regulation, we consider that it should be left to the national law to determine how those proceedings should be commenced.

**Publication of insolvency proceedings and the lodging of claims**

The good functioning of cross-border insolvency proceedings relies on the exchange of information between insolvency practitioners, courts and creditors. In particular, a court opening insolvency proceedings needs to know whether the company is already subject to insolvency proceedings in another Member State. However, the Insolvency Regulation leaves it up to the insolvency practitioners to decide whether to request publication of the opening judgment in another Member State. At present, EU law does not contain an obligation to publish the opening of insolvency proceedings in an insolvency register nor does it provide for a way to search insolvency registers in other Member States.

**Do you agree that the absence of mandatory publication of the decision opening insolvency proceedings is a problem?**

- [ ] Yes
- [ ] No

**If so, how would you like the situation to be improved?**

- [ ] Member States should be required to register the opening judgment in a public register.
- [ ] Member States should be required to register the opening judgment in a specific insolvency register.
- [x] Member States should be required to register the opening judgment in an insolvency register based on a common set of entries to facilitate cross-border searches and the interconnection of national insolvency registers. If so, please specify which type of information should be registered.
- [ ] Other
Please specify

- Date proceedings are opened and closed
- Jurisdiction in which proceedings are opened
- Company/Person's name, address and registered number of company
- Type of proceedings and whether they are main or secondary proceedings
- Appointed officeholder and contact details

We understand that the lack of an existing comprehensive system for registration of insolvency proceedings opened in the UK would make the introduction of an EU wide requirement difficult in the UK, but there would be a substantial domestic benefit to having such a register. If it is too difficult to introduce a comprehensive register for all insolvency proceedings commenced in the UK (on the basis that, it may not be known at the outset of any proceedings whether there will be a cross-border element), as an interim measure, a register of UK insolvency proceedings opened in respect of non-UK registered companies would still be helpful. We consider that this would need to be an EU requirement in order for the UK Government to allocate scarce resources to such a project.

The Insolvency Regulation guarantees creditors the right to equal access to insolvency proceedings opened in another Member State. It obliges the court opening the proceedings or the insolvency practitioners to inform all known creditors of the conditions for lodging their claims. The information is to be provided in the language of the Member State of the opening of proceedings. Foreign creditors may lodge their claims in their own language but be ready to provide translation upon request.

Are there any problems in general with the lodging of claims in another Member State or the treatment of foreign creditors?

☐ Yes ☐ No

Please specify

Are there any difficulties with the Insolvency Regulation’s rules on languages for information to creditors and the lodging of claims? In particular, have you experienced difficulties with lodging claims in a foreign language, for example, delays or high translation costs?

☐ Yes ☐ No
Differences in national insolvency laws

The Insolvency Regulation contains rules on jurisdiction, recognition and enforcement and the law applicable to insolvency proceedings. It does not, in principle, harmonise substantive insolvency law. National insolvency laws vary widely among Member States and, according to recent studies, these disparities can create obstacles to the proper administration of cross-border insolvencies and difficulties for companies having cross-border activities or assets in the EU. Studies have also analysed the relation between the efficiency of national legal regimes on insolvency and entrepreneurial activity and have highlighted that a number of inefficiencies in insolvency law can hamper doing business in the country in question. At the same time, an expedited national insolvency procedure may not sufficiently grant the parties the possibility to contest decisions taken by the court, thereby preventing them from asserting their rights.

In your view, do the differences in national insolvency law create obstacles to the proper administration of cross-border insolvency proceedings or difficulties for companies having cross-border activities or assets in different Member States?

☐ Yes  ☐ No

If so, what are the main areas where common rules would be useful in the EU?

Broadly speaking, we consider that the discrepancies between different Member States’ national insolvency laws, and the differing policies underlying such regimes, make it extremely difficult to achieve harmonisation. Even a relatively straightforward example (such as the bar date for submitting claims) has far reaching consequences. For example, in the UK, there are seen to be advantages in setting the bar date a short period prior to any distributions so that the officeholder knows whether there are going to be funds to distribute and can prevent the creditor from incurring the costs of filing its claim in circumstances where there will be no distributions. In other Member States, however, a much shorter period is set so that all claims are registered with the court. We consider that it would be dangerous to try to impose harmonised requirements across the EU which could have unintended consequences in particular Member States.

Hence we consider that the focus of the Insolvency Regulation should be (as it is at present) on providing a framework for conducting cross-border insolvency cases and setting out clear choice of law rules in which the different national rules of the Member States can operate and interact.
In your view, are there important inefficiencies in your national insolvency law?

☑ Yes  ☐ No

If so, should these inefficiencies be addressed at EU level?

No. In the UK there is currently a lack of clarity as to which claims fall within the administration or liquidation expenses regime, which can distort the priority of claims in the estate to the disadvantage of both secured and unsecured creditors, and can sometimes make a restructuring or insolvency unviable. It is hoped that the issue will be addressed by the British Parliament to the extent that it is not resolved by the Supreme Court next year. It is not, however, a matter for EU law.

Do you consider that your national insolvency law strikes an adequate balance between the need for efficient proceedings and the parties' right to an effective remedy?

☑ Yes  ☐ No

Please specify

Cost of Proceedings

In your view, are the costs of cross-border insolvency proceedings disproportionate with respect to the debt?

☐ Yes  ☑ No

If so, what are the most problematic cost elements and how could they be reduced?

It is inevitably the case that the costs of some complex cross-border insolvency cases are high and this has lead to some press interest, for example in the Barings and Lehman Brothers cases. However, the costs always have to be considered in the context of the return to creditors and in the two examples mentioned, the returns have been or are likely to be high. In any event, we do not consider that the costs aspect is a matter for EU law.
In your view, are the costs of cross-border restructuring or reorganisation disproportionate?

☐ Yes  ☒ No

If so, is this an obstacle to reorganisation and continuation of business? How could they be reduced?

See above.

Should there be simplified insolvency regimes at reduced costs for certain debtors, in particular self-employed persons and SMEs?

☒ Yes  ☐ No

If so, what kind of regime would you propose?

The UK already has these types of regimes, for example, in the case of personal bankruptcy, there is a process of Debt Relief Orders (DROs) which are available instead of bankruptcy proceedings, and we also have an out-of-court procedure for appointing an administrator.

Other Issues

- Is there any other aspect which should be addressed in the context of the revision of the Insolvency Regulation?

There is one other article of the Insolvency Regulation that causes us concern from time to time and that is Article 43 (applicability in time). This provides (among other things) that “Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done”. It is not clear what the reference to “acts done” includes and how this is intended to inter-relate with the applicable law articles discussed above. If the “acts done” is simply the commencement of main or secondary insolvency proceedings (which would be in keeping with the first sentence of Article 43), we would have no issue. If, however, the acts done include the entry into of transactions so that Articles 5 to 15 would cease to apply to any transaction entered into prior to 31 May 2002, this could result in a two-tier regime which would be extremely unhelpful. However, we recognise
that as time marches on, the impact of this clause will diminish.