Laura Carballo Piñeiro[*]

Towards the reform of the European Insolvency Regulation: codification rather than modification

Abstract

The European Insolvency Regulation has largely succeeded in providing a framework for cross-border insolvency. But after serving for more than a decade, the time is ripe to give it 'a new facelift', as suggested by Mrs. Viviane Reding. This paper provides a critical overview of the Proposal amending the Regulation issued by the European Commission on 12 December 2012. While its inputs are backed up by a broad consensus as it mostly reflects developments in national insolvency laws and codifies the Court of Justice of the European Union's case law, the Proposal is a missed opportunity to modify some rules which do not properly contribute in their current wording to achieving the insolvency proceedings' goals. This is particularly remarkable in view of the extension of the Regulation's scope of application to include proceedings with reorganization, adjustment of debt or rescue purposes and hence, aiming to enhance their cross-border effects and ultimate goals.

1. Introduction

The European Insolvency Regulation, or the EIR,[1] is the product of many years of reflection and a significant development in the way states approach insolvency law. Its history dates back to the projects of the seventies and eighties when a number of sensitive points were raised and eventually resolved through the adoption of the model of modified universalism, i.e. by combining main insolvency proceedings with universal effects and, where appropriate, secondary proceedings limited to the debtor's assets located in the country where it has an establishment.[2] In the years since its entry into force the EIR has more than met expectations, as evidenced by a rich judicial practice which has been able, with its help, to solve the conflicts which arise when a person becomes insolvent and defaults generally in the cross-border market.[3] The same practice has, however, unveiled a number of shortcomings, and these are what lie behind the Proposal amending the EIR presented by the European Commission on 12 December 2012.[4] In addition to codifying the Court of Justice of the European Union's (hereafter CJEU) case law, the Proposal seeks to fit the developments undergone by national insolvency laws in recent years into the EIR by emphasizing business restructuring rather than liquidation. There is a broad general consensus on the proposed amendments, which have already been blessed by the European Parliament,[5] although some disagreements remain which must await member state negotiation in the EU Council. This paper aims to discuss the main innovations in the EIR that are expected to be the outcome of the ongoing revision process, and to address some difficult issues which need to be reconsidered in view of the new European approach to business failure and insolvency, as envisaged by the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 12 December 2012.[6]

To begin with, modernizing the EIR requires extending its scope of application, given that the current version only applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Many collective proceedings which aim at preventing debtor insolvency, including those which maintain the debtor in possession, do not fit into this definition; as they are excluded from the EIR, they do not benefit from their effects being automatically recognized in member states other than the state in which they were opened. Accordingly, creditors may ignore them and, for example, not take part in their debtor restructuring plan, thereby threatening their success.

In pursuit of economic recovery and sustainable growth,[7] the new European approach to business failure and insolvency seeks a different scenario, capable of promoting business restructuring and a second chance for entrepreneurs, away from the old clichéd approach which considered insolvency a stigma. The change in focus is visible in the redrafted Article 1 EIR, which emphasizes aims other than liquidation such as reorganization or debt adjustment, the latter being a clear reference to proceedings providing for debt discharge for consumers and the self-employed.[8] According to its wording, only confidential procedures would be excluded, having regard to the fact that creditors and third parties would not be aware of their existence. The European Parliament Resolution of 5 February 2014 amending the Proposal also excluded proceedings not taking place under court control or supervi-

* Associate Professor of Private International Law, University of Santiago de Compostela (Spain), and an Alexander von Humboldt Fellow. This paper has benefited from comments from members of the editorial board, who the author wishes to thank; all opinions and errors are her own.

1 Regulation (EC) No. 1326/2000 of 29 May 2000 on insolvency proceedings, *OJ* 2000, L 160.

2 See among others J.L. Westbrook, 'The Lessons of *Maxwell Communication*', *Fordham Law Review* (64) 1996, p. 2531-2541, p. 2533.

3 See B. Wessels, 'Revision of the EU Insolvency Regulation: What Type of Facelift?', 2011, available at <www.eir-reform.eu/uploads/papers/PAPER%205-1.pdf> (last accessed 12 March 2014).

4 COM(2012) 744 final.

5 See European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, Doc. A7-0481/2013.

6 COM(2012) 742 final.

7 See the Communication from the Commission. Europe 2020. A strategy for smart, sustainable and inclusive growth, Brussels, 3 March 2010, COM(2010) 2020 final. See further the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Entrepreneurship 2020 Action Plan – Reigniting the entrepreneurial spirit in Europe, COM(2012) 795 final. However, contrasting the Commission's ambitions with the needs of businesses in difficulties G. McCormack, 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective', *Journal of Private International Law* 2014, p. 41, p.43.

8 See specifically Recital 3 of the Proposal and Recital 9a EIR as redrafted by the Proposal. These proceedings would therefore join the list of national procedures in Annex A following a preliminary examination by the Commission to ensure that they actually meet the requirements of Art. 1 (see Art. 45), thus ending an old discussion about which proceedings ought to be included within the Annex. See B. Hess et al., *External Evaluation of Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, 2013, available at <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>, p. 36; Wessels 2011, p. 93-94 (*supra* note 3).

sion, a deletion that would not seem to be in accordance with the aims of the new approach to business failure, given that out-of-court processes are more expeditious and cheaper than legal proceedings, and thus more suitable for achieving the aim of putting debtors back on their feet.[9] Indeed, shortly after the European Parliament Resolution the Commission issued a Recommendation on common principles to set up national insolvency proceedings with a view to restructuring businesses or providing a second chance to entrepreneurs which actually promoted out-of-court arrangements.[10] Nevertheless, European Parliament's amendment to the Proposal draws a line as regards to which kind of out-of-court procedures may fit within the EIR's scope, seeking to avoid placing the authority to decide in which country the proceedings should be opened – given the absence of a court to solve this international jurisdiction issue – in the insolvency representative's hands.[11] This would amount to a conferral of the power to choose the most convenient insolvency law, as the EIR attaches this law to the head of jurisdiction, i.e. the *lex fori in foro proprio* applies.

Forum shopping is indeed a major issue in this field, sustained by the great legal divergence between member states' insolvency laws. The EIR seeks to avoid it, but has actually encouraged it when setting up a cross-border insolvency framework. This is based on the coincidence between *forum* and *ius*, for which reason forum shopping proceeds by transferring jurisdiction to open a main insolvency proceeding from one country to another. Nevertheless, the outcome has been positive in cases where debtors have benefited from more insolvency-friendly jurisdictions than would otherwise be applicable, and reorganized their businesses. Against this background, the Proposal does not change the basic EIR structure and only provides for further rules to promote the efficiency and effectiveness of insolvency proceedings, including corporate group insolvency.

These innovations are significant, but there is very little progress in other directions with a more subtle political weight. The distributional effects of insolvency among all creditors is one of the sectors in which the legal divergence mentioned above is greatest, given that it depends on circumstances concerning the balance of political power and resulting social arrangements in each country. Precisely for this reason, modified universalism has been preferred over other models: although a single insolvency proceeding with universal effects is the most efficient model,[12] it is not realistic insofar as states wish to preserve their understanding of the *pari passu* principle and apply their insolvency law to protect local priorities. Hence, along with the main universal proceedings, secondary proceedings involving the same debtor may be opened, with the advantage that the law of the country where they are opened is applicable. Similar interests inform exceptions to the application of the *lex fori concursus* as the governing law of distribution and priority rights. A number of options that sought primarily to protect debtors' access to credit were considered at the time of drafting the 1995 Brussels Convention on insolvency proceedings from which the EIR stems, but they generate a reasonable doubt as to whether the EIR contains excessive protection for sophisticated creditors *vis-à-vis* those that are not. The reason for this is the immunity rule in favour of secured creditors laid down in the EIR, according to which creditors are not subject to the effects of insolvency proceedings when rights *in rem* or title reservations concern assets located in a state other than that in which proceedings are opened.[13] Forum shoppers may therefore take advantage of asset transfers and create a safe haven for some creditors while disregarding the general body of creditors. The Proposal does not modify the relevant provisions but the extension of the EIR's scope makes its revision more urgent. Although pre-insolvency and hybrid proceedings seek to bind all creditors, including secured creditors, the immunity rule hinders their effect at cross-border level and, hence, their success.[14]

The following section deals with the main innovations introduced by the Commission's Proposal and the subsequent European Parliament Resolution. They may significantly improve the EIR's performance yet not eliminate forum shopping. However, and mainly taking advantage of CJEU case law, proceedings transfer as a source of forum shopping is tackled by strengthening the rules on international jurisdiction. In the same vein, the new provisions on coordination between proceedings, including those involving debtors belonging to the same group of companies, may ultimately help to prevent opportunistic behaviour. Other formulas for circumventing the *lex fori concursus*, in particular the said immunity rules, remain unchanged, however. The third section of this paper deals with some issues which are neither addressed by the Commission's Proposal nor by the European Parliament Resolution, paying regard to EU ambitions concerning insolvency harmonization. This would of course be a sure way of reducing forum shopping, but it does not seem to be achievable in the short or medium term, in spite of being on the EU agenda. For this reason, amending the EIR in the areas of immunity rules and other issues which serve to prevent and overcome business failure, i.e. transaction avoidance and directors' liability in the vicinity of insolvency, are ultimately advocated.

9 See Commission Staff Working Document Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency, Brussels, 12 March 2014, SWD(2014) 61 final, with further references and evidence.

10 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, COM(2014) 1500 final.

11 See Art. 3b(2) of the Proposal deleted by the Parliament Resolution and indicating that the insolvency representative established the debtor's centre of main interests when the insolvency proceeding was opened without a court decision according to the relevant national law.

12 See further G. McCormack, 'Universalism in Insolvency Proceedings and the Common Law', *Oxford Journal of Legal Studies* 2012, p. 325-347.

13 This issue was raised by the Estonian National Report during the evaluation of the EIR preceding the Proposal. See Hess et al. 2013, p. 260 and 266 (*supra* note 8).

14 The application of the EIR to this type of scheme would also amount to restricting them to debtors whose COMI is in the relevant state, thereby hampering the access of other businesses to successful procedures. See H. Eidenmüller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond', Working Paper No. 199/2013, ECGI Working Paper Series in Law, March 2013, p. 1-22, p. 9-13, available at <http://ssrn.com/abstract=2230690> (last accessed 17 March 2014); McCormack 2014, p. 48 (*supra* note 7).

15 See J.A. McCahery, 'Creditor Protection in a Cross-Border Context', *EBOR* 2006, p. 455-459; G. McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings', *Cambridge Law Journal* 2009, p. 169-197; W-G. Ringe, 'Forum Shopping under the EU Insolvency Regulation', *EBOR* 2008, p. 579-620.

2. Issues addressed by the Proposal for the European Insolvency Regulation

2.1 *Debtor's COMI and forum shopping*

The debtor's centre of main interests or COMI is a key EIR concept as it determines its application when located in a member state, the jurisdiction with the competence to open the main proceedings, and the law applicable thereto. However, it has received a great deal of criticism on the grounds that its variable nature, which depends on where the debtor conducts the administration of its main interests, fosters forum shopping.[15] When the debtor is a company it may also lead to the undermining of creditor protection. The EIR lays down the presumption that a company's COMI is located at its registered office, taking into account that insolvency and company laws are conceived as complementary by all legal systems.[16] However, this presumption is rebuttable.[17] Indeed, the debtor's COMI is considered to be a tribute to the real seat theory, as it points to the country where the company carries out the administration of its main interests on a regular basis, ascertainable by third parties.[18] In contrast, the CJEU case law established in the familiar set of judgments in *Centros*,[19] *Überseering*,[20] *Inspire Art*,[21] and *Cartesio*,[22] pushes forward the incorporation theory insofar as the imposing of requirements other than the ones required in the member state of incorporation is deemed contrary to Articles 49 and 54 of the Treaty on the Functioning of the European Union. Accordingly, the lack of harmonization in choice of laws rules in company law increases the cases of non-coincidence between the COMI and a company's registered office. Furthermore, the potential application of two different sets of rules to company and insolvency matters, with the possible compromising of creditor protection, provides for further incentives for forum shopping.[23] For example, state A may have set up loose directors' liability rules in its company law but opted for a tight regime on transaction avoidance with a view to protecting creditors, while state B may have opted for the contrary. A company may therefore transfer its COMI from state A to state B, whose transaction avoidance rules are less demanding, the outcome being that the company benefits from both regimes to the detriment of the general body of creditors and the government objectives pursued by both legislations. In fact, non-coincidence between *lex societatis* and *lex fori concursus* may result in the over-protection or under-protection of creditors, for which reason replacing COMI with the country where the registered office is located has been advocated.[24]

Nevertheless, it has been noted that using a company's registered office also fosters insolvency forum shopping by allowing shareholders and directors to choose the incorporation law which most favours their interests,[25] or, more simply, by transferring the registered office. In this regard, it is important to note that jurisdiction is ascertained on the date on which the opening of insolvency proceedings are filed; before that date the transfer of the registered office pursuant to the relevant laws is feasible and even encouraged by freedom of establishment.[26] It is true that most legislations lay down specific protective measures for employees and some creditors[27] such as secured creditors, which must be complied with before the transfer is agreed. However, non-adjusting creditors, meaning all those that are not in a position to trade with the company, do not benefit from these measures, so have to suffer the consequences of the transfer of the registered office. Furthermore, selecting the latter as the connecting point for insolvency matters would not totally prevent divergence between lex fori concursus and lex societatis, given the lack of harmonization on company law and conflict of laws. As can be seen, using the registered office would not avoid insolvency forum shopping either.

Maintaining the COMI as the key concept of the EIR in the Proposal is therefore a cautious decision, as it seems to better protect the many interests at stake.[28] While the definition of the COMI includes a specific reference to third parties – such as creditors – the presumption that it is located at the company's registered office silences much of the criticism mentioned above. In addition, forum shopping is not condemnable in general terms, but only if it is the result of manipulation.[29] The Proposal targets such cases by reinforcing legal certainty, first, by shifting the definition of the COMI in Recital 13 to include it in the wording of Article 3, and second, by providing further guidance on its location. In its *Eurofood* judgment the CJEU stated that the presumption referring the COMI of a company to the country of its registered office 'can only be rebutted if there are objective factors which are ascertainable by third parties that establish that the actual situation does not match the situation that apparently reflects the location at that registered office',[30] expressly referring to the case of letterbox companies. Its *Interedil* judgment provides further guidance as to when the rebuttal of the presumption can be undertaken, now enshrined in Recital 13a of the Proposal, 'requiring a compre-

16 Highlighted for example by C. Graf von Bernstorff, 'Das Betreiben einer englischen Limited in Deutschland', *RIW* 2004, p. 498-502, p. 502.

17 See, for example, AG Hamburg 14 May 2003, *IPRax* 2003, p. 534, No. 40, with comments by M-P. Weller, 'Einschränkung der Gründungstheorie bei missbräuchlicher Auslandsgründung?', *IPRax* 2003, p. 520-524.

18 See for all M. Lauterfeld, 'Centros and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo-foreign Companies in German International Company and Insolvency Law?', *European Business Law Review* 2001, p. 79-88.

19 CJEU 9 March 1999, Case C-212/97, [1999] *ECR* I-1459, *NIPR* 1999, 242 (*Centros Ltd.* v. *Erhvers-og Selskabsstyrelsen*).

20 CJEU 5 November 2002, Case C-208/00, [2002] *ECR* I-9919, *NIPR* 2003, 19 (*Überseering* v. *Nordic Construction Company Baumanagement GMBH*).

21 CJEU 30 September 2003, Case C-167/01, [2003] *ECR* I-10155, *NIPR* 2003, 255 (*Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd*).

22 CJEU 16 December 2008, Case 210/06, [2008] *ECR* I-9641, *NIPR* 2009, 16 (*Cartesio*).

23 Legal mechanisms contained in both laws are interconnected, so that e.g. a legal system may not require minimum capital to set up a company in exchange for a strict directors' liability regime and vice versa. See H. Hirte and S. Mock, 'Wohin mit der Insolvenzantragspflicht?', *ZIP* 2005, p. 474-478.

24 See Eidenmüller 2013, p. 13-17 (*supra* note 14).

25 See J.L. Westbrook, 'Locating the Eye of the Financial Storm', *Brook Journal of International Law* 2006-2007, p. 1019-1040, p. 1028-1035.

26 See CJEU 20 October 2011, Case C 396/09, [2011] *ECR* I-9915, *NIPR* 2011, 474 (*Interedil*).

27 A remarkable example is Art. 4(2) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (text with EEA relevance), *OJ* 2005, L 310/1.

28 This decision may have also been influenced by the fact that the 1997 UNCITRAL Model Law on Cross-Border Insolvencies also enshrined the debtor's COMI as its key concept. See McCormack 2014, p. 49 (*supra* note 7), who also suggests that the proposals weaken, rather than strengthen, the COMI presumption.

29 See in particular, Ringe 2008, p. 579-620 (*supra* note 15), *passim*.

30 CJEU 2 May 2006, Case C 341/04, [2006] *ECR* I-3813, *NIPR* 2006, 127, para. 34 (*Eurofood IFSC*). See further A. Espiniella Menéndez, 'Procedimientos de insolvencia incompatibles en el espacio europeo', *La Ley. Unión Europea* No. 6516, 30 June 2006, p. 1-15; P. Mankowski, 'Klärung von Grundfragen des europäischen Internationalen Insolvenzrechts durch die Eurofood-Entscheidung?', *BB* 2006, p. 1753-1758.

hensive assessment of all the relevant factors establish[ing], in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State'. In the case in question the company transferred its registered office from Italy to the UK, but all its assets and activities remained in Italy and were visible to creditors. The question was whether the presumption locating the COMI in the UK could be rebutted, and the answer was affirmative, but only when it could be concluded that the actual centre of management of the company's interests was still located in Italy. As in *Eurofood*, the presumption is considered to be a strong one, thus reinforcing the concurrence between company and insolvency law.

The Proposal furthermore specifies that individuals' and professionals' COMI is located at their habitual residence and main place of business respectively. It is worth noting that both references are conceived as mandatory statements and not presumptions, i.e. these concepts actually replace the COMI.[31] Both rules supposedly seek to reduce incentives for forum shoppers, but this assumption is debatable given that both concepts may also be manipulated, i.e. transferred. For this reason the COMI ought to play the same role as it does where legal persons are concerned, namely, of opening an escape valve for cases in which habitual residence and principal place of business are indeed opportunistic insofar as an assessment of the circumstances as a whole points to another country as the place from which a natural person habitually administers her main interest in a manner ascertainable by third parties.[32] In fact, the attention paid by the COMI to third parties differentiates it from the habitual residence and the main place of business and makes it fitting for it to be the key concept of a legal instrument dealing with insolvency law. In the absence of any reference to third party interests, it is to be feared that the subjective element implied in the concepts of habitual residence and principal place of business will predominate, placing the decision as to where to open insolvency proceedings exclusively in the debtor's hands. Accordingly, a modification in Article 3(1) to turn these mandatory rules into presumptions is to be advocated, given that they do indeed reduce forum shopping and increase legal certainty.[33]

In the same vein, the European Parliament initiative addressing the time factor when locating the debtor's COMI is to be welcomed. The CJEU did tackle the issue, but only in the event of the transfer being undertaken between the requesting and the opening of insolvency proceedings.[34] In amending the Proposal the Parliament targets COMI transfers that occur before a petition for the opening of a proceeding is filed by considering that there has been no transfer if this occurs in the three months before the petition is filed.[35] The establishment of such a rule at the EU level does not call into question freedom of establishment, as it obeys the general objective of protecting creditors. A three-month period seems too short though; a six-month minimum would be more effective in discouraging fraudulent transfers.[36]

Finally, further amendments also target forum shopping by making it clear that the seized court must *ex officio* examine its jurisdiction and justify its decision as to the grounds it relies upon for considering the debtor's COMI to be located in its country. In addition, foreign creditors are specifically entitled to challenge the decision.[37] This directly addresses the unease generated by controversial case law locating the COMI of foreign subsidiaries in the country of the parent company's headquarters,[38] and in general by cases in which the COMI location was contentious and the matter was settled by the first jurisdiction to open insolvency proceedings, thereby disregarding connections with another country without any reasoning.[39]

2.2 *The improvement of coordination between proceedings*

The Proposal focuses especially on increasing the efficiency and effectiveness of insolvency proceedings, an issue underlying three debates arising from the application of the EIR and now finding its way into the Regulation's provisions: the principle of the *vis attractiva concursus*, i.e. that some actions dealing with insolvency-related matters must be brought before the insolvency courts;[40] the relationship between main and secondary insolvency proceedings, and the insolvency of groups of companies.

Pursuant to EIR, secondary insolvency proceedings must be winding-up proceedings when opened after the opening of main proceedings. The Proposal changes this approach and secondary proceedings with restructuring goals are now allowed at the EU level.[41] This is an interesting development, given that coordination between main and secondary proceedings also receives a boost in the Proposal, thereby increasing the chances of a restructuring plan being approved in both jurisdictions. In addition, the subordinate role of the secondary insolvency proceedings is underlined. The competent court

31 Art. 16(3) of UNCITRAL Model Law on Cross-Border Insolvencies already lays down a presumption as to where the COMI of natural persons is located, i.e. not a mandatory provision.

32 This point can be explained in light of the case dealt with by the CJEU judgment of 8 November 2012, Case C-461/11, *NIPR* 2013, 151 (*Ulf Kazimierz Radziejewski* v. *Kronofogdemyndigheten i Stockholm*), where a Swedish citizen residing in Belgium applied for a Swedish debt adjustment scheme on the grounds that his employer was Swedish and his debts had mainly been incurred within that jurisdiction. For a discussion of the concept of habitual residence in this context, see T. Linna, 'Cross-Border Debt Adjustment – Open Questions in European Insolvency Proceedings', *International Insolvency Review* 2013, p. 1-20, p. 15-18. In fact, this Swedish scheme is not included within the current version of the EIR. As to the manipulation of the habitual residence in this context, the case of a flat in London where more than thirty debtors fixed their residence has been commented upon.

33 See in this respect F. Cornette, 'Le "centre des intérêts principaux" des personnes physiques dans le cadre de l'application du Règlement Insolvabilité dans les departments de la Moselle, du Bas-Rhin et du Haut Rhin', *Journal du Droit international* 2013, p. 1115-1125, p. 1122-1125.

34 CJEU 17 January 2006, Case C 1/04, [2006] *ECR* I-701, *NIPR* 2006, 30 (*Staubitz-Schreiber*).

35 The three-month period is reminiscent of that in Art. 9 of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

36 Six months is the period laid down in, e.g., Art. 10(1) *in fine* of the Spanish Insolvency Act, Law No. 22/2003 of 9 July.

37 See Art. 3b of the Proposal.

38 See among others I.F. Fletcher, *Insolvency in Private International Law*, 2nd edn., Oxford: Oxford University Press 2005, p. 387-396; P. Oberhammer, 'Europäisches Insolvenzrecht in praxi – Was bisher geschah', *Zeitschrift für das gesamte Insolvenzrecht* (*ZInsO*) 2004, p. 761-773, p. 767, fn. 60.

39 See with this criticism G. Moss, I.F. Fletcher and S. Isaacs (eds.), *The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide*, Oxford: Oxford University Press 2002, p. 40-41.

40 This issue was settled by the CJEU on 12 February 2009, in Case C 339/07, [2009] *ECR* I-767, *NIPR* 2009, 282 (*Christopher Seagon* v. *Deko Marty Belgium NV*). See Art. 3a of the Proposal.

41 See Art. 3(3) of the Proposal in which the last sentence of the current 3(3) – 'these latter proceedings must be winding-up proceedings' – has been deleted. See CJEU *Interedil* (*supra* note 26); CJEU 17 November 2011, Case C-112/10, *NIPR* 2012, 73 (*Procureur-generaal bij het hof van beroep te Antwerpen* v. *Zaza Retail BV*).

may refuse to open secondary proceedings or may postpone their opening, considering in particular whether the main proceedings are able to protect local creditors in a similar manner to the secondary.[42] By this means, consideration is given to the fact that handling debtor insolvency from a single jurisdiction and under one administration significantly increases the chances of recovery. National policies are nevertheless taken into account. Following English case law entitling the insolvency representative of the main proceedings to enter into an undertaking which is binding on the estate and by which local creditors' rights are ensured the same treatment as if secondary proceedings had been opened,[43] Article 18(1) has been redrafted to facilitate these undertakings at the EU level[44] while establishing some limits in order to avoid abusive behaviour on the part of the insolvency representative.[45]

The insolvency of groups of companies has now formally found a place in the EIR. The CJEU *Eurofood* judgment clarified the rule of 'one company, one insolvency, one proceeding',[46] i.e. the EIR's general rules are applicable to companies belonging to a group in the absence of specific rules dealing with the insolvency of the group as such. In other words, the close link between companies actually operating as one economic unit in the market is not taken into account. The need to tackle the issue has increased over the years and with the possibility of restructuring the group thanks to insolvency proceedings,[47] and the Proposal now elaborates on the idea of independent insolvency proceedings involving companies belonging to the same group, in order to introduce coordination mechanisms among them.[48] The European Parliament Resolution of 5 February 2014 improved the Proposal by establishing a specific group coordination proceeding in the country where the COMI of the member which performs most crucial functions within the group is located, conducted by a coordinator in charge of, *inter alia*, designing the coordination plan between group members as well as the group restructuring strategy. In so doing, conflicts of interests between the representatives of insolvency proceedings involving group members will be more easily neutralized.[49]

In general, coordination between proceedings receives a major boost in the Proposal. Firstly, it is widened to involve the courts in charge of administering the relevant proceedings – and not only insolvency office-holders as was the case until now[50] – either main/secondary or main/main in the case of a group of companies.[51] At the same time, soft law mechanisms such as undertakings and protocols are granted a prominent place within the Proposal with a view to tailoring cooperative behaviour to the case in question.[52] In addition, the Proposal seeks to strike a balance between EU and national policies by maintaining modified universalism without fully giving up the ideal of a unitary insolvency proceeding within the EU, as shown by the interest in avoiding the commencing of secondary proceedings and the reminder that concentrating the insolvency of a group of companies in a single country is feasible provided that the member state has national and local jurisdiction over all companies concerned.[53]

3. Issues not addressed by the Proposal

3.1 *The* status quo*: Protecting* some *creditors*

In order to protect certain creditors and thereby to secure the debtor's access to credit and further chances of recovery, the EIR contains a number of exceptions to the application of the *lex fori concursus* as the law governing asset distribution and the ranking of claims. Accordingly, specific rules deal with rights *in rem*, reservations of title and rights to compensation with a view to securing the position of the creditor/investor in the event of debtor insolvency.[54]

42 See Recitals 19a and 19b.

43 See High Court of Justice Birmingham, Chancery Division, 18 April 2005, *MG Rover I* [2005] EWHC 874 (Ch), EIR-database (Cimejes) No. 76; High Court of Justice London, 9 June 2006, *Collins & Aikmann III*, [2006] EWHC 1343 (Ch), EIR-database No. 134; High Court of Justice London, 11 February 2009, *Nortel Networks SA and Others* [2009] EWHC 206.

44 In addition to submitting undertakings' form requirements to the law of the state of the main proceeding, the provision redrafted by the Parliament lays down objective criteria that they must meet, in particular the factual assumptions on which it is based, such as determining which assets are located in the state where the request to open secondary proceedings is made, their value, distribution and ranking among local creditors, and in particular the costs of opening a secondary proceeding.

45 See Recital 19b in accordance with amendment 8 of the Parliament's Resolution. In the same vein, Art. 29a(2a) has been amended by the Parliament to entitle local creditors to challenge the decision not to open secondary proceedings, as well as Art. 29a (2b) to recall that local creditors may seek protective measures to avoid the relocation of assets situated in the state of the debtor's establishment.

46 CJEU *Eurofood IFSC*, para. 30 (*supra* note 30).

47 See C. Paulus, 'Group insolvencies – Some Thoughts on New Approaches', *Texas International Law Journal* (42) 2007, p. 819-830.

48 See Recitals 20a, 20b of the Proposal, and 20aa of the Parliament's Resolution, and in particular Chapter IVa of the Proposal.

49 Identified as an anticommons problem by R.J. de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and Anticommons', *International Insolvency Review* 2012, p. 67-83, p. 81-82; the Parliament's amendment seems to have a precedent in German legal works on the matter: see Eidenmüller 2013, p. 19-21 (*supra* note 14). In the same vein, the Parliament has rightly changed the concept of a group of companies in Art. 2(i) (j) and (ja). However, group coordination proceedings may entail further litigation and legal costs. See further McCormack 2014, p. 58 (*supra* note 7).

50 Arts. 31(2)(b), 42a(b) of the Proposal lay down further instructions aimed at insolvency representatives, reminding them that they must pursue restructuring goals and for this reason coordination mechanisms are put at their disposal.

51 See Arts. 31a and 31b of the Proposal.

52 The significance of protocols and workouts to achieve coordination is considered to be one of the reasons why the UNCITRAL Model Law on Cross-Border Insolvencies has not been widely accepted. See, S. Chandra Mohan, 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?', *International Insolvency Review* 2012, p. 199-223, p. 221-222. Given their success different guidelines have already been provided such as the European Communication and Cooperation Guidelines elaborated by Profs. B. Wessels and M. Virgós, available at <www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>, the ALI Court-to-Court Communication principles, and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009. See further R. Mason, 'Cross-Border Insolvency and Legal Transnationalisation', *International Insolvency Review* 2012, p. 105-126.

53 See Recital 13a of the Proposal. In this regard already N.W.A. Tollenaar, 'Proposal for Reform: Improving the Ability to Rescue Multinational Enterprises under the European Insolvency Regulation', *International Insolvency Law Review* (*IILR*) 2011/3, and advocating for the consolidation of the group's insolvency in one jurisdiction, see I. Mevorach, 'The "Home Country" of a Multinational Enterprise Group Facing Insolvency', *International and Comparative Law Quarterly* 2008, p. 427-448; Westbrook 2006, p. 1035 (*supra* note 25).

54 See Recital 25 EIR. Further, G. McCormack, *Secured Credit and the Harmonisation of Law*, Cheltenham: Edward Elgar 2011, p. 55-57.

In this regard, Articles 5 and 7(1) EIR deserve special consideration. They are respectively devoted to third party rights *in rem* and title reservations. Both establish that their holders are not affected by insolvency proceeding when their security involves an asset located in a country other than that opening the insolvency proceeding. In fact, three models were considered when deciding on the effects of insolvency proceedings on these rights.[55] The first advocates the exclusive application of the *lex fori concursus* regardless of where property rights are located; the second the application of the insolvency rules of the *lex rei sitae*; and the third an immunity rule, i.e. neither the *lex fori concursus* nor the *lex rei sitae* should decide on the effects of insolvency over rights *in rem* on assets located in a country other than the one where proceedings are opened. Articles 5 and 7 EIR apply the third model, i.e. they establish an immunity rule in favour of third party rights *in rem* and title reservations on the basis that the complexity of the proceeding is thereby reduced, resulting in cost savings.[56] Indeed, the rule prevents an insolvency representative from dealing with adaptation problems arising out of the application of any of these laws; although one law would govern the effects of an insolvency proceeding on the secured right, the other should also be considered, either as the law where the asset is located, or as the law governing the powers of the insolvency representative.

However, and given the new approach to business failure, it is important to note that the immunity rule laid down in both provisions creates potential hold-out creditors. While promoting the restructuring of businesses and debt discharge frameworks, maintaining the bonus granted by Articles 5 and 7 EIR to cross-border secured creditors threatens their success.[57] The only way to affect these security rights is by opening secondary proceedings in the country where the debtor's assets are located. This is only feasible in some cases though, and not when the debtor is a private individual. In this regard, the expected inclusion of debt discharge schemes within the EIR will put the protection of secured creditors in a different light, making the detriment to other creditors and in general upon the objectives of the insolvency proceeding clearer.[58]

In this context, a debtor may take advantage of these rules to circumvent the *lex fori concursus*, thereby achieving immunity for certain creditors. Further disincentives to forum shopping may be conceived; for example, a rule similar to Article 5 is contained in No. 15 of the Global Rules on Conflict of Laws Matters in International Insolvency Cases promoted by the American Law Institute, but with the caution that 'the benefit does not apply if proof is provided that the state where the assets are situated at the time of the opening of insolvency proceedings has no substantial relationship to the parties or the transaction in relation to which the security right was created and there is no other reasonable basis for the fact that the assets are so situated'.[59] These safeguards already exist in the EIR inasmuch as, where appropriate, an action for the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors as referred to in Article 4(2)(m) may be initiated.[60] However, Article 13 EIR introduces a significant barrier to the success of these actions insofar as third parties benefiting from an act that is detrimental to the general body of creditors may argue that the act in question cannot be possibly challenged under its governing law, i.e. Article 13 functions as a veto to the application of the *lex fori concursus* and jeopardizes national policy on transaction avoidance. In short, it seriously hampers the success of avoidance proceedings as they are submitted to two divergent laws.[61] In this regard, the opening of secondary proceedings may again be the best alternative to achieve the goals of insolvency proceedings.

Indeed, the protection of secured creditors at the EU level goes well beyond the underlying policy of avoiding unpredictable results arising from the application of the *lex fori concursus*, but the Proposal does not put forward any modification of the current *status quo*, not even to try to improve the EIR's treatment of mechanisms tailored by insolvency law to targeting fraud, such as the avoidance proceedings mentioned above. In pursuit of creditor protection, directors' liability in the vicinity of insolvency also deserves to be mentioned, given that it draws directors' attention to creditors' interests when difficulties begin. In fact, transaction avoidance and directors' liability play a significant role in a preventive insolvency framework:[62] key to protecting creditors and the estate,[63] they are critical in avoiding the aggravation of the debtor's insolvency and, hence, in ensuring best management practices. They may then contribute to the rescue and recovery culture by showing a debtor in difficulties the path to opening a proceeding in time, in addition to making the distinction between honest and fraudulent activities, whose significance is specifically underlined by the Commission while recommending restructuring proceedings for businesses in difficulties and a second chance for entrepreneurs.[64] Two way-outs of this situation can be explored: harmonization and reform of the EIR's private international law rules.

3.2 *Way-outs*

3.2.1 Via harmonization

One of the most obvious way-outs to avoid the problems mentioned above is to take the path of harmonization. The European Parliament tackled the issue first, by requesting the assistance of INSOL Europe, the European association of insolvency practitioners and scholars, in the form of a study on the feasibility of harmonizing insolvency laws in the EU to deal with companies' Europe-wide dimension. The resulting report concluded that there was indeed plenty of room for

55 See M. Virgós and F.J. Garcimartín, *Comentario al Reglamento europeo de insolvencia*, Madrid: Thomson-Civitas 2003, p. 94-95.

56 See Report on the Convention on insolvency proceedings by M. Virgós and E. Schmit (1996), para. 97. The right to set-off depends on the *lex fori concursus* or on the law applicable to the passive credit, that against which set-off is intended (Arts. 4(2)(d) and 6 EIR).

57 See 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, Strasbourg, 12 December 2012, COM(2012) 743 final, p. 12.

58 See further Linna 2013, p. 18-19 (*supra* note 32).

59 See the comments and text in I. Fletcher, '"L'enfer, c'est les autres": Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency", *Texas International Law Journal* (46) 2011, p. 489-512.

60 Art. 4(2)(m) is also redrafted in the Proposal, but the new version only affects the English EIR version.

61 See further references and criticisms by L. Carballo Piñeiro, *Acciones de reintegración de la masa y Derecho concursal internacional*, Santiago de Compostela: Servicio de Publicaciones 2005, p. 245-287.

62 Both mechanisms play a similar role in preventing fraudulent acts, for which reason some legal systems emphasize avoidance proceedings while neglecting directors' liability, and vice versa. See G. Wagner, 'Distributions to Shareholders and Fraudulent Transfer Law', *EBOR* 2006, p. 217-231, p. 219-220.

63 See Ch. Thole, 'Die Vorsatzanfechtung als Instrument des Gläubigerschutzes', *Zeitschrift für Insolvenzrecht* (*KTS*) 2007-3, p. 293-335.

64 See Commission Communication of 12 December 2012, p. 5 (*supra* note 6).

forum shopping, and suggested harmonizing an important sector of insolvency law.[65] Following the report, the European Parliament issued a resolution inviting the Commission to deliver a proposal for harmonizing and revising insolvency rules on a number of issues,[66] specifically, the opening of insolvency proceedings; the publicity thereof; claim filing and verification rules; the avoidance of fraudulent transfers and preferences; restructuring plans; and the insolvency of groups of companies. The EIR's legal foundations do not justify harmonizing substantive issues, but the Proposal does address procedural and administrative matters. As already seen, the EIR includes a new chapter devoted to the insolvency of corporate groups, largely following INSOL Europe's suggestions,[67] while the Proposal tackles the publicizing of proceedings by requiring publicly accessible electronic registers to be established at national level and providing for their interconnection at EU level,[68] and a full claim presentation and verification regime is also provided for.[69]

The harmonizing of substantive insolvency laws is also on the EU agenda. Significantly, the European Parliament Resolution of 5 February 2014 amended Recital 11 EIR to indicate that 'further harmonization measures should also introduce preferential rights of employers'. The first step was taken by the Commission Recommendation of 12 March 2014 on common principles for national preventive restructuring frameworks, which intends a bottom-up harmonization with a view to enhancing coherence among them and thus promoting the rescue and recovery culture.[70] In the accompanying reports, the Commission promises further studies and attempts at harmonizing.[71] However, although specific harmonizing proposals have already been put forward, the time does not seem to be ripe, and the issue is when it will be.

It should be noted that European Parliament Resolution of 15 November 2011 excluded asset distribution and creditor ranking, set-off rights and the termination of contracts from harmonization, given their entanglement with national policies including social security matters.[72] However, equal treatment of creditors may be indirectly achieved by harmonizing other insolvency provisions such as transaction avoidance, whose regulatory details are a source of legal divergence and jeopardize the success of insolvency proceedings and the achieving of their goals as it contributes to securing the ranking of claims prior to the opening of proceedings and to avoiding business failure while enhancing best management practices.[73] The task is a difficult one, however, as it may well be said here that the devil is in the detail, namely, national laws diverge greatly as to avoidance transaction rules' structure, the type of acts involved and the subjective/objective criteria required to make a transaction or preference void. Nevertheless, the European Parliament Resolution of 2011 suggested partial harmonization, paying attention only to specific types of acts that are detrimental to creditors, whose voidness ought to be decided in accordance with objective criteria such as the time period during which they were performed in relation to the opening of the insolvency proceeding and the connection between the debtor and creditor entering into the act.[74] The first steps have at least been taken insofar as the 2014 Commission Recommendation indicated that new financing agreed upon in a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.[75]

In a similar vein, experts have advised harmonizing directors' liability on the grounds of not requesting the opening of insolvency proceedings on time.[76] INSOL Europe and the High Level Group of Company Law Experts have both recommended the introduction at EU level of an action similar to the English action for wrongful trading,[77] a proposal which

65 The INSOL Report entitled *Harmonisation of Insolvency Law at EU Level* was published in Brussels in April 2010, and it is available at: <www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf> (last accessed 19 May 2014), p. 9-12. Further reports followed: A.M. Pukzsto, *Harmonisation of Insolvency Law at EU Level with Respect to Opening of Proceedings, Claims Filing and Verification and Reorganisation Plans*, 2011, available at: <www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22313/20110622ATT22313EN.pdf> (last accessed 17 March 2014); and D. Fritz, *Harmonisation of Insolvency Law at EU level: Avoidance Actions and Rules on Contracts*, 2011, available at: <www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22311/20110622ATT22311EN.pdf> (last accessed 17 March 2014).

66 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)) [P7_TA (2011)0484].

67 INSOL Europe Report 2010, p. 24 (*supra* note 65).

68 See Recitals 29 and 29a, and Arts. 20a to 20d of the Proposal, which also provides for a transition regime in Arts. 21 and 22 requiring insolvency courts and representatives to publish key decisions in relevant registers until electronic public registers are put in operation.

69 It is worth noting that national laws cannot require representation by a lawyer to lodge a claim, and a minimum period of 45 days is provided for this. EU forms are included within the Regulation to cut costs and facilitate access to foreign courts. See Recital 21a and Arts. 39 to 41 of the Proposal. See on legal divergence in this area, Pukzsto 2011, p. 10-14 (*supra* note 65).

70 In fact, regulatory competition has already produced some comparative approaches such as the Spanish insolvency reform which follows the English system. On the PIL issues regulatory competition arises in the absence of a clear adscription of pre-insolvency proceedings either to the Insolvency or the Brussels I Regulations; see J. Payne, 'Cross-border Schemes of Arrangement and Forum Shopping', *EBOR* 2013, p 563-589.

71 See Commission Communication of 12 December 2012, p. 5-8 (*supra* note 6).

72 The INSOL Europe Report 2010, p. 14-22 (*supra* note 65) proposed harmonizing these issues as well. See, exploring viable solutions to this issue, F. Mucchiarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension', *EBOR* 2013, p. 175-200.

73 See R. Mangano, *La revocatoria fallimentare delle attribuzioni indirette*, Turin: Giappichelli 2004, *passim*.

74 Similarly, see Fritz 2011, p. 10-16 (*supra* note 65). With a specific proposal, see R.J. de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies', *International Insolvency Review* 2011, p. 219-244.

75 See points 6(e), 27 to 29 of the 2014 Commission Recommendation (*supra* note 10).

76 Apart from the wrongful trading laid down in Section 214 of the British Insolvency Act, it is laid down in Arts. L-651-2 *Code Commerce*; 265, 409 and 530 of the Belgian *Code de Sociétés*; 172.3 of the Spanish Law 22/2003, 9.7, § 823 II of the German *Bundesgesetzsbuch* in accordance with §§ 92 II *Aktiengesetz* and 64 I *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, now 15a *Insolvenzordnung* (2008). See further H.C. Hirt, 'The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance', *European Company and Financial Law Review* (*ECFR*) 2004, p. 71-120; R. Goode, *Principles of Corporate Insolvency Law*, 2nd edn., London: Sweet & Maxwell 1997, p. 539-541; K. Schmidt, *Gesellschaftsrecht*, 4th edn., Cologne: Heymanns 2002, p. 1082-1086; M.J. Verdú Cañete, *La responsabilidad civil del administrador de sociedad de capital en el concurso de acreedores*, Madrid: La Ley 2008, p. 79-167; Ph.R. Galle, 'Le dirigent de société et le "nouveau" droit des enterprises en difficulté issue de la réforme du 18 décembre 2008', *Revue des sociétés* 2009, p. 249-272; Z. Cohen, 'Directors' Negligence Liability to Creditors: A Comparative and Critical View', *Journal of Corporate Law* 2001, p. 351-391.

77 See Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, p. 9, 12, 15, 68-69, in particular Recommendations III.13, and IV.10, p. 86. See further 'Stellungnahme der Arbeits-gruppe Europäisches Gesellschaftsrecht (Group of German Experts on Corporate Law)', *ZIP* 2003, p. 863-880, p. 870.

was welcomed by the European Commission.[78] It is submitted that corporate governance would be improved by its introduction at the EU level, given that it aims to enhance best management practices.[79] A general consensus on the matter is lacking,[80] on the grounds that it may trigger excessive caution among directors, making them reluctant to try businesses or strategies that would otherwise have saved the company at risk.[81] Nevertheless, a balance seems to have been struck and the debate channelled towards how it should be regulated.[82] However, the Commission has not made further attempts in this direction,[83] i.e. it does not take into account the role of this liability rule as an incentive for an early filing of a petition for restructuring or adjustment.[84]

3.2.2 Via private international law rules

Failing the harmonization path, private international law may be useful. However, the Proposal does not modify the EIR's rules on applicable law, given the apparent lack of problems in their application,[85] and only contains some clarifications in relation to rules concerning employment contracts, the right to compensation and arbitration proceedings;[86] hence, it does not tackle the immunity rules laid down in Articles 5 and 7 EIR. As seen above, harmonization as regards security rights seems difficult to achieve. In any case, the problems generated by the current state of affairs may be curtailed by submitting the effects of the insolvency proceeding on them either to the *lex rei sitae*,[87] or to the *lex fori concursus* provided that the secured creditor is entitled to oppose the consequences of the proceeding on its right *in rem* or title reservation not being in accordance with the *lex rei sitae*.[88] The latter avoids adaptation problems better than the former, which, in its favour, has the advantages of better protecting secured creditors' confidence and not fostering litigation arising out of the opposition rule. Adaptation problems may be curtailed by a reminder similar to that provided for in Article 10a of the Proposal, namely, making insolvency courts equivalent to national courts if the law of the country where the assets are located requires insolvency court intervention to affect the right *in rem* at stake. At any rate, any one of the aforementioned alternatives to the current *status quo* serves the interests of insolvency proceedings better, as both allow creditor and third party foreclosure restrictions to be taken into account as well as further powers granted to insolvency representatives laid down by insolvency law.
The Proposal does not modify EIR rules on transaction avoidance either, placing civil law purposes and thus legal certainty over insolvency law purposes. This is surprising given that the CJEU tackled avoidance proceedings while dealing with the principle of the *vis attractiva concursus* in the context of jurisdiction, clearly establishing its case law that their objectives are closely related to the insolvency proceeding, meaning that they seek to increase insolvency assets and hence protect the interests of the general body of creditors,[89] for which reason they are deemed to be insolvency-related matters. They aim to secure the *par condicio creditorum* in the vicinity of insolvency and therefore ought to be submitted to the *lex fori concursus* for the better achieving of insolvency goals. To this end, Article 13 should be deleted as hampering them. Indeed, this is recommended by the European Parliament Resolution of 2011, along with the harmonizing of transaction avoidance.[90] The report accompanying the Proposal blamed the lack of action in this matter on the relative lack of national case law dealing with this conflict rule, thus coming to the conclusion that the application of Article 13 does not pose any problems.[91] However, the absence of case law may also be explained as a result of the discouraging effect that Article 13 triggers when the legal costs of undertaking an avoidance proceeding are weighed up against the uncertainty of its final outcome.
In contrast, the Proposal does bring in some innovations as regards the action of wrongful trading, while establishing the principle of the *vis attractiva concursus* in Article 3a. Since *Seagon* v. *Deko Marty Belgium* actions arising directly from insolvency proceedings and closely linked to them are to be brought before the insolvency courts. The point to be made now is whether directors' liability in the vicinity of the insolvency is also an insolvency-related matter. In fact, this debate seemed to have concluded with an old Court of Luxembourg judgment, *Gourdain* v. *Nadler*,[92] but it was later revived by arguments about its corporate nature in the light of the preventive function of insolvency that it achieves as associated with other credit protection provisions established under company law, such as the minimum capital rule.[93] The dilemma must, however, be resolved in accordance with the insolvency objec-

78 Communication from the Commission to the Council and the European Parliament –'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', COM(2003) 284 final, at p. 16.

79 Furthermore, it would enhance the protection of creditors and would thus solve some problems stemming from the minimum capital rule. This rule is meant to protect creditors and stakeholders, and yet it is commonly agreed that it does not serve its purpose, so that although it does not produce disadvantages, it is necessary to seek alternatives. See among others Wagner 2006, p. 217-231 (*supra* note 62); P.O. Mülbert, 'A Synthetic View of Different Concepts of Creditor Protection, or: A High Level Framework for Corporate Creditor Protection', *EBOR* 2006, p. 356-408, p. 385-387.

80 See Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, Summary Report, Brussels, 2006, p. 2, 13-14, available at <http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf> (last accessed 19 May 2014).

81 See P. Davies, 'Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency', *EBOR* 2006, p. 301-337; I.M. Ramsay, 'An Overview of the Insolvent Trading Debate', in I.M. Ramsay (ed.), *Company Directors' Liability for Insolvent Trading*, Melbourne: CCH Australia and Centre for Corporate Law and Securities Regulation, Faculty of Law, the University of Melbourne 2000, p. 1-15, p. 1, 8-15; H.T.C. Hu and J.L. Westbrook, 'Abolition of Corporate Duty to Creditors', *Columbia Law Journal* (107) 2007, p. 1321-1403.

82 See T. Bachner, 'Wrongful Trading – A New European Model for Creditor Protection?', *EBOR* 2004, p. 293-319; H. Eidenmüller, 'Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers', *EBOR* 2006, p. 239-258.

83 See, nevertheless, C. Gerner-Beuerle et al., *Study on Directors' Duties and Liabilities Prepared for the Commission DG Markt*, London: LSE Enterprise 2013.

84 See Eidenmüller 2013, p. 8 (*supra* note 14).

85 See Commission Report of 12 December 2012, p. 13 (*supra* note 57).

86 See Arts. 6a, 10a and 15 of the Proposal.

87 As suggested by, e.g., R. van Galen et al., *Revision of the European Insolvency Regulation: Proposals by INSOL Europe*, Clifton: INSOL Europe 2012, p. 10.

88 As argued by Hess et al. 2013, p. 278-280 (*supra* note 8).

89 CJEU *Seagon*, para. 17 (*supra* note 40).

90 See Annex to the Parliament Resolution of 2011, point 2(5).

91 The first question addressing Arts. 4(2)(m) and 13 of the Regulation is still pending before the CJEU. See Case 557/13, *OJ* 2014, C 15/9 (*Lutz*).

92 CJEU 22 February 1979, Case 133/78, [1979] *ECR* 733-756 (*Gourdain* v. *Nadler*).

93 See C.T. Ebenroth and M. Kieser, 'Die Qualifikation der "action en comblement du passif" nach Art. 180 des neuen französischen Insolvenzrechts', *KTS* 1988, p. 19-48, p. 41-44; F. Willemer, *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Tübingen: Mohr Siebeck 2006, p. 124-138.

tives that it pursues:[94] it obliges directors to respect creditors' interests in the vicinity of insolvency and therefore file the request for the opening of proceedings on time. A company in financial difficulties is prevented by these means from incurring more debts, i.e. from increasing the number of its creditors and thus reducing their recovery rates or the business's chances of restructuring.[95] Characterizing this as an insolvency-related matter involves applying the *lex fori concursus*, and the doubts mentioned above should have led to the introduction of a specific conflict rule,[96] in fact, to the inclusion of a further indent in Article 4(2) EIR. Instead, it is only mentioned in Recital 13b of the Proposal.

The Proposal entitles the insolvency representative to file an insolvency-related action along with another based on civil or commercial law before the courts of the defendant's domicile, provided that both are related and it is more efficient to bring them in this forum.[97] Recital 13b specifically mentions the case of actions for directors' liability based on insolvency law as well as company law or general tort law. Indeed, a director may be liable in accordance with different causes of action which may be subjected to different laws in a cross-border context, thereby triggering legal uncertainty and regulatory gaps. This jurisdiction rule helps to overcome the enforcement problem underlying these actions by referring insolvency representatives to a single jurisdiction and hence cutting legal costs.[98] This objective would have been better achieved by bringing all related actions before the insolvency court, as it is a predictable forum for all interested parties. But the Proposal has chosen a restrictive approach to the principle of *vis attractiva concursus*, as proven by the definition of the actions falling within the *forum concursus*. It does not refer to claims whose legal basis stems from the debtor's insolvency but which may be undertaken irrespective of the opening of an insolvency proceeding.[99] This could be the case of directors' liability when there are not enough assets to open insolvency proceedings against the company.[100] The point to be made now is that the reference to this liability rule laid down in Recital 13b does not end the controversy surrounding the characterization issue related to it, for which reason a further indent in Article 4(2) is to be advocated, thereby enhancing legal certainty in a field already haunted enough by enforcement problems.

4. Conclusion

The European Union is quickly heading towards a new approach to business failure and insolvency. In so doing, the significance of harmonizing insolvency laws has become clear, given that the great divergence among member states' laws in these matters threatens transparency and legal certainty, while preventing the proper restructuring of companies and the rescue of debtors in danger. However, substantive issues seem too entrenched in national laws to expect moves in that direction in the short and medium term. This can only be confirmed by the Commission Recommendation on common principles to national preventive restructuring frameworks hoping for a bottom-up harmonization. In the meantime the Proposal for a European Insolvency Regulation ought to try to level the playing field and secure fair play for the general body of creditors by having recourse to private international law techniques and thus amending some controversial provisions, in particular those regarding security rights and transaction avoidance. This would not only enhance creditor protection, but would also contribute to the establishment of a rescue and recovery culture by improving best management practices. By the same token, clearer rules regarding directors' liability in the vicinity of insolvency would also be welcome.

94 See N. Bermejo Gutiérrez and E. Rodríguez Pineau, 'Normas de protección de acreedores: entre el derecho de sociedades y el derecho concursal', *InDret* 2006-4, p. 1-41; A. Espiniella Menéndez, *Procedimientos de insolvencia y grupos multinacionales de sociedades*, Navarra: Cizur Menor 2006, p. 138-142.

95 BGH 6 June 1994, II ZR 292/91, *NJW* 1994, p. 2220-2225, and H. Altmeppen, 'Änderungen der Kapitalersatz- und Insolvenzverschleppungshaftung aus "deutsch-europäischer" Sicht', *NJW* 2005, p. 1911-1915, p. 1914; H. Eidenmüller, 'Gesellschaftsstatut und Insolvenzstatut', *RabelsZ* 2006, p. 474-504, p. 494-495; A. Franz, 'Internationales Gesellschaftsrecht und deutsche Kapitalgesellschaften im In- bzw. Ausland', *BB* 2009, p. 1250-1259, p. 1253; M. Habersack and D.A. Verse, 'Wrongful Trading – Grundlage einer europäischen Insolvenzverschleppungshaftung', *ZHR* 2004, p. 174-215, p. 207; V. Röhricht, 'Insolvenzrechtliche Aspekte im Gesellschaftsrecht', *ZIP* 2005, p. 505-516, p. 507-509.

96 See Eidenmüller 2006, p. 495 (*supra* note 95).

97 See Art. 3a of the Proposal.

98 See further Gerner-Beuerle 2013, p. 238-242 (*supra* note 83).

99 Art. 3a refers to 'any action which derives directly from the insolvency proceedings and is closely linked with them'.

100 See G. Spindler, 'Trading in the Vicinity of Insolvency', *EBOR* 2006, p. 339-352.