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 City of London Law Society ("**CLLS**") represents approximately 14,000 City of London lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Insolvency Law Committee. Individuals and firms represented on this Committee are as follows:

Hamish Anderson, Norton Rose LLP (Chair)

Ken Baird, Freshfields Bruckhaus Deringer LLP

Nigel Barnett, SNR Denton UK LLP

Tony Bugg, Linklaters LLP

Adrian Cohen, Clifford Chance LLP

Patrick Corr, Sidley Austin LLP

Stephen Foster, Hogan Lovells International LLP

Stuart Frith, Stephenson Harwood

Stephen Gale, Herbert Smith LLP

Ian Hodgson, Slaughter and May

Ben Larkin, Berwin Leighton Paisner LLP

Chris Mallon, Skadden Arps Slate Meagher & Flom (UK) LLP

Jennifer Marshall, Allen & Overy LLP

Byron Nurse, Eversheds LLP

James Roome, Bingham McCutchen LLP

Mike Woollard, SJ Berwin LLP

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*

The City of London Law Society Insolvency Law Committee members represent international law firms who have been instructed on some of the largest and most complex cross-border restructurings and insolvencies of recent years. As practitioners, the committee is able to comment on concepts which may seem attractive from an academic or theoretical perspective but which would give rise to issues in practice.

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
☐ Estonia	☐ Luxembourg	☒ United Kingdom
☐ Finland	☐ Malta	☐ Other
☐ France	☐ Netherlands	
☐ Germany	☐ Poland	

Please specify*

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

Hamish Anderson

Chair of the City of London Law Society Insolvency Law Committee

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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?

Overall, based on our collective experience as legal practitioners of leading international law firms, we consider that the Insolvency Regulation operates, for the most part, effectively and efficiently to co-ordinate cross-border insolvency proceedings.

Issues relating to a company's centre of main interests ("**COMI**") and the application of the Insolvency Regulation to cross-border insolvencies involving groups of companies have been addressed and are continuing to be addressed through case-law and market practice and so we would not recommend any changes in this regard.

The Court of Justice of the European Union has performed its function well with regards to interpreting the Insolvency Regulation and providing guidance in relation to issues such as COMI for which, following a number of decisions, there is now a clear framework. In addition, a case-law approach has helped to align this concept globally. We consider that it would be unhelpful if changes to the Insolvency Regulation were now made, leading to a period of uncertainty while the new provisions were tested by the courts.

With respect to the application of the Insolvency Regulation to cross-border insolvencies involving groups of companies, in our experience, the market has proved very effective in providing successful practical solutions that have maximised value for creditors. We consider that market driven solutions are the right approach as this is inherently more flexible than a prescribed and rigid framework for group situations set out in the Insolvency Regulation.

Finally, the interaction of the Insolvency Regulation with Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Brussels I Regulation**"), has raised certain issues particularly in the context of schemes of arrangement under the UK Companies Act 2006 and the uncertainty as to whether schemes of arrangement will be recognised

by the courts in other Member States. We suggest that schemes of arrangement continue to remain outside of the scope of the Insolvency Regulation and, instead, be dealt with through amendments of the Brussels I Regulation (as discussed in our response below).

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

In addition to the changes to the Brussels I Regulation referred to above, in our experience, it would be helpful to consider further the provisions dealing with the coordination between main and secondary proceedings and the provisions in relation to applicable law.

As discussed in our response below, we consider that there would be merit in preventing a court from opening secondary proceedings without first notifying and engaging with the officeholders in the main proceedings and providing those officeholders with standing to make formal representations to the court should an application to open secondary proceedings be made. As creditors may receive a better return if secondary proceedings are not opened, it would be helpful if a court hearing an application to open secondary proceedings is in possession of such information.

There are also important uncertainties in relation to the exceptions in Articles 5 to 15 to the general applicable law rule in Article 4 which make it difficult to give clear advice to those structuring transactions. It would be helpful to have these uncertainties clarified either through an experts' report (such as the Virgos Schmit Report which accompanied the Convention on Insolvency Proceedings) or possibly through changes to the Insolvency Regulation. We would stress, however, that the intention should merely be to clarify any areas of uncertainty. We agree with the objectives and substance of the applicable law rules as currently drafted.

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

While it may be advantageous to include certain pre-insolvency or hybrid proceedings within the scope of the Insolvency Regulation, we would recommend that the decision as to which procedures to include should be made at the national level. This would enable a decision to be made as to whether a particular procedure should be kept outside the scope of the Insolvency Regulation and therefore remain available to debtors who may not have their COMI in that jurisdiction (see, for example, the extensive use of schemes of arrangement by debtors whose COMI is not in the UK). We do not consider that any amendments to the Insolvency Regulation are required in this respect, so long as it is clear that the Annexes contain a definitive list of the available procedures in a particular jurisdiction. The fact that French safeguard proceedings are currently listed in Annex A shows that it is possible to list pre-insolvency proceedings under the current framework.

Accordingly, we would recommend that each Member State be permitted to list the pre-insolvency or hybrid proceedings that it wishes to include in the scope of the Insolvency Regulation in Annex A (with Annex C amended accordingly) and that those Annexes be classified as definitive to avoid the uncertainty inherent in the courts of other Member States having to decide whether a listed proceeding is or is not an "insolvency proceeding". Although we are seeing a move towards agreement on the definitive nature of the Annexes (as, for example, in *Eurotunnel* and *Fabryka Mebli Tapicerowanych Christianapol*), contrary views exist (see for example the Rhodes Multi Member Court of First Instance decision of 2007 where the court sought to determine whether Dutch proceedings fell within the scope of the Insolvency Regulation by reference to the definition of "insolvency proceedings" despite the fact that the Dutch bankruptcy proceedings were listed in Annex A) and so confirmation of the Annexes' definitive status would be helpful.

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?

Please see response above. We would recommend that it be left to Member States to decide whether the Insolvency Regulation should cover pre-insolvency restructuring or debtor in possession procedures. Again, the fact that debtor in possession proceedings (such as German self-management) are already available as main proceedings shows that no amendments need to be made to the Insolvency Regulation 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?

In our experience, while the applicability of the Insolvency Regulation to over-indebted private and self-employed individuals is not an issue in the United Kingdom as these individuals are subject to bankruptcy proceedings and are therefore covered by the scope of the Insolvency Regulation, we would recommend that it be left to Member States (as for pre-insolvency and hybrid procedures) to decide whether to extend the scope of the Insolvency Regulation to cover civil bankruptcy procedures. In order to comply with the requirement in the Insolvency Regulation that there is a divestment of assets from the debtor, we consider that these proceedings should involve either the appointment of an insolvency officeholder or the supervision of the court or the right for an affected creditor to apply to the court.

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	☒ No	☐ No opinion

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

Based on our experience in the UK, the absence of provisions in the Insolvency Regulation for the recognition of insolvency proceedings outside the EU or for the coordination between proceedings inside and outside the EU has not proved problematic. In the UK, a framework for recognising foreign insolvency proceedings is already in place via section 426 of the Insolvency Act 1986, the common law, the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Cross-Border Insolvency Regulations 2006 (which implement the UNCITRAL Model Law on Cross-Border Insolvency).

While we recognise that a similar framework may not be in place in other Member States, in our opinion it would be preferable for the Insolvency Regulation not to be widened in scope in this regard. Any amendment to the Insolvency Regulation is liable to cut across the existing regimes, and in particular the UNCITRAL Model Law on Cross-Border Insolvency. Rather, we would recommend that those Member States who have yet to sign up to the UNCITRAL Model Law on Cross-Border Insolvency be encouraged to do so.

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")?

☒ Yes	☐ No	☐ No opinion

If so, how should it be amended?

Based on our collective experience as practitioners, COMI is a useful tool for determining the appropriate jurisdiction for main insolvency proceedings. We would not recommend, however, amending the text of the Insolvency Regulation to define further or codify its meaning:

- While some uncertainty used to exist as to the meaning of COMI, following the decisions of the Court of Justice of the European Union in *Eurofood, Interedil* and *Mediasucre*, there now exists a clear framework for assessing a company's COMI.
- A codification of the current case-law position or, alternatively, importing a definition of COMI based on Recital 13 to the Insolvency Regulation would be to react to issues that have already been considered and resolved by the courts and may hinder the flexibility required to face future circumstances. Codification of the status quo may also result in extensive litigation to determine if anything has changed and return the position to one of uncertainty.
- Judicial interpretation of COMI has enabled a helpful alignment between the position under the Insolvency Regulation and the position under the UNCITRAL Model Law on Cross-Border Insolvency (as implemented in Great Britain through the Cross-Border Insolvency Regulations 2006 and in the US through Chapter 15 of the US Bankruptcy Code). Codification of the definition of COMI in the Insolvency Regulation may have knock-on consequences and restrict judicial ability to ensure consistency in the interpretation of these instruments.

Does the interpretation of the term “COMI” by case-law cause any practical problems?

☐ Yes	☒ No

If so, please describe these problems

In our experience, a case law approach to the interpretation of COMI provides a valuable balance between constructive flexibility to respond to each debtor's particular set of circumstances (for example, the current approach to the insolvency of multinational groups of companies (see further below)) and certainty arising out of the rebuttable presumption that a debtor's COMI is at the place of its registered office.

We would, however, welcome clarification of when an establishment must exist for the purpose of opening secondary proceedings and, in particular, whether an establishment must exist at the time prior main proceedings are opened.

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

☐ Yes ☒ No

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

Based on our practical experience:

- "COMI shifting" is a valuable device that may be used to achieve an outcome for creditors that is better than would otherwise be available. There has been support for COMI shifting from the courts which have distinguished between good and bad forum shopping. Indeed, there are circumstances in which forum shopping will be acceptable and even prudent under the Insolvency Regulation in order to maximize recovery proceeds and preserve company value or viability or both (and suggests that the introduction of a "look back period" could potentially be detrimental). Examples of judicial endorsement of COMI shifting include: *Hellas Telecommunications (Luxembourg) II SCA*, where Lewison J remarked that one might expect a corporate entity (or an individual) to change its COMI from its original or presumed location in a system of law which encourages a single market across the whole of the European Union;*TXU Europe German Finance BV*, where the registrar presiding over a CVL of debtor companies incorporated in the Netherlands and the Republic of Ireland which had moved their COMIs to England, stated that he may not have granted an order for a winding up if there had been evidence that the COMI migration had prejudiced creditors; and *The PIN Group* restructuring, where the Cologne Insolvency Court found that it was not illegal to move a debtor's COMI to take advantage of legal restructuring tools in other member states. We would also note the decision in *Staubitz-Schreiber*, where AG Colomer distinguished between good and bad forum shopping in the opinion he delivered in the case, noting that forum shopping, in the absence of uniformity of private law systems, was merely the 'optimisation of procedural possibilities… which is in no way unlawful'. He subsequently reiterated these views in the opinion he issued in *Seagon*. We would therefore strongly suggest that any "look-back period" be avoided. A "look-back period" would not reflect the economic reality that COMI is (quite properly) a fluid concept and could run contrary to EU principles of freedom of establishment. Furthermore, any look-back period will be, by its very nature, an arbitrary length. Why should the position 6 months or 1 year be any more important than the position 6 months (or 1 year) less one day?

- Corporate structures are often artificially created following an acquisition to take advantage of certain benefits such as favourable tax regimes. These structures may not reflect reality going forward. Companies may wish to change their COMI for reasons that are unrelated to an insolvency filing and, in practice, it may be difficult to ascertain whether a company has moved its COMI solely to take advantage of a different insolvency regime or whether the move was influenced by other commercial factors. In this regard, any significant restrictions on a company's ability to move its COMI may not fit in well with the freedom of movement and establishment within the European Union.

- While in our experience abusive relocations of COMI have been a feature mostly of individual bankruptcies rather than corporate insolvencies, three factors alleviate against the risk of abusive COMI shifts in the corporate context. In practice, any COMI shift is time consuming and cannot be effected overnight, not least due to the requirement that COMI must be objectively ascertainable by third parties. In addition, the courts look closely at a debtor's COMI and are capable of identifying potential abuses, as is highlighted by the decision in *Hans Brochier Holdings Limited*. In this respect, a prescriptive checklist definition of COMI may end up providing a legitimate mask for what would otherwise be considered abusive forum shopping. The risk of an abusive COMI shift is also limited by the duties owed by the directors of the debtor company. In our experience, directors are often hesitant to move the company's COMI unless, in doing so, the company is able to benefit from an insolvency or restructuring regime which provides a more favourable outcome for the company's stakeholders and the prior consent and cooperation of those stakeholders has been sought.

- Even in the case of individual bankruptcies where there may be more abusive relocations of COMI, we think that the courts are best placed to monitor and police any abuses. The English courts are already live to this and decisions such as *Shierson v Vlieland-Boddy* and the *Sean Quinn* case show that, where the court considers that the COMI movement is a sham, the court will disregard it. Hence we do not consider that any changes are necessary, even in an individual bankruptcy context.

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?

Many of the issues involving the interplay between the Insolvency Regulation and the Brussels I Regulation have now been resolved by the courts (see for example the CJEU decisions of *Seagon v Deko Martin Belgium NV* and *F-Tex*). A key remaining issue is the relationship between the Insolvency Regulation and the Brussels I Regulation in the context of the recognition of UK schemes of arrangement. Schemes of arrangement have become an increasingly popular restructuring tool and are now well used by companies incorporated outside of UK (for example in *La Seda de Barcelona SA*, *Wind Hellas* and *Rodenstock*, to name just a few). Schemes of arrangement present a viable alternative to formal insolvency proceedings with a helpful and effective cram-down mechanism and are often chosen where there is no viable alternative in the COMI jurisdiction (examples being the *Wind Hellas* and *La Seda* cases). It is, however, unclear whether such schemes will be recognised by the courts in other Member States. Following the decision in *Equitable Life*, it appears that schemes may fall between, and therefore not be covered by the recognition provisions of either, the Insolvency Regulation or the Brussels I Regulation (although we note that the *Equitable Life* decision involved an insurance company and so could be distinguished on its facts).

While the recent decisions in *Rodenstock* and *Primacom* provide some comfort that where the underlying agreements are governed by English law the courts of other Member States will, pursuant to Rome I (Regulation (EC) No. 593/2008)), apply English law to the question of whether the creditors' rights have been varied by the scheme, it would, however, be useful for the recognition of schemes of arrangement to be addressed directly.

To ensure that the benefits of schemes of arrangement remain available to companies whose COMI is outside of the UK and cannot be properly or easily be moved, and to aid cross-border restructurings using schemes, we would suggest that schemes of arrangement should remain outside of the scope of the Insolvency Regulation. We would, however, recommend that the Brussels I Regulation be amended to clarify that a court order sanctioning a scheme of arrangement is a "judgment" under, and therefore covered by the recognition provisions of, the Brussels I Regulation. To assist in the dovetailing of the Insolvency Regulation and the Brussels I Regulation, we would suggest that this be done by clarifying that the exclusion for "bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" relates solely to the proceedings covered by the Insolvency Regulation. A similar amendment would need to be made to the jurisdiction provisions in Part II of the Brussels I Regulation to clarify that the English courts can sanction a scheme of a foreign company. Various arguments were put forward in the *Rodenstock* and *Primacom*

cases as to why an English court would have jurisdiction to sanction a scheme under the Brussels I Regulation but we suspect that the simplest argument is that, where the English law governed agreements between the parties contain a jurisdiction clause whereby the parties agree to submit to the jurisdiction of the English court, this should satisfy the provisions of Article 23 of the Brussels I Regulation.

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?

While the Insolvency Regulation does not expressly deal with the insolvency or restructuring of multinational groups of companies, in practice the market has found successful solutions, as highlighted by the outcomes in, amongst others, *Eurotunnel, Lennox Holdings PLC* and *Nortel*.

These solutions are designed to maximise value for creditors. If the Insolvency Regulation is amended to provide a specific regime for group companies, there is a significant risk that the flexibility of these work arounds will be lost. The current position has the benefit of enabling the same insolvency procedure (with the same officeholder, subject to any conflicts of interest) to be commenced in the same jurisdiction in respect of each subsidiary either on the basis that both the parent and subsidiaries' central administration is in the same jurisdiction or by way of COMI shifts (as, for example in *Collins & Aikman Corporation Group*), while promoting coordination and cooperation to maximise value for the creditors of the group in circumstances where such value would only be preserved through the sale or the continued trading of the group as a whole (as in *Nortel*). In addition, a separate regime may not sit well with the fact that the parent may not be incorporated in the EU, or if so, may have been incorporated in a particular Member State for regulatory or tax reasons and accordingly the insolvency regime of that Member State may not be best placed to restructure the group as a whole. Further, any regime premised on the group's central administration would likely encounter the problem that multinational groups often have more than one place where central management functions are carried out.

We would suggest that instead of creating a separate regime for group companies, which runs the risk of cutting across the flexibility of the current approach, it would be better to allow the market to continue to find solutions that respond to the individual circumstances of each multinational group. Any changes to the Insolvency Regulation in this regard would also run the risk of cutting across UNCITRAL's work in this area (see for example Part 3 of UNCITRAL's Legislative Guide on Insolvency Law regarding the Treatment of Enterprise Groups in Insolvency). As was demonstrated in *Nortel*, however, better communication, cooperation and coordination between officeholders and, importantly, the courts is needed so that maximum value can be obtained for stakeholders and so we would propose that the cooperation provisions in Article 31 be extended to group companies (please see also our response below on the coordination between main and secondary proceedings).

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?

In our experience as practitioners, secondary winding up proceedings often run the risk of destabilising main proceedings, particularly if these are aimed at rescuing the company as a going concern, by reducing value and increasing costs. As, for example, it is rare for a multinational company's operations to be localised by jurisdiction, liquidating part of that company via secondary proceedings is likely to negatively impact any rehabilitation strategy being implemented through the main proceedings.

While local priorities do need to be protected, and secondary proceedings may be necessary in some cases to trigger employee guarantee funds or, in the UK, the adoption of the pension liabilities by the Pension Protection Fund, the effect of opening secondary proceedings needs to be balanced against the interests of the company's stakeholders as a whole. Where (as in the UK) local priorities can be respected by the officeholders in the main proceedings, there may well be no advantage in opening secondary proceedings, which simply add an additional layer of cost and administrative complexity (as noted in the decision of the French Court of Appeal in *MG Rover*). We would therefore suggest that, unless the opening of secondary proceedings is requested by the liquidator in the main proceedings who may have particular reasons for wanting the secondary proceedings (for example these may be the only way of closing down a branch office in an efficient manner), the power to open secondary proceedings be limited to circumstances where there is a demonstrable benefit to creditors. This follows the approach already taken by the courts in *MG Rover*, *NV Interstore/Megapool BV*, and *Trillium (Nelson)*

Properties Limited v Office Metro Limited, in which it was noted that secondary proceedings should not be opened unless they serve a useful purpose. We have also suggested in the next section below some proposals aimed at ensuring better coordination between the main and the secondary proceedings. Finally, we would suggest that, where secondary proceedings are opened by the liquidator in the main proceedings, value would be better preserved by expanding the scope of such secondary proceedings to include suitable rehabilitation procedures. The scope of secondary proceedings should otherwise remain limited to winding up proceedings.

To facilitate the administration of complex cases where, potentially, both main and several secondary proceedings are possible, it would be useful to have clear rules on the jurisdiction of the relevant courts to determine the location of assets. To avoid the problem of conflicting decisions, we would suggest that the location of assets be determined in line with Article 5 and Article 2(g) by the court controlling the main proceedings.

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

☐ Yes ☒ No

If so, how could it be improved?

As referred to above, where main proceedings have been opened, the act of opening of secondary proceedings may negatively impact on the ability to maximise value for creditors and rescue the company or group effectively and in a coordinated manner. While Article 33 permits a temporary stay of secondary proceedings, this presupposes that those proceedings have already been opened. It may instead be in the interests of stakeholders that secondary proceedings are not opened. As demonstrated in *Nortel*, even if the secondary liquidation proceedings had been stayed, regard would have had to have been taken by the English administrators of the Nortel group to those proceedings, potentially preventing the administrators from trading the relevant group company (except for the purpose of the liquidation) and effecting a coordinated reorganisation of the Nortel group as a whole.

While a work around was found in *Nortel*, with the English court holding that it had the power under Article 31(2) to send letters to the courts in each of the Member States where the Nortel group had a subsidiary requesting that the courts notify the administrators of an application to open secondary proceedings and give the administrators an opportunity to make representations should any such application be made, it is unclear whether such requests are formally binding on recipient courts.

Consequently, we consider there would be merit in preventing a court from opening secondary proceedings without first notifying and engaging with the officeholders in the main proceedings and providing those officeholders with standing to make formal representations to the court should an application to open secondary proceedings be made. Clearly this is not necessary if it is the officeholder in the main proceeding that is requesting the commencement of the secondary proceedings. As creditors may receive a better return if secondary proceedings are not opened, it would be helpful if a court hearing an application to open secondary proceedings is in possession of this information.

Does the duty to cooperate between insolvency practitioners work efficiently and effectively?

☒ Yes ☐ No

If so, how could cooperation be improved?

In accordance with their duties under Article 31, in our experience most insolvency practitioners dealing with complex cross-border insolvencies look to cooperate with their foreign counterparts.

We would recommend, however, that the duty to cooperate be extended to officeholders and the courts involved in the main and secondary insolvency proceedings of a group of companies although there are clearly issues with defining a group for these purposes. We would propose that the same definition is used as was proposed by UNCITRAL in its work on enterprise groups.

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?

While the courts have taken a positive approach to cooperation (as, for example, in *Nortel* above, *Ben Q Mobile Holdings BV* and *EMTEC*), we consider that it would be helpful to incorporate expressly a duty to cooperate similar to the duty and powers contained in Articles 25 to 27 of the UNCITRAL Model Law on Cross-Border Insolvency. If the courts of the Member States require guidance on how court to court communications should be carried out (particularly if the judges in particular jurisdictions have less experience of such communications), reference can be made to European Communication and Cooperation Guidelines for Cross-Border Insolvency produced by Professor Wessels and Professor Virgos although we think it is important that these remain as a set of guidelines that can be evolved over time rather than becoming part of the Insolvency Regulation itself. Please see also our comments above on the coordination of main and secondary proceedings.

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 immoveable 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 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?

We note that the exceptions in Articles 5 to 15 to the general choice of law rule in Article 4 were negotiated by the Member States over a number of years while the Insolvency Regulation was still in the form of a Convention on Insolvency Proceedings. We consider that they strike the right balance between the law of the insolvency proceedings and other applicable laws and we would not propose that the objectives and/or policy behind the articles be changed. It is important, when giving advice to parties who are entering into and structuring transactions, that the position is clear and that legitimate expectations are protected and we consider that Articles 5 to 15 are essential in this regard.

However, the exceptions to the general rule which are contained in Article 5 (Rights in Rem), Article 6 (Set-Off) and Article 13 (Detrimental Acts) of the Insolvency Regulation, in particular, have given rise to issues which have created uncertainty and which require clarification in order to make these exceptions operate more effectively while not changing the underlying principles or balance struck by these articles.

The clarifications sought below could be made in one of three ways:

- Ultimately we suspect that the courts of the Member States and the Court of Justice of the European Union will resolve some of these uncertainties, as they have done in relation to COMI. However, we note that there are currently very few CJEU decisions dealing with the applicable law provisions, we suspect because most of the battles have been in relation to jurisdiction and so the choice of law battles are still to come, and so guidance may be required in one of the other ways set out below until the case law has been established.

- An experts' report (similar to the Virgos Schmit report in relation to the Convention on Insolvency Proceedings) could be commissioned to clarify some of the issues set out below and this could act as a legislative guide when interpreting Articles 5 to 15. As the report would merely provide guidance, this would allow the courts and the CJEU to develop the case law on flexible terms, responding to further issues that may come up in the future.

- Clarificatory changes could be made to the Insolvency Regulation itself although care would need to be taken that any such amendments did not change the underlying principles or balance struck by the articles.

Article 5 (Rights in Rem)

Article 5 immunises rights in rem from the effects of insolvency proceedings but only where the secured assets (including both tangible and intangible assets) are located in a Member State other than the Member State in which main or secondary proceedings are commenced. The fundamental policy behind Article 5 is to protect the trade in the Member State where the assets are situated and the legal certainty of the rights over them. Whilst we consider that Article 5 has been successful in this regard, we consider the following issues create uncertainty in the practical operation of Article 5 and require further clarification:

- In the case of an intangible asset, there may be difficulties in determining the *lex situs* of the asset for the purposes of determining whether or not it is located in the Member State in which the insolvency proceedings have been commenced or whether the asset is located in another Member State. The Insolvency Regulation does not set out which court should determine this issue. Whilst Article 2(g) gives some assistance, it is not clear whether or not the list of assets set out in Article 2(g) of the Insolvency Regulation is intended to be exhaustive or whether the

conflict rules outside the Insolvency Regulation are intended to determine the *situs* of assets which do not readily fall within the categories listed in Article 2(g) (for example, how are items such as private company shares and bank accounts dealt with in relation to this Article?). And what if an asset falls into more than one category? A ship, for example, is tangible property falling within the first limb of Article 2(g) but the ownership of that ship could also be recorded in a public register as per the second limb of Article 2(g).

- There is also a question as to what constitutes a right in rem for the purposes of Article 5 (and which court determines this). Does this expression include all types of security and quasi-security interest (such as retention of title clauses, flawed asset arrangements, finance leases and sale and repurchase agreements)? What about powers of attorney that may have been given to support or protect the security interest – do these form part of the right in rem? And what about rights of rem which may be recognised in one Member State but not others (such as the beneficial interest under a remedial constructive trust)? It would be good if clarity could be given, at the very least, as to which court should determine these issues. Is this the court in which main proceedings are commenced or the court in the jurisdiction in which the secured asset is located (subject to the difficulties referred to above in determining this).

- The exact scope of Article 5 also remains unclear. In particular, guidance as to whether Article 5 protects the secured indebtedness as well as the right in rem is required. If a secured creditor's claim is reduced or compromised as a consequence of a main insolvency proceeding, can the secured creditor rely on Article 5 to enforce its security over assets in another Member State in respect of the full amount of its original secured claim or does the security interest only stand as security for the reduced claim (as compromised through the main insolvency proceeding)?

- There is also a question regarding which law determines the priority of the security. Article 4(2)(i) of the Insolvency Regulation states that the law of the state of opening of proceedings will determine the ranking and treatment of claims in the insolvency proceedings (including for example whether any claims are to be given preferential status in the insolvency proceedings). Under English law, certain categories of preferential claims have priority over the claims of a floating charge-holder but not the claims of a fixed charge-holder. However, different Member States have different rules in this respect. If insolvency proceedings were to be commenced in France, for example, but a secured asset was located in England, it is not clear whether the existence of any priority claims would be determined by French insolvency law under Article 4(2)(i) or whether the English rules referred to above would apply by virtue of England being the *lex situs* of the secured assets. If English law is to be preferred, it is not clear whether the English insolvency priority rules or pre-insolvency priority rules should be applied.

Article 6 (Set-Off)

Article 6 sets out an important exception to the general rule on applicable law whereby the opening of insolvency proceedings will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor provided that such a set-off is permitted by the law applicable to the debtor's cross-claim. This exception is particularly important to financial institutions that need to establish definitively whether they have a right of set-off in relation to a corporate customer in order to assess their exposure to that customer.

There are certain aspects of the protection of set-off rights provided under Article 6 which are unclear and which require further clarification:

- It is not clear whether the term "permitted by the law applicable to the insolvent debtor's claim" is a reference to the contractual set-off rules of the jurisdiction in question, or the relevant insolvency set-off rules or a combination of both. If it is the insolvency set-off rules (regardless of whether any insolvency proceedings have been commenced in the place of the applicable law), how do you determine which insolvency procedure should be considered? In the UK, for example, there are different insolvency set-off rules with different cut-off dates in an administration and a liquidation (any claims that have been incurred or acquired by the counterparty after the cut-off date cannot be taken into account for insolvency set-off purposes and so determining the relevant date for these purposes will be essential).

- Does the right of set-off, or the debtor's claim, need to arise prior to the opening of insolvency

proceedings?

- It should be confirmed whether or not Article 6 only applies to set-off or also extends to close-out netting. It would be useful to introduce into the Insolvency Regulation a netting safe harbour similar to that under Article 25 of the Credit Institutions Winding Up Directive (Directive 2001/24/EC) to address any residual uncertainty in jurisdictions where a distinction is drawn between set-off and netting. In our experience, netting is not just an issue for banks, but many corporate counterparties also enter into netting agreements.

- Finally, which law determines which claims are eligible for set-off? (For example, do the claims have to be liquidated, matured or payable by a particular date etc.?)

Article 13 (Detrimental Acts)

Article 13 provides a defence to the avoidance rules of the Member State where proceedings are opened where the person who benefited from an act detrimental to all the creditors provides proof that (a) the act is subject to the law of another Member State and (b) that law does not allow any means of challenging the relevant case.

The aim of Article 13 is to uphold the legitimate expectations of creditors or third parties of the validity of the act in question in accordance with the normally applicable national law. Whilst Article 13 has been successful in this regard, we consider the following key issues in relation to Article 13 create uncertainty and need to be clarified in order to ensure its effective operation and practical application:

- To what law will the act in question be subject and which Member State determines this? For example, if a payment is avoided under the law of the state of opening of main proceedings for being a preference, is the applicable law under Article 13 the law governing the agreement under which the payment fell due or the place of performance or somewhere else?

- Further, does Article 13 involve a consideration of the insolvency law of that jurisdiction (including any avoidance provisions) even if no insolvency proceedings have been commenced in that jurisdiction or does it extend to all potential means of challenge, both under insolvency law and non-insolvency law?

- It is not clear how the expression “any means of challenge” in Article 13 relates to the expression “in the relevant case” and there appears to be a tension between these expressions. At one extreme, it could be argued that this test would be satisfied only when all relevant challenge periods had expired, but many Member States (including the UK) provide unlimited challenge periods for certain acts which have the effect of defrauding creditors. If instead the court has to consider whether there is a means of challenge (including under insolvency law) on the applicable facts, there may be difficulties in determining what insolvency proceedings should be considered and when these proceedings should be deemed to have commenced for the purposes of any hardening periods.

- Concern has been expressed that a court of a Member State (where main proceedings have been opened) may refuse to recognise a choice of law in a contract governing a transaction where the choice of law resulted in a defence to a claw-back action or, indeed, may find ways of limiting the application of Article 13 more generally given that the relevant court will, prima facie, have held that the transaction is vulnerable under its national law and the counterparty is now seeking to challenge this decision.

- Further, the Italian courts have handed down a number of decisions (in circumstances where Italian insolvency proceedings have been opened and the Italian insolvency officeholder has sought to challenge a transaction previously entered into by the debtor) which suggest that, where the insolvency officeholder is not a party to the transaction being challenged, Article 13 will have no application to any challenge brought by the insolvency officeholder (*Grandis Grandi Magazzini Discount S.r.l. v Allgauland Kasereine GmbH; Soc. Volare Airlines v Tramp Oil Aviation Ltd; Soc. Volare Airlines v Compania Espanola De Petroleos S.A.*). This approach may, in such circumstances, limit the ability of a counterparty to a transaction to rely on Article 13 in any claw-back action. These decisions highlight the difficulties experienced by national courts with the concepts in Article 13.

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?

Please see comments with respect to the exceptions above.

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

☐ Yes ☒ No

If so, how should it be amended?

Please see comments with respect to Article 5 above.

Does the provision on detrimental acts operate satisfactorily in practice?

☐ Yes ☒ No

If so, how should it be amended?

Please see comments with respect to Article 13 above.

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

We note the following points for consideration:

- National courts may not know whether main proceedings have been opened elsewhere and there is a risk that they could therefore also open main proceedings.
- On a practical level, it is difficult for a foreign court to assess whether a document is effective in another jurisdiction to open insolvency proceedings (for example, due to language issues or unfamiliarity with another jurisdiction's form and procedures).
- There is a need to restrict any refusals to recognise insolvency proceedings on public policy grounds, although the courts are now largely taking a restrictive view of Article 26 (see further below).

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

While the majority of cases support a restrictive interpretation of Article 26 in accordance with the decision in *Eurofood*, we are aware of at least one first instance decision in *Hans Brochier Holdings Limited* in which the recognition of English administrators appointed via an out-of-court route was refused for reasons including public policy objections (although ultimately it was held by the courts in both England and Germany that the company's COMI was in Germany and therefore these arguments were not considered by a higher German court).

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?

To date, Member States have taken a practical approach to the need for a court decision, recognising that this is not always necessary (as in the out-of-court appointment route for administrators in the UK, or a decision by creditors to "open" proceedings by way of a company voluntary arrangement). In light of the differences in national law in this regard, we would suggest that it be left to national law to determine the mechanism by which insolvency proceedings are said to have been opened. On this basis, provided the Annexes are stated to be definitive, no amendment to the definition of opening insolvency proceedings is necessary.

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	☐ Member States should be required to register the opening judgment in a	☒ Member States should be required to register the opening judgment in an	☐ Other

	public register.	specific insolvency register.	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.	

Please specify

We consider that the following information should be included in the register:

- Name of company / individual, registered address / address, company number
- Type of proceedings, whether main or secondary and date of commencement
- Name and address of officeholder / person to contact if debtor in possession proceedings
- If the register is a European-wide one, jurisdiction in which insolvency proceedings have been commenced.

Whilst an electronic European-wide register of insolvency proceedings has considerable merit, we are aware that few Member States currently require this information to be registered nationally in any comprehensive way and so, as things stand at present, a European-wide register could not simply provide links to the relevant national registers (and there may be problems with searching even if it were to do so). Furthermore, we suspect that, unless it is a European requirement that Member States provide this information (either by way of a European-wide register or through a series of national registers), it will be difficult for governments in the present economic climate to justify the expenditure required to establish such registers.

Given that a single European-wide register would be easier to search and it is just as easy to file the required information via a European central register than to do so locally, we are in favour of the idea of a central European-wide register containing the information set out above. We think the costs of translating this information into all of the official languages of the EU would be prohibitive but so long as the register is searchable by company name, we do not think this should be an issue. It would be necessary to register all insolvency proceedings commenced in the UK as it is not always clear, at the outset, whether there could be a cross-border element to those proceedings. However, given that an officeholder already has a number of local registration and filing requirements, it is hoped that this one could simply be added to the list.

If a European-wide register proves unviable, we would recommend the following:

- each Member State should maintain a register of insolvency proceedings involving companies registered under the laws of that Member State; and
- those opening insolvency proceedings in other Member States other than the state in which the debtor is registered should register details of such proceedings for entry on the register in the jurisdiction where the relevant company subject to such insolvency proceedings has its registered office.

This approach would allow for one search to be carried out covering insolvency proceedings in each

Member State (and therefore on a smaller register), which would make it easier to conduct accurate searches.

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

We are not aware of any problems.

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

Please specify

We are not aware of any difficulties.

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?

While there are, inevitably, differences between Member States' national laws, we consider that an attempt to harmonise requirements would require an extensive reworking of insolvency laws, with the potential for resulting inconsistencies and uncertainty. Even aspects which may seem relatively procedural or non-contentious can have knock-on consequences and need to be considered in the context of the insolvency proceedings as a whole. As market practice has shown (and as noted above in respect of COMI shifts), variations in Member States' procedures can be used to effect corporate rescues that result in better outcomes for creditors. As such, we consider that the Insolvency Regulation should continue to provide for a cross-border framework, with appropriate choice of law and recognition provisions, which supports the flexibility of the current system.

In your view, are there important inefficiencies in your national insolvency law?

☒ Yes	☐ No

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

The important inefficiencies in English insolvency law include administration expenses and out-of-court appointments. These need to be dealt with at a national level and do not require EU intervention.

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?

The costs of cross-border insolvency proceedings are generally driven by the following variables:

- the duration of the insolvency process;
- the behaviour of the stakeholders involved; and
- the complexity of the issues dealt with throughout the process,

whereby, the longer the insolvency process lasts and the less co-operative stakeholders are, the more likely it is that the insolvency costs will be disproportionate. And further, the higher the complexity of the issues the more time-consuming and therefore costly. However, these costs are, to a large extent, inevitable given the subject matter and do not need to be addressed at the level of EU law. Furthermore, in a number of cases, while the costs have been high, the return to creditors has also been high (and much higher than would have been the case had there been no coordination of the proceedings at a cross-border level).

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?

The costs of cross border restructurings are likely to be less disproportionate in practice given that a restructuring is a voluntary process and driven by the creditors.

However, there are two factors that make a cross border restructuring more expensive:

- in the case of an out of court, consensual restructuring, there is no automatic recognition in other Member States; and
- in certain cases, the lack of automatic recognition in other Member States may be an important factor for a company to implement a restructuring in England to benefit from other recognition tools available here (such as the UNCITRAL Model Law, or section 426 of the Insolvency Act 1986).

We would note that there are a significant number of cross-border out of court restructurings that are undertaken quickly and efficiently (with the impact that costs are low). However, these cross-border restructurings do not gain as much press attention.

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?

Outside of a bankruptcy context, our experience shows that special regimes for SMEs are, in practice, rarely used. For example, we are aware of only a limited number of cases where a company has availed itself of the small company moratorium that exists in a company voluntary arrangement.

Other Issues

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

We note the following issues which should be addressed:

Directors Duties

Directors' duties are not directly addressed in the Insolvency Regulation. It would benefit the directors of a company facing financial difficulties if there was greater certainty as to the basis on which their conduct would subsequently be judged and the law that would be applied in this context. The following issues need to be considered:

- the impact of a COMI shift on directors' duties where, following a COMI shift, the company's directors may assume different statutory obligations and liabilities;
- the potential for the director to incur liability with respect to a breach of any obligation to file for

insolvency proceedings in any Member State where the company had an establishment where main proceedings have already been initiated. In our view, it should be made clear that filing proceedings in the place of the COMI should prevent the directors from being liable in relation to a failure to file in the place of any establishment;

- to what extent do directors' duties fall within Article 4(2) of the Insolvency Regulation and are therefore tested by reference to the requirements of the jurisdiction in which the main proceedings are opened? and

- would an action for breach of fiduciary duty or negligence linked to the events triggering the company's insolvency (where such action arose prior to its COMI being altered) fall within Article 4(2)?

Directors disqualification

Consideration should be given to the possibility of directors' disqualification orders to having pan-European effect.

Article 43

It is unclear whether the reference to "acts done" refers to the commencement of main or secondary proceedings or to displace the applicable law provisions for transactions entered into before 31 May 2002, which would create a time dependant (and thus inconsistent) approach to the applicable law.

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