

# **ON THE FUTURE OF EUROPEAN INSOLVENCY LAW**

INSOL Europe Academic Forum's 5<sup>th</sup> Edwin Coe lecture

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The Academic Forum of INSOL Europe, founded in 2004, is a constituent body of INSOL Europe, a Europe-wide association of practitioners in insolvency. The Academic Forum's primary mission is to engage in the representation of members interested in insolvency law and research, to encourage and assist in the development of initiatives in the insolvency field, to foster the development of research in insolvency by younger scholars and to participate in the activities organised by INSOL Europe. The membership of the Academic Forum includes insolvency academics, insolvency practitioners with recognised academic credentials as well as those engaged in the research and study of insolvency. The Academic Forum meets annually in conjunction with the main conference of INSOL Europe and also arranges half-yearly conferences around suitable themes of interest to the practice and academic communities. Previous meetings have taken place in Prague (2004), Amsterdam (2005), Monaco (2007), Leiden and Barcelona (2008), Brighton and Stockholm (2009), Leiden and Vienna (2010), Milan, Venice and Jersey (2011), and Nottingham (2012).

*Previous Edwin Coe lectures*

1. Professor Jay L. Westbrook, University of Texas, Austin, TX, USA – Barcelona 2008
2. Gabriel Moss QC, 3/4 South Square – Stockholm 2009
3. The Hon Mr Justice Ian Kawaley, Supreme Court of Bermuda, Hamilton, Bermuda – Vienna 2010
4. Professor Karsten Schmidt, President of the Bucerius Law School, Hamburg, Germany - Venice 2011

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## Introduction

I would like to begin this afternoon by thanking the board of the Academic Forum of Insol Europe for the invitation to speak to you today.<sup>1</sup>

Early this year the European Commission issued a “Consultation on the future of European Insolvency Law”.<sup>2</sup> It is an open, internet-based consultation inviting reactions to a questionnaire which will assist the Commission to determine whether and how the existing legal framework should be improved and modernised. My first thought was: what is European Insolvency Law? Fortunately, the Commission provides for an answer: the European Insolvency Law is laid down in Regulation (EC) No 1346/2000 on insolvency proceedings (the “Insolvency Regulation”) which applies since 31 May 2002.

I am challenging this phrasing.

I would like to depart from the description that European Insolvency Law (also hereinafter: EIL) is a body of rules and practices, formed both by national law and the law of the EU relating to matters of financial distress. In earlier publications I indicated that the core content of insolvency law concerns the prevention, regulation and administering of discontinuity in legal relationships of persons who have legal rights (companies or natural persons) and find themselves in financial difficulty. The essence of the legal domain of European insolvency law then is the avoidance or streamlining of (the consequences of) the possible inability to fulfil payment obligations. Consequently, in a European context, European insolvency law is also concerned with certain contractual arrangements (e.g. cross-border private arrangements or ‘work outs’) and the recording of ‘best practices’, which, in practice, play an important role.<sup>3</sup>

Presently, this body of rules and practices has certain recognisable principles in the cross-border area, such as the principle of applying the *lex concursus*, automatic recognition of certain judgments and cross-border cooperation between insolvency office holders. The totality of this body, however, largely is a crystal ball, as European Insolvency Law is still searching for patterns of interactions between the two systems of national laws and EU law, and the coherence within the law of the EU itself. Among the many topics that are presently

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<sup>1</sup> During the lecture only selected topics of the text were addressed.

<sup>2</sup> <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=Insolvency>.

<sup>3</sup> See e.g. Bob Wessels, *International Insolvency Law*, 3<sup>rd</sup> ed., Deventer: Kluwer, 2012, para. 10001.

debated, evaluated, regulated or litigated in this area, in the light of European Insolvency Law, the following three themes specifically stand out as the most important to discuss today.

1. The present state of European Insolvency Law, for which I make a distinction between:

- 1.1. The early period
- 1.2. The cross-border period
- 1.3. The harmonisation period

The second theme concentrates on:

2. Insolvency law and its role in establishing a better Europe
- 2.1. Better functioning of the internal market
- 2.2. Initiatives regarding natural persons?

My third and last theme presents a focus on:

3. Actors in the field of European Insolvency Law, being:
  - 3.1. Legislature
  - 3.2. Courts
  - 3.3. Insolvency office holders
  - 3.4. Academia

I will then end with some concluding remarks regarding the Future of European Insolvency Law, which is also the title of my lecture.

1. The present state of European Insolvency Law

1.1. The early period

1. European Insolvency Law, until 2002, has showed its presence in different shapes and forms, although I add that its visibility has been limited. One of the first and very important signs has been in the area of the transfer of undertakings with Directive 77/187/EC with regard to Safeguarding of Employees' Rights in the event of Transfer of Undertakings. The Directive, quite remarkably, is silent on the question whether it applies in cases of insolvency. In a Dutch case of 1985 the ECJ concluded that Article 1(1) of Council Directive No

77/187/EEC of 14 February 1977 does not apply “.... to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor.” The Court added that the Member States are at liberty to apply the principles of the Directive to such a transfer on their own initiative. The Directive, however, does apply – so the Court determines – where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a “*surséance van betaling*” (judicial leave to suspend payment of debts).<sup>4</sup> Although in this Directive “insolvency” as a term was not covered in the text, it is obvious that there is a direct effect of the European rule into the national legal system of a Member State.

2. It then took thirteen years before “insolvency” again asked for attention, now as an event which was expressly taken into account in the Directive 90/314/EC regarding the insolvency of a Tour Operator. Article 7 provides: “The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency”.<sup>5</sup> Here again insolvency led to a set of national rules in the legislation of the Member States. In several other EU instruments too “insolvency” as legal phenomenon was made a part of its provisions, e.g. in the Directive 97/9/EC re Investor Compensation Schemes, Directive 2000/35 with regard to Late Payments in Commercial Transactions, Directive 2000/74 on the Protection of Employees in the Event of Insolvency of their Employer (updating Directives 77/187 and 80/987), Regulation 2001/2157 with regard to the Statute for a European company (SE) in which Article 63 provides: “As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general

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<sup>4</sup> ECJ 7 February 1985, Case 135/83 (*H. B. M. Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*). The Court observed: “In addition, the rules on liquidation proceedings and analogous proceedings are very different in the various Member States. For that reason, and in view of the fact that insolvency law is the subject of specific rules both in the legal systems of the Member States and in the Community legal order, it may be concluded that if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose.” The Court’s observation “that insolvency law is the subject of specific rules ..... in the Community legal order” is interesting but rather mysterious.

<sup>5</sup> CJEU 16 February 2012, Case C-134/11 (*Jürgen Blödel-Pawlik v HanseMercur Reiseversicherung AG*) decided that Article 7 of Council Directive 90/314/EEC is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its fraudulent use of the funds transferred by consumers.

meeting”, or – a recent example – the Proposal for a Regulation on the Statute for a European Foundation (FE), within which Article 36 (“Transfer of registered office”), paragraph 3 provides: “The FE shall not transfer its registered office ..... if proceedings for winding-up, insolvency or similar proceedings have been brought against it ....”<sup>6</sup> Here, insolvency as a term seems rather narrow. The drafters certainly have not looked into the definition in the Insolvency Regulation.

3. The given examples are important for those directly involved (employees, travellers, certain legal persons etc.), but in this first pan-European period there is no sign that “insolvency” as such has been an object of specific policies of study on an EC (since 2009: EU) level, nor that “insolvency”, as far as it has been included in EU legal instruments, is drafted in a coherent way in these instruments that in their core deal with other matters. There is a level of interaction between EU law and national law of Member States, but the interplay is limited to certain national islands of civil law. There is, as far as I can see, no evidence that these islands are interconnected, meaning that the specific national rules have been discussed or aligned between Member States themselves.

## 1.2. The cross-border period

4. A second phase in the development of EIL began with the entry into force of the Insolvency Regulation, in May 2002. Unlike the early phase, this one is clearly introducing a system in a body of rules. It has given an enormous boost to insolvency practice, education and research. The Insolvency Regulation has a private international law angle, which has as its basis (now) Article 81 TFEU. The Insolvency Regulation is a legal instrument that forms a part of a more comprehensive framework of the private international (insolvency) law system of the EU. This wider framework consists of a variety of components, such as the Brussels I Regulation on International Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, to which the Insolvency Regulation fills the gap.<sup>7</sup> Presently – mid

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<sup>6</sup> Proposal for a Council Regulation on the Statute for a European Foundation (FE), Brussels, 8 February 2012, COM(2012) 35 final, 2012/0022 (APP).

<sup>7</sup> Article 1(1) Brussels I excludes from its scope insolvency proceedings relating to “bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”

October 2012 – the Insolvency Regulation is the subject of a large review process. I will make some remarks regarding this process later.

5. It is in this period too that reorganisation and winding-up of financial institutions is on the EU drawing table. Insurance Undertakings and Credit Institutions are excluded from the Insolvency Regulation since they are subject to special arrangements and, to some degree, national supervisory authorities have wide-ranging powers of intervention. Since 2011 some of these intervention powers are in the hands of one of the three European Supervisory Agencies in the financial sector. The respective Directives 2001/17 and 2001/24 have resulted in an abundance of implemented national provisions, rather detailed and spread over different national sources, such as Acts or Codes on civil law, Insolvency Acts and/or Banking Acts. Since a few years, in the midst and hopefully the aftermath of the financial crisis, debates are ongoing on the most desirable European structure for the resolution of banks and investment firms. In the June 2012 proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms<sup>8</sup> “resolution”<sup>9</sup> constitutes – according to the proposal – an alternative to normal insolvency procedures<sup>10</sup> and provides a means to restructure or wind down a bank or investment firm that is failing and whose failure would create concerns as regards the general public interest, such as threaten financial stability, the continuity of a bank’s critical functions and/or the safety of deposits, client assets and public funds.<sup>11</sup>

6. In the period of their creation, some ten years ago, both Directives have been the subject of a debate on the nature of these rules. The Italian author Galanti, for instance, is of the opinion

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<sup>8</sup> Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, Brussels, 6 June 2012, COM(2012) 280 final, 2012/0150 (COD). Article 1(3) of the proposal defines “investment firm” as an investment firm as defined in Article 3(1)(b) of Directive 2006/49/EC that are subject to the initial capital requirement specified in Article 9 of that Directive.

<sup>9</sup> Article 2(1) of the proposal: “resolution” means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution.

<sup>10</sup> Article 2(40) of the proposals: “normal insolvency proceedings” mean the collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator, normally applicable to institutions under national law and either specific for those institutions or generally applicable to any natural or legal person. The description generally follows the one in Article 1(1) EU Insolvency Regulation with regard to collective insolvency proceedings.

<sup>11</sup> See [http://ec.europa.eu/internal\\_market/finances/docs/committees/reform/20120912-com-2012-510\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com-2012-510_en.pdf).

that the rules concerning private international law which are included in the Directive 2001/24 (Credit Institutions) are placed in the more important and overall framework of exchange of information and cooperation among authorities: “The circumstance that banks and insurance undertakings are subject to prudential supervision accounts for the allocation of the crisis directives in the EU-derived law in these sectors, thus giving to the rules on private international law a secondary role.”<sup>12</sup> Belgian Professor Torremans<sup>13</sup> however puts it in a different perspective, as follows: “The final aim is therefore not so much to exclude these entities from the scope of the Regulation, as to put in place a tailor made special regime for them.”

7. Whereas the legislative instruments originating from the cross-border period continue to evolve concerns may be expressed regarding certain topics. There certainly is a level of interaction between EU law and national law of Member States, but the way this interaction plays out lead to rather different results. To give one example of the interaction of EU law and national law, the Insolvency Regulation led to some gaps with existing national (insolvency) procedural laws. In the Netherlands for instance as per 2003 an attempt was made to realise the Insolvency Regulation’s full potential by making “national” and “European” law compatible. A set of some 15 legislative provisions has been included in the Netherlands Bankruptcy Act. Germany did the same in the German Insolvency Act, where France on a national level however has used a “*circulaire*” for these purposes. Mutual comparison of these rules demonstrate that the three countries have introduced many different consequences in their aim of striving for the compatibility of the Insolvency Regulation on the one hand and national procedural legislation on the other, leading to e.g. different rules for publications, registrations, languages to use or the degree of a court’s involvement.<sup>14</sup>

8. I have not seen attempts either that the implementation of those Directives in specific national rules has been discussed or aligned between Member States themselves. If you and me have an assignment and we are working from the same template, doesn’t it make sense that we share some thoughts and discuss some approaches? It seems to me a quite common

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<sup>12</sup> Enrico Galanti, The New EC Law on Bank Crises, in: International Insolvency Review 2002, 49ff, at 52.

<sup>13</sup> Paul Torremans, Cross Border Insolvencies in EU, English and Belgian Law, European Monographs nr. 39, The Hague / London / Boston, Kluwer Law International, 2002, 145.

<sup>14</sup> Further on such realisation or adoption measures in Austria, England, Germany, France, Czech Republic and Poland, see Bob Wessels, International Insolvency Law, 3<sup>rd</sup>. ed., Deventer: Kluwer, 2012, para. 10492.



way especially as we are “buddies”, given the existence of “mutual trust” between Member States.

9. Another area to pay attention to is the coherency within the system of EU law itself. Coherency, I think, has two components. The first one is synchronisation or fine-tuning, the second is what I now call: adjusting.

Synchronisation is at hand for instance with the Brussels I Regulation and the Insolvency Regulation. In the proposals of December 2010 to amend the Brussels I Regulation<sup>15</sup>, the cited exclusion in Article 1(1) Brussels I (excluding from its scope insolvency proceedings relating to “bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”) leaving doubts as to its scope, which could have been avoided by synchronising, therefore by clarifying that Article 1(1) excludes those matters that fall within the scope of the Insolvency Regulation.

Another example of synchronisation relates to the Insolvency Regulation and the two Directives mentioned, both on the definitions of the proceedings (collective insolvency, winding-up, reorganisation) as well as the scope of these instruments ((collective) investment firms are excluded from the Regulation; does the recent draft-definition of June 2012 for investment firm fully close the gap of Article 1(2) of the Insolvency Regulation?; definitions of set-off and netting?). Another synchronisation item relates to the law applicable. Article 4(1) Insolvency Regulation applies the so called *lex concursus* (or: *lex forum concursus*), the law of the Member State within the territory of which insolvency proceedings are opened governs all the conditions for the opening, conduct and closure of the insolvency proceedings, the admissibility of claims and the rules on distribution, etc. There is one difference, though. Article 10(1) Directive 2001/24 concerning banks does not determine that the “law” of the home Member State are universally applicable; it provides that “the laws” (plural) and “... regulations and procedures” of the home Member State are applicable. To symbolise (at least in its wording) this broader regime, I have referred to the “laws, regulations and practices” as

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<sup>15</sup> Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 14.12.2010, COM(2010) 748 final; 2010/0383 (COD).

the “lex domus”, in contrast to the *lex concursus* as meant in Article 4(1) Insolvency Regulation.<sup>16</sup>

The other component of coherence relates to adjustment, e.g. in case certain provisions of the Insolvency Regulation will be amended adjustment involves the necessity to amend the mirror-image provisions in the Directives (e.g. those relating to applicable law) accordingly. According to the Spanish professors Virgós and Garcimartín, the instruments concerning cross-border insolvency (the Insolvency Regulation and the two Directives) are part of a single common system on cross-border insolvency, all forming a, what they call: “hermeneutic circle” within which the rules should be interpreted and construed<sup>17</sup>. Although I have criticised this unconvincing “hermeneutic circle” interpretation-theory<sup>18</sup>, I agree with the authors that the EU legislator is the main guarantor of the unity and coherence of the EU law system, and therefore should synchronise and adjust as just mentioned.

10. A final note regarding this cross-border phase is that it is not only related to cross-border insolvency matters. Although concerns regarding the principles of subsidiarity and proportionality could be made, often preventing unification of matters of civil law, including insolvency law, as being impossible or exceptional, it should be mentioned that several provisions of the Insolvency Regulation are to be characterized as substantive rules and are therefore now accepted throughout Europe as unified rules concerning the topics to which they relate, see for example Articles 7(2), 20, 29-35, 39 and 40 of the EU Insolvency Regulation. I give only one example, Article 7(2) of the EU Insolvency Regulation.<sup>19</sup> Article

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<sup>16</sup> See Gabriel Moss and Bob Wessels, General Introduction to the EU Insolvency Law Framework and Principles with regard to Financial Institutions, in: Gabriel Moss and Bob Wessels (eds.), *EU Banking and Insurance Insolvency*, Oxford University Press, 2006, 3ff.

<sup>17</sup> See Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, 2004, 9ff.; Francisco J. Garcimartín, *The Review of the EU Insolvency Regulation: Some General Considerations and Two Selected Issues (Hybrid Procedures and Netting Arrangements)*, Report of the Netherlands Association for Comparative en International Insolvency Law 2011, *ius*, 2012, 19ff (this report is available via [www.naciiil.org](http://www.naciiil.org)).

<sup>18</sup> See Bob Wessels, *The Hermeneutic Circle of European Insolvency Law*, in: E.H. Hondius, J.J. Brinkhof, M. de Cock Buning (red.), *Contracteren internationaal* (Opstellenbundel aangeboden aan prof. mr. F. Willem Grosheide), Den Haag: Boom Juridische Uitgevers, 2006, 351ff.

<sup>19</sup> Article 7(2): “The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.” In the Dutch text Article 7 refers to “*goed*” (a legal term used to describe all property: tangible, intangible, rights ownership, entitlements and claims), however, this should be interpreted for the purposes of Article 7 as the Dutch term “*zaak*” (which refers to all

7(2) regulates the legal consequences in the event of the seller's insolvency following the transfer of an asset (from seller to purchaser). Article 7(2) says that the opening of main insolvency proceedings against the seller of an asset, after delivery of the asset, (i) shall not constitute grounds for rescinding or terminating the sale, and (ii) shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of the main proceedings. As a result of the application of Article 7(2) the contract (sale of assets) is not vitiated and the legal consequences of the contract (acquiring ownership by the purchaser) in principle become operative. Provided the purchaser continues paying his instalments he will be the owner as soon as the last term expires. The scope of the provision gives it priority over the rules of national law which deviate from Article 7(2) or contract provisions with a different content.<sup>20</sup> Remarkably this is a uniform substantive rule of (at least in the Netherlands) general private law or of insolvency law, created on a European level, but hardly debated in national legal circles.

### 1.3. The harmonisation period

11. Over thirty years after the first confrontation between EU law and national law of a Member State in a matter of insolvency, the book of rules for EIL turns to a next page: harmonisation. On 15 November 2011 the European Parliament (EP) approved a "Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law". In its motion the EP requests the Commission to submit to Parliament, on the basis of Article 50, Article 81(2) or Article 114 of the Treaty on the Functioning of the European Union (TFEU), one or more legislative proposals "relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives."<sup>21</sup> One of the categories on the EP's wish-

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moveable and immovable assets). A similar observation can be made in relation to the French text (referring to "*bien*" rather than "*chose*").

<sup>20</sup> For a further treatment, see Bob Wessels, *International Insolvency Law*, 3<sup>rd</sup> ed., Deventer: Kluwer, 2012, para. 10670ff. The wider EU context for retention of title problems include Article 4(1) Directive 2000/35 on late payments, Articles 3, 4 and 14 Rome I Regulation.

<sup>21</sup> See Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)). In the motion the EP confirms "that the

list concerns matters related to harmonisation of national insolvency law. As topics ready for research on the suitability of harmonisation the EP suggests (amongst others), certain aspects of the opening of insolvency proceedings, certain aspects of the filing of claims, aspects of avoidance actions and general aspects of the requirements for the qualification and work of liquidators, which is the EU term for a variety of insolvency office holders working in the EU Member States. Is this in any way feasible or is it “all hell breaks loose”? As these harmonisation-proposals are the object of a different study, soon to be published, I will not dwell on them now.<sup>22</sup>

## 2. Insolvency law and its role in establishing a better Europe

12. I now turn to the second theme, the question whether insolvency law can serve in establishing a better Europe. Most remarkably the European Parliament is indicating as a possible legal basis for its recommendations for harmonisation Article 114 of the Treaty on the Functioning of the European Union (TFEU). By this suggestion “insolvency” is directly placed within the goals of the establishment of the internal market.<sup>23</sup>

### 2.1. Better functioning of the internal market

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recommendations respect the principle of subsidiarity and the fundamental rights of citizens”. For all related documents, see <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN>. According to Wikipedia (visited 3 October 2012) a level playing field is “... a concept about fairness, not that each player has an equal chance to succeed, but that they all play by the same set of rules. A metaphorical playing field is said to be level if no external interference affects the ability of the players to compete fairly. Government regulations tend to provide such fairness, since all participants must abide by the same rules. Examples of such regulation: building codes, material specifications and zoning restrictions, which create a starting point/ a minimum standard --- a ‘level playing field’.”

<sup>22</sup> See Ian F. Fletcher and Bob Wessels, *Harmonisation of Insolvency Law in Europe*, Reports presented to the *Nederlandse Vereniging voor Burgerlijk Recht* (Netherlands Association of Civil Law), to be discussed in its Annual meeting, December 14, 2012, The Hague, The Netherlands (referred to as *Harmonisation Report 2012*).

<sup>23</sup> In general on harmonisation and the internal market, see Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer / T.Wiedmann (Eds.), *Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen*, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 37.

13. Title VII (“Common Rules of Competition, Taxation and Approximation of Laws”) TFEU, contains a Chapter 3 (“Approximation of Laws”), which includes Article 114 (ex Article 95 TEC). Its first paragraph provides:

“1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”<sup>24</sup>

14. In literature, the term “internal market” (sometimes referred to as: single market) has been described as a territorial (geographic) space within which there is full mobility of production factors, such as labour, capital, goods and services, as an efficient allocation of these factors results in a higher level of welfare in the Union.<sup>25</sup> According to the German scholars Wiedmann and Gebauer this internal market (*Binnenmarkt; marché intérieur*) has developed from a step-by-step developing project to a permanent duty of the Union (*Binnenmarktauftrag als Daueraufgabe der Union* or Internal market as an endurance assignment).<sup>26</sup> The term “internal market”, therefore, has a dual meaning. Next to the indication of a certain space, it also relates to a goal, to strive for two complementary avenues: (i) measures for the approximation of the provisions laid down by law<sup>27</sup> and (ii) provisions which do not allow (private) obstacles in inter-Member State traffic, such as hindrances to the freedom of movement of workers within the Union<sup>28</sup>, to the freedom of establishment (for corporations)

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<sup>24</sup> Article 26 TFEU (ex Article 14 TEC): “1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. 3....”

<sup>25</sup> See R.W.E. van Leuken, *Internemarktbeginnselen en privaatrecht*, WPNR 2011/6901 (Themanummer “Algemene beginselen van Unierecht en het privaatrecht”).

<sup>26</sup> See Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer / T.Wiedmann (Eds.), *Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen*, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 32.

<sup>27</sup> See Articles 114 and 115 TFEU. For an overview of these measures related to civil law in Dutch literature, see Asser/Hartkamp 3-I\* 2011, nr. 235ff.

<sup>28</sup> In a recent Opinion delivered on 13 September 2012, Advocate General Sharpston has concluded that Article 45 TFEU (Freedom of movement for workers within the Union), must be interpreted as meaning that a residence requirement such as that included in the Swedish *skuldsaneringslagen* (an insolvency measure, not listed in Annex A of the EU Insolvency Regulation) as a condition for obtaining debt relief constitutes a restriction on the

(Article 49 TFEU)<sup>29</sup> and the prohibitions regarding free competition (e.g. Articles 101 and 107 TFEU on State Aid).

15. My point of view is that in this concept of “internal market”, the creation of a European community and the further establishment of the European Union, including its four freedoms, strongly fostering and enhancing trade, business and investments across national boundaries, can not be regarded as complete without a transparent and solid insolvency system. This submission is not new. It has already been made over a decade ago by Manfred Balz, one of the architects of what now is the EU Insolvency Regulation, in that a “functioning bankruptcy system is essential to any economy that aspires to achieve the freedoms of establishment of business and the free flow of goods, services and capital, and to integrate national markets into a unitary internal market.”<sup>30</sup> Of course, certain stigma still exist, such as a debtor’s insolvency indicates his overall failure in business or reflects presumptions of fraud to the detriment of its creditors, but generally in business life, insolvency has grown to become a calculable and acceptable enterprise risk.<sup>31</sup> In most more developed legal systems insolvency law has grown in importance, although most countries continue to discuss and struggle with the desirable approach and therefore the goals of insolvency law.

16. As I see it, companies and businesses operate best in a challenging environment, which is beneficial for all parties concerned, such as suppliers, the companies’ management, employees, creditors, customers, shareholders and the tax collecting government. This logically means that uninterrupted continuity of any business is a desideratum in itself, as it means: (i) the possibilities of continuing employment, including (ii) job security for management, (iii) the (guided by good management) possibility of efficiently employing all the available means to run a good business (e.g. natural resources, technical equipment), (iv) a share in the profits (dividend) for shareholders, (v) the possibility to continue all other

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freedom of movement of workers because it is liable to prevent or deter a worker from leaving Sweden to take up employment in another Member State (in the case at hand: France).

<sup>29</sup> For a discussion, see: Arie Van Hoe and Melissa Vanmeenen, *Insolvency law and the Freedom of Establishment: Friend or Foe?*, in: Rebecca Parry (ed.), *The Reform of International Insolvency Rules at European and National Level*, Nottingham, Paris: INSOL Europe 2011, 179ff.

<sup>30</sup> Manfred Balz, *The European Convention on Insolvency Proceedings*, in: *70 American Bankruptcy Law Journal* 1996, 485ff, at 490.

<sup>31</sup> See Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus & Harry Rajak, *A Global View of Business Insolvency Systems*, The World Bank, Washington DC, 2010, 143, submitting that insolvency is an enterprise risk.

relations, with small suppliers of goods and services and buyers/customers of the business' products and services, and (vi) the continuous stream of tax-money to the State, to finance its chosen policies. In this respect, insolvency law is the vital core and provider of strength and resilience of any economic system. If the financial difficulties go from bad to worse, insolvency laws should have available rules to timely prevent these difficulties or respond to them, to formulate a optimum approach to a solution, within which all rules of company law, contract law, the law on securities, employment law, and of course insolvency procedural law itself are taken into account. If indeed "insolvency" is a true part of the legal skeleton for an internal market in the meaning of Article 114 TFEU, a design for an insolvency law that will meet the key objectives within the focus of EU policies on the longer term must in its substantial and procedural forms be brought into alignment with norms and principles which are predominant in the non-insolvency law area.<sup>32</sup>

17. Today, I miss a coherent vision of the structural place of insolvency in relation to the realisation of the internal market. With a focus on corporate insolvency law the participants in the market themselves could take responsibility by discussion and drafting certain principles on how for instance a restructuring market would look like and, thus, assist the European Commission in further developing its ideas. Here a call is made to the European equivalent of associations of industry, trade, employees, banks, unions and insolvency specialists to further the debate on this important topic.

## 2.2. Initiatives regarding natural persons?

18. Although the European Parliament's motion of November 2011 is certainly challenging, it is just as imperfect, as the great majority of recommendations it covers do not relate whatsoever to natural persons. In fact it refers only once (possibility of harmonisation of opening of insolvency proceedings) to "natural persons". Is there a role for the EU in this regard?

19. In the last two decades Member State's have adopted specific insolvency regimes regarding natural persons (sometimes also "consumers", "non-merchants" or "non-traders"),

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<sup>32</sup> In our Harmonisation Report 2012 Fletcher and I present an Agenda for future work.

whilst such rules still are lacking in many countries, including – in Europe – e.g. in Bulgaria, Greece, Italy, Hungary, Lithuania, Luxembourg and Croatia, the last one being the 28th EU Member State as of July 1, 2013.<sup>33</sup> Generally, the reason for a national treatment of the phenomenon seems to be that in the area of natural persons many times some other purposes in legislation may have a primary attention, such as the protection of a certain minimum of assets and income, available for an individual natural person (and his household) or the specific goal of “financial rehabilitation of over-indebted individuals and families and their reintegration into society”.<sup>34</sup> Such a rehabilitation may include specific support on debt counselling, participating in social welfare programs or certain obligations to be fulfilled during participation in an collective insolvency proceeding or debt rescheduling scheme (such as the duty to inform a court or an insolvency supervisor on new received income, the duty to apply for a job, and so on). Not the EU, but the much larger geographically spread Council of Europe has formulated as a goal for insolvent natural persons their “reintegrating in society”, which is the active component of the more passive view of the EU, being the “... view to guaranteeing a decent life to the poorest debtors (as a principle of social justice).”<sup>35</sup>

20. Another reason for leaving out natural persons by the European Parliament certainly will be the largely different views on the fair and equitable allocation of consumer credits risks and the society’s view on providing rehabilitation or a fresh start to a natural person/debtor who has (unfortunately) fallen into a situation that he reasonably can not repay all its pre-insolvency debts. Furthermore, Member States’ have largely different rules regarding the

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<sup>33</sup> Lithuania will introduce legislation regarding debt rescheduling for natural persons as of 1 March 2013, see Law No. XI-2000, VŽ, 19 May 2012, No. 57-2823. In Hungary and Luxembourg drafts for laws on discharge regimes are pending, whilst in Italy Law 3/2012 generally deals with debts of natural persons but does not provide a discharge.

<sup>34</sup> See recommendation 4(f) of the Council of Ministers of the Council of Europe (20 June 2007) to its (over 40) member states “ [to] introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by: .... f. encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market”, Recommendation CM/Rec(2007)8, with a follow up Resolution 294 (2009), <https://wcd.coe.int>. See Jason J. Kilborn, Expert recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010, see <http://ssrn.com/abstract=1663108>.

<sup>35</sup> See page 2 of the Terms of Reference for the EU Group of Experts on Cross-border Insolvency [http://ec.europa.eu/justice/newsroom/contracts/files/2012\\_expert-group-insolvency/terms\\_of\\_reference\\_group\\_insolvency\\_en.pdf](http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf). From another angle it has been submitted that “..... consumer insolvency poses a systemic risk to global financial stability”, for which reason the World Bank presently is conducting a critical comparative study of existing legal regimes to help nations design, modernise or revise insolvency law systems applicable to natural persons. See [http://siteresources.worldbank.org/EXTGILD/Resources/WB\\_TF\\_2011\\_Consumer\\_Insolvency.pdf](http://siteresources.worldbank.org/EXTGILD/Resources/WB_TF_2011_Consumer_Insolvency.pdf).



question what belongs to the insolvency estate<sup>36</sup> or – on the contrary – what is exempted from such an insolvency estate<sup>37</sup>, the contributions to be made to the estate, the extent and the nature of the discharge (“fresh start”), restrictions imposed on the debtor during the proceedings or as a condition for such a discharge, the events in which such proceedings may be terminated, the avoiding powers of creditors, the duration of the proceedings, just to name a few.<sup>38</sup> In July of this year, the German scholar Hoffmann (with its COMI in Estonia) concluded that in Europe “a minimum degree of comparability can hardly be determined”.<sup>39</sup>

21. Presently, on a European level, insolvency of natural persons mainly is known from the phenomenon of “bankruptcy tourism”, where a natural person is shifting its COMI to another Member State, to be in the position to have the court of that Member State open collective insolvency proceedings, to which the respective debtor will be a subject. It is rather likely that such a choice is sparked by the lighter nature or the specific legal effects of these proceedings as similar proceedings would have had if the debtor would have had its COMI in the Member State from which he travelled, including the durations of the proceedings.<sup>40</sup>

22. This topic creates at least two problems. The first one is the challenge that it puts on the application of the Insolvency Regulation for instance with French courts (especially in the Alsace) stretching the requirements for the determination of the COMI of (German)

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<sup>36</sup> H. Rajak, Determining the Insolvent Estate – A Comparative Analysis, 20 International Insolvency Review, Spring 2011, Issue 1, 1ff.

<sup>37</sup> D. McKenzie Skene, The Composition of the Debtor’s Estate on Insolvency: A Comparative Study of Exemptions, 20 International Insolvency Review, Spring 2011, Vol. 20, Issue 1, 28ff.; Rolef J. de Weijts, Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons, 21 International Insolvency Review 2012, 67ff.

<sup>38</sup> See the Consumer debt report II, Reports of Findings and Recommendations, London: INSOL International, 2011, and Signe Viimsalu, The Over-Indebtedness Regulatory System in the light of the Changing Economic Landscape, in: Juridica International XVII/2012, 217ff, also available via [www.juridicainternational.eu/public/pdf/ji\\_2010\\_1\\_217.pdf](http://www.juridicainternational.eu/public/pdf/ji_2010_1_217.pdf).

<sup>39</sup> Thomas Hoffmann, The Phenomenon of “Consumer Insolvency Tourism” and its Challenges to European Legislation, Journal of Consumer Policy, July 2012 (DOI 10.1007/s10603-012-9207-8). For an earlier study on the same topic, see Thomas Hoffmann, Consumer Insolvency Tourism and the EIR – Stuck between Convergence Needs and the Stockholm Action Plan?, in: Rebecca Parry (ed.), The Reform of International Insolvency Rules at European and National Level, Nottingham, Paris: INSOL Europe 2011, 191ff.

<sup>40</sup> See A. Walters and A. Smith, ‘Bankruptcy Tourism’ under the EC Regulation on Insolvency Proceedings: A View from England and Wales, International Insolvency Review, Winter 2010, Vol. 19, Issue 3, 181ff.; Marc D’Avoine, *Internationale Zuständigkeit des deutschen Insolvenzgerichts bei offenkundiger “Rückkehroption” des ehemals selbständig wirtschaftlich tätigen Schuldners mit dem Ziel der Restschuldbefreiung*, Neue Zeitschrift für Insolvenzrecht (NZI) 8/2011, 310ff.

debtors<sup>41</sup>, an English court annulling a previous order opening bankruptcy proceedings of a debtor (a German notary, presenting himself as sports photographer in the UK), which was made on false information regarding his COMI<sup>42</sup>, and a German court applying – beyond its deliberate narrow interpretation – the public policy defence against recognition of such proceedings, opened for instance in England.<sup>43</sup> There may certainly be a degree of sympathy for these cautious judges, but the problem perceived should be solved, not by judges deciding in ad hoc cases, but by the legislator, based on a well balanced set of legal rules.

23. Secondly, such forum shopping may be beneficial for an individual debtor, but even if it is resulting in a genuine COMI move, it may appear as an unfair circumvention of national rules and in the case of insolvency can result in creditors losing out. A rather recent example relates to Ireland, where at least thirteen Irish property developers, who owe the State's National Asset Management Agency (NAMA) at least €2 billion, have been declared bankrupt in the UK. By doing so they escaped the draconic Irish 12 years' period to be discharged from debts, and enjoyed the period from adjudication to automatic discharge, which under current UK insolvency law is one year. The Minister for Justice of Ireland, Alan Shatter, is cited: "The very essence of having a common market is that you need to have common rules with regard to access to bankruptcy legislation and not rules which appear to be in conflict with each other and can provide incentives for people to engage in bankruptcy tourism."<sup>44</sup>

24. In the EU, however, there are no such common rules. It has been observed that in Europe no harmonisation of legislation is on the agenda either, given the huge differences in domestic proceedings.<sup>45</sup> Referring to the research of Kilborn and of Hoffmann, certain topics are (slowly) converging. A recent examples of this tendency is to limit the length of such proceedings, e.g. in Ireland, Germany and Greece. This tendency flows from changing views on how to respond to debt-overburdened natural persons in a modern credit-based society.<sup>46</sup>

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<sup>41</sup> See e.g. Court of Appeal Colmar 16 September 2008, discussed in: Bob Wessels, *International Insolvency Law*, 3rd ed., Deventer: Kluwer, 2012, para. 10561a.

<sup>42</sup> High Court of Justice 29 August 2012 [2012] EWCH 2432 (Ch) (*Sparkasse Hilden Ratingen Velbert v Horst Konrad Benk and the Official Receiver*).

<sup>43</sup> Landesgericht Cologne 14 October 2011, NZI 2011, 957, correctly criticised by Vallender, EWiR 2011, 775ff.

<sup>44</sup> The Financial Times 6 July 2012.

<sup>45</sup> See also J. Israël, *Shopping voor een schone lei*, *Nederlands Tijdschrift voor Burgerlijk Recht* 2012/19,

<sup>46</sup> See too Joseph Spooner, *Long Overdue: What The Belated Reform of Irish Personal Insolvency Law Tells Us About Comparative Consumer Bankruptcy*, in: 86 *American Bankruptcy Law Journal* 2012, 243ff, at 298, on

The first signs of another development point at a tendency to limit rights of secured creditors. In the ongoing financial crisis, in nearly all Member State's many over-indebted families will have to cope with settling their debts, especially struggling mortgage holders. Presently in Ireland<sup>47</sup> a draft of a Personal Insolvency Bill 2012 is being discussed, introducing (amongst others) three non-judicial based processes, one of which is the Personal Insolvency Arrangement (PIA), which applies to both unsecured debt (of any amount) and secured debt of up to € 3 million. In an Opinion of September 14, 2012, the European Central Bank (ECB) stated that it generally supported the Irish reforms, but observes that the PIA reforms are "unprecedented" both in scope (including secured debt) as in amount, and recommends that the limit for these PIA's, the category dealing with the biggest debtors, be reduced to € 1 million: "In particular certain features of the proposed PIA regime may have negative implications for credit institutions in their capacity as creditors and even for the wider functioning of the financial system", asserts this Opinion.<sup>48</sup>

25. On 12 September 2012, the President of the European Commission, Mr Barroso, delivered his State of the Union 2012 Address. He said:

"..... Our agenda of structural reform requires a major adjustment effort. It will only work if it is fair and equitable. Because inequality is not sustainable. In some parts of Europe we are seeing a real social emergency. Rising poverty and massive levels of unemployment, especially among our young people. That is why we must strengthen social cohesion. It is a feature that distinguishes European society from alternative models. Some say that, because of the crisis, the European Social model is dead. I do not agree. Yes, we need to reform our economies and modernise our social protection systems. But an effective social protection system that helps those in need is not an obstacle to prosperity. It is indeed an indispensable element of it. Indeed, it is precisely those European countries with the most effective social protection systems and with the most developed social partnerships, that are among the most successful and competitive economies in the world. Fairness and equity means giving a

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the rapid convergence in many European jurisdictions to introduce fast-track insolvency proceedings for natural persons in case on "no income, no assets".

<sup>47</sup> I understand that similar ideas are discussed in Greece and Norway.

<sup>48</sup> "If made use of by large numbers of debtors, the PIAs could significantly increase default rates and thus impact on both the capital adequacy and liquidity position of credit institutions at a time when they are still undergoing restructuring", see Opinion of 14 September 2012 on measures relating to personal insolvency (CON/2012/70), published on the ECB's website. I am leaving aside the question whether Ireland, after adopting the Bill, will propose to include these "non-judicial" proceedings to be listed on Annex A of the Insolvency Regulation.

chance to our young people. We are already doing a lot. And before the end of the year, the Commission will launch a Youth Package that will establish a youth guarantee scheme and a quality framework to facilitate vocational training.” Let’s keep these words in mind.

26. In its Opinion mentioned, the ECB also invites the Irish authorities “to make it easier for secured creditors to repossess mortgaged properties upon default by the debtor.” It is difficult to see how such a statement can be justified. I seriously query whether, in the recent circumstances, with hundreds of thousands of family’s overburdened with debt, the unconditional execution by banks is the right answer. Isn’t it time, given the statement of Commission’s President Barroso and in the light of desirabilities expressed in the Treaty on European Union (“to deepen the solidarity between their peoples, while respecting their history, their culture and their traditions”, “to promote economic and social progress for their peoples”, as well as e.g. Article 3(1) TEU (“The Union’s aim is to promote peace, its values and the well-being of its peoples”) to tackle this very sad and wide spread problem on a EU level and introduce certain limitations on the realisation of secured rights, such as a postponement of execution under certain circumstances, with a discretionary position for a court. Spooner’s recent statement regarding draconian personal bankruptcy laws in Ireland: “Thus the novel nature of the problem of consumer over-indebtedness has called for novel political responses”<sup>49</sup> is certainly ready to be addressed to the EU legislator.<sup>50</sup>

### 3. Actors in the field of European Insolvency Law

Ladies and gentlemen,

I would like to finalise this lecture with some remarks on the actors in the field of European Insolvency Law. I fully agree with Paul Omar’s recent observation that creating insolvency law and rules in practice is a collaborate effort by judges, practitioners and academic

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<sup>49</sup> Joseph Spooner, Long Overdue: What The Belated Reform of Irish Personal Insolvency Law Tells Us About Comparative Consumer Bankruptcy, in: 86 American Bankruptcy Law Journal 2012, 243ff, at 298.

<sup>50</sup> Jean Luc Vallens, The Future of the European Regulation on Insolvency Proceedings, in: Rebecca Parry (ed.), The Reform of International Insolvency Rules at European and National Level, Nottingham, Paris: INSOL Europe 2011, 121ff., goes much further by submitting that harmonisation seems possible in the area of “relief for individual debtors after bankruptcy, and discharge and new start”. On October 10, 2012, the World Bank published its Draft Report on the Treatment of the Insolvency of Natural Persons (inviting feedback by November 9, 2012), see <http://siteresources.worldbank.org/INTGILD/Resources/WBPersonalInsolvencyReportOct2012DRAFT.pdf>.

scholars.<sup>51</sup> I am not hesitant to address these others, but the first actor which comes to mind is the legislator itself, either the EU legislator or national legislators. In this lecture I limit myself to the earlier one.

### 3.1. Legislature

27. The EU legislator acts as the fundamental safeguard of the unity and coherence of the EU law system. As such, one of its main tasks is to guarantee the completeness and internal consistency of all the parts forming the EU legal system on cross-border insolvency, and, in future the inclusion of “insolvency” in the further development of the internal market. Leaving aside the awkward, burdensome and politically sensitive history of the coming into effect of the EU Insolvency Regulation, the legislative system itself has an inherent conceptual failure. In the present system individual Member States may propose to list insolvency proceedings in Annex A. There is no evidence that there is any check by an EU body, which leads to the sheer unilateral promotion of a national definition to an Annex with as a result a “European effect” to this national proceeding. As I have analysed elsewhere the present framework opens the door for opportunistic behaviour by a Member State placing “sort of” insolvency proceedings in the Annex, which is detrimental for the trust to put in the core base of the system of automatic recognition of insolvency judgments in the context of the Insolvency Regulation.<sup>52</sup>

28. I regret to inform you that also concerning the legislative process of evaluating the Insolvency Regulation the Commission is having problems – to put it mildly – to receive a sufficient mark. Article 46 of the Insolvency Regulation provides that the Commission will submit at the latest on 1 June 2012 a report concerning the application of the Regulation accompanied, if necessary, by a proposal for adaptation of the Regulation. This term has been exceeded. How come? Well, anyone with only a bit of knowhow and experience in these types of evaluations would calculate some 18 months for research, assessment, discussion and preparation for such a report and its accompanying proposal for adaptations. In April 2010, in an address to the European Parliament Mrs Vivian Reding on behalf of the European

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<sup>51</sup> Paul Omar, *The building blocks of insolvency reform: Is law enough?*, in: *eurofenix* Summer 2012, 32ff.

<sup>52</sup> See Bob Wessels, *What is an insolvency proceeding anyway?*, *International Insolvency Law Review (IILR)* 4/2011, 491ff.

Commission, announced: “Pursuant to Article 46 of the regulation, not later than 1 June 2012, the Commission shall present an application report and amendment proposal if needed. .... Ten years after its entry into force, it is expected that the regulation will need a new facelift. Therefore, the Commission will launch a large study on this issue at the beginning of 2011.” At that time, on 10 January 2001 another Commissioner, Mr Barnier, in the context of the work for a new framework for crisis management in the financial sector, said: “By June 2012 the Commission shall present an application report and amendment proposal if needed.”<sup>53</sup>

29. Unlike the legislative commandment and the promises given, we now know that the Commission (note that Ms Reading is in charge, not Mr Barnier) clearly failed to meet this legislative deadline. The first step to action by the Commission however was not taken in the beginning of 2011, but 14 months later, in March 2012, by setting out the public consultation I mentioned earlier.<sup>54</sup> Since April 2012 an Evaluation study is being conducted (performed by a consortium of the Universities of Heidelberg and Vienna) as well as a Study for an impact assessment of a revision of the Regulation, in which identified policy options in terms of their economic, social and fundamental rights impacts as well as the impacts on Member States’ judicial systems are assessed. This has been done by a multi-disciplinary consultancy, based in Brussels.<sup>55</sup> As far as I am informed the latter impact study was available for the Commission early September 2012, whilst the Heidelberg/Vienna report is due second week October 2012. A “Group of Experts on Cross-border Insolvency” assists the Commission in the preparation of a legislative proposal for a revision of the Insolvency Regulation and the adoption of this proposal is foreseen (as indicated in the Commission Work Programme 2012) for December 2012.<sup>56</sup> It is uncertain whether both reports of a few hundred pages together will sincerely influence the nearly finalised work in the process of drafting of the legislative proposal. For various reasons this state of affairs is – to say the least – unfortunate. In my opinion the whole process could have gained from the acknowledgement of the basic imperative to start early which such a process and with strong leadership by (someone appointed by) the Commission in managing and coordinating this whole process.

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<sup>53</sup> Ms Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship. Mr Barnier is the Commission’s member for Internal Market and Services. See [www.europarl.europa.eu](http://www.europarl.europa.eu). For sources see Bob Wessels, EU Insolvency Regulation: Where to go from here?, *International Insolvency Law Review* 3/2011, pp. 298-308.

<sup>54</sup> See footnote 1. See also [http://ec.europa.eu/justice/newsroom/civil/opinion/120326\\_en.htm](http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm).

<sup>55</sup> I have participated in the Panel of Senior Advisors of this Study.

<sup>56</sup> I am a member of this Group of Experts.

30. A second flaw in the Commission's approach is – at least in the area of corporate insolvency – to recognise and acknowledge that for the necessity to include insolvency law within the achievements to develop such an internal market, parties in this market seems to play only a limited role. However, a piece of light entered the room two weeks ago. On 3 October 2012, the European Commission expressed its wish for a strong, deep and integrated Single Market which creates growth, generates jobs and offers opportunities for its European citizens which were not there 20 years ago. I quote: “The completion of the Single Market is a continuous exercise and is a central element of the European growth agenda to address the current economic crisis. This is why the European Commission has today adopted Single Market Act II, putting forward twelve key actions for rapid adoption by the EU institutions.” These actions are concentrated on what is called “four main drivers for growth, employment and confidence”, being, I am quoting again: “a) integrated networks, b) cross border mobility of citizens and businesses, c) the digital economy, and d) actions that reinforce cohesion and consumer benefits.”. Interestingly, section b) has as a third action point: (iii) modernise insolvency proceedings, starting with cross-border cases, and contribute to an environment that offers second chances to failing entrepreneurs.<sup>57</sup> Doesn't it reflect the EU legislatures' believe in the power of the full manufacturability of this internal market? It seems that the EU

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<sup>57</sup> [http://ec.europa.eu/internal\\_market/smact/index\\_en.htm](http://ec.europa.eu/internal_market/smact/index_en.htm). For ease of reference I quote the specific abstract dealing with insolvency, see the Communication related to the “Single Market Act II. Together for new growth, at page 7, “Key action 7: Modernise EU insolvency rules to facilitate the survival of businesses and present a second chance for entrepreneurs”, with the following text: “Businesses operating in Europe benefit from an overall positive business environment, which the EU is further improving through its better regulation agenda. But more can be done. Europe needs modern insolvency laws that help basically sound companies to survive, encourage entrepreneurs to take reasonable risks and permit creditors to lend on more favourable terms. A modern insolvency law allows entrepreneurs to get a second chance and ensures speedy procedures of high quality in the interest of both debtors and creditors. We thus need to establish conditions for the EU wide recognition of national insolvency and debt-discharge schemes, which enable financially distressed enterprises to become again competitive participants in the economy. We need to ensure simple and efficient insolvency proceedings, whenever there are assets or debts in several Member States. Rules are needed for the insolvency of groups of companies that maximise their chances of survival. To this end, the Commission will table a legislative proposal modernising the European Insolvency Regulation. However, we need to go further. At present, there is in many Member States little tolerance for failure and current rules do not allow honest innovators to fail 'quickly and cheaply'. We need to set up the route towards measures and incentives for Member States to take away the stigma of failure associated with insolvency and to reduce overly long debt discharge periods. We also need to consider how the efficiency of national insolvency laws can be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market. To this end, the Commission will table a Communication together with the revision of the European Insolvency Regulation.” See [http://ec.europa.eu/internal\\_market/smact/docs/single-market-act2\\_en.pdf](http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf). The Communication mentioned is set for the 4<sup>th</sup> Quarter 2012. No doubt there will be further discussion on this key action.

is taking the lead in responding to problems which increasingly transcend national boundaries, either because the problems do not lend themselves to solely national regulation or because they involve the interests of the international community as a whole. In this new environment the traditional areas of EU law or national law (such as private law, criminal law, administrative law or insolvency law) acquire an increasingly internationalised character, in which its content is formed on different levels, with different legal measures (including soft law mechanisms), established either “top-down” the legislation-ladder or “bottom-up”, initiated by private actors or a mix of such modes of operation.<sup>58</sup> Here, in matters of insolvency, the ears of the Commission should be much closer to the European ground. The backbone of the legal framework for insolvency as an integral part of the internal market is a balanced development of decision making, with time for consultation, study, constructive criticism and debate, with strong involvement of all players in the market.<sup>59</sup>

### 3.2. Courts

32. So far for making rules. “In the field of insolvency there are two actors whose integrity and experience are central to the functioning of the insolvency system: judges and administrators”.<sup>60</sup> This submission is made by professor Jay Westbrook from Austin, Texas, who delivered the Edwin Coe lecture in 2008. Of importance for the judicial area in Europe is

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<sup>58</sup> See e.g. Petra Buck-Heeb / Andeas Dieckmann, *Selbstregulierung im Privatrecht*, Mohr Siebeck, 2010; Matthias Knauf, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*, Mohr Siebeck, 2010; Jan M. Smits, The Complexity of Transnational Law: Coherence and Fragmentation of Private Law, in: Netherlands Reports to the Eighteenth International Congress of Comparative Law (Washington 2010), Antwerpen-Oxford 2010, 113ff.; Jan M. Smits, *Private Law 2.0. On the Role of Private Actors in a Post-National Society*, Eleven International Publishing, The Hague, 2011; Sam Muller et al. (Eds), *The Law of the Future and the Future of Law*, Torkel Opsahl Academic Epublisher, Oslo, 2011.

<sup>59</sup> In our Harmonisation report, mentioned earlier, Fletcher and I have developed seven criteria – not necessarily in this order and overlaps could occur – which may point at a direction to take in the process of developing a legislative skeleton for harmonisation of insolvency: (i) consistency with international norms, (ii) goals for the EU, (iii) take stock, (iv) formulate overriding objectives, (v) draft flexible legislation, (vi) examine whether there is need for action, (vii) strive for a fair balance between the (often competing) interests of creditors and other parties concerned. For a framework that could guide public policy-makers in assessing whether, and in what form, private regulation can prove the most appropriate form of policy intervention, see the interesting six-step process of Fabrizio Cafaggi and Andrea Renda, *Public and Private Regulation. Mapping the Labyrinth*, in: *The Dovenschmidt Quarterly. International Review on Transitions in Corporate Life, Law and Governance* 2012, nr. 1, 16ff.

<sup>60</sup> Jay Lawrence Westbrook et al., *A Global View of Business Insolvency Systems*, The World Bank, Washington DC, 2010, 203.



the so-called Stockholm-programme. In 2012 within the EU supportive measures have been taken for the benefit of “delivering an area of freedom, security and justice for Europe’s citizens” with the object of guaranteeing “.... respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal and technological change”.<sup>61</sup> This seems easier said than done. However, after the entry into force of the Lisbon Treaty, in December 2009, an Action Plan Implementing the Stockholm Programme has been published aiming actively at strengthening confidence in the European judicial area.<sup>62</sup> It is clear that it focuses on the area of freedom, security and justice, and therefore stays within the (perceived) restrictions of Article 81 TFEU.<sup>63</sup>

33. The Action Plan says: “The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods.” In the area of cross-border judicial co-operation, the corner-stone principle is that of mutual recognition, founded on a high level of confidence in the legal systems of the other Member States. What the system of mutual recognition requires, however, is more: it requires well-founded mutual confidence, thus Pauliine Koskelo, President of the Supreme Court of Finland, adding: “We cannot, however, expect our systems of criminal or civil justice to work well for the citizens of other Member States unless and until they work well in general. If the justice systems don’t function up to standard in the domestic context, they will hardly function up to standard in cross-border situations either. Therefore, we simply cannot escape the fact that adhering to the principle of mutual recognition necessarily entails that the justice systems in each and every Member State must be brought up to standard. This is an urgent and serious common concern in the interest of citizens throughout the Union.”<sup>64</sup>

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<sup>61</sup> European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>).

<sup>62</sup> Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20.4.2010 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>).

<sup>63</sup> At page 4. See C.W.A. Timmermans, *Voorrang van het Unierecht door ‘multilevel’ rechterlijke samenwerking*, SEW February 2012, 50ff, observing that judicial cooperation takes place on three levels: pre-judicial reference procedures to the CJEU, on an informal level and via court cases.

<sup>64</sup> See her address to the IBA Northern Europe Conference, Helsinki 3-4 September 2009, available at [www.kko.fi/47788.htm](http://www.kko.fi/47788.htm).

34. In the insolvency arena, an area of concern is the uncertainty of the existence of common (minimum) standard for an insolvency judges. A first look at the general tableau of “courts” is not encouraging. In many civil law countries insolvency cases are not dealt with by specialised courts (like the bankruptcy courts in the USA), but by a court that has general competence in civil matters and disputes. These countries include Belgium, Czech Republic, Estonia, Germany, France and the Netherlands. In some countries (supervisory) judges could be non-professional lay judges, such as in Belgium, France and the Netherlands. In England, the High Court Bankruptcy Registrars, and throughout the country the county court judges with designated jurisdiction in insolvency matters, oversee individual insolvency proceedings, as the bankruptcy order must be made judicially.<sup>65</sup> I am not aware of any research results related to such questions as whether the judges in these courts are specialised enough (in applying rather complicated insolvency law matters, many times in a rather short time frame) and possess sufficient commercial experience. Only in the last decade useful, but limited data have become available to sketch the general European procedural landscape, resulting in such conclusions as that there is no common European definition for “court”, that there are “radically different” court budgets and that the professional status of judges is not harmonised.<sup>66</sup> The fundamental principle in cross-border insolvency matters within the EU is that recognition of judgments delivered by the courts of the Member States is automatic (Article 16 InsReg) as it “should be based on the principle of mutual trust,” see recital 22 to the Insolvency Regulation and since 2009 in Article 81(4) TFEU. This principle serves as the cornerstone for confidence in the Member State’s judicial capacity. For the very near future systematic examination in this specific field is recommended in an aim to obtain accurate and comparative data on aspects of the functioning of courts in insolvency matters<sup>67</sup> and – if need be – work on a programme to bring the judiciary indeed up to standard. I can therefore fully

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<sup>65</sup> Other types of procedure – such as Individual Voluntary Arrangements (IVA) and Debt Relief Orders (DRO) – are commenced out of court, but the court always has “oversight” in the sense that there can be a reference or an appeal to the court if contested issues arise.

<sup>66</sup> See Alan Uzelac, *Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations*, in: X.E. Kramer and C.H. van Rhee, *Civil Litigation in a Globalising World*, T.M.C. Asser Press, 2012, 175ff. See also the Council of Europe’s Commission for the Efficiency of Justice (CEPEJ) report of September 2012, establishing a reference at European level to evaluate European judicial systems recognised and providing – so the website says – the opportunity to compare, identify, analyse and plan possible improvements on the basis of a detailed picture of the daily functioning of judicial systems in 46 European States and to measure the main trends, see <http://www.coe.int/t/dghl/cooperation/cepej/>

<sup>67</sup> Article 2 (d) InsReg provides: “court” shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings”.

support the reasons to monitor justice sector performance, as recently expressed in the The Hague Institute for the Internationalisation of Law (HiIL)'s Programme Justice Monitoring and Guardians of Justice, one of which is: "(iii) economic growth depends on effective protection of property rights, contractual rights, labor rights, consumer rights, effective debt collection and insolvency."<sup>68</sup>

### 3.3. The insolvency office holder

35. For matters of insolvency the most important actors in nearly any insolvency proceeding in Europe is the insolvency office holder, who will derive its authority from the provisions of domestic law.<sup>69</sup> In an individual case the allocation of functions between a court and an insolvency office holder liquidators, including the legal and operational relationships between them, will be based on law and additional regulations, as well as a country's institutional system, merely related to the requirements to fulfil these actors' functions, including professional and ethical rules that apply to them. As Westbrook indicated, a successful insolvency proceeding is heavily dependent on a skilled and experienced insolvency office holder and court. He also noted a short overview of a few different jurisdictions demonstrated that selection of insolvency office holders, their supervision and their remuneration can be arranged in "quite a number of ways".<sup>70</sup>

36. In a report of 2007, published by the European Bank for Reconstruction and Development (EBRD), a comparative survey has reviewed the manner in which the laws of eight south-eastern European countries make provision for issues such as qualifications, licensing, appointment, removal/retirement/replacement, standards of work and conduct, discipline and remuneration of office holders in insolvency cases.<sup>71</sup> The principal purpose of the survey was

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<sup>68</sup> The other reasons are: (i) mutual trust in justice institutions, in cooperation between the police and the courts, and in fair, effective migration procedures, performance/productivity of justice sector organizations, (ii) human rights, protection of victims, prevention of crime, rule of law and fundamental freedoms, see <http://www.hiil.org/project/Justice-monitoring-guardians>

<sup>69</sup> I am now leaving aside these roles as they are determined by the EU Insolvency Regulation.

<sup>70</sup> Jay Lawrence Westbrook et al., *A Global View of Business Insolvency Systems*, The World Bank, Washington DC, 2010, 208ff.

<sup>71</sup> Jay Allen, Neil Cooper, Ron Harmer, *A Regional Report on Insolvency Office Holders in South-East Europe*, June 2007. See [www.ebrd.com/downloads/legal/insolvency/insolerv.pdf](http://www.ebrd.com/downloads/legal/insolvency/insolerv.pdf). These eight countries are Albania, Bosnia and Herzegovina, Bulgaria, FYR Macedonia, Montenegro, Romania, Serbia, and Slovenia.

to determine whether and the extent to which the respective laws of the countries mentioned make such provision. Aware of the relatively young and rather untested legal regimes related to insolvency in these countries the drafters' main conclusions are: (i) that in all the topics mentioned a variety of approaches have been chosen in a country's laws and regulations, (ii) that there is a clear need for appropriate detailed standards to guide office holders in their work and to improve the basis on which their work can be measured and assessed, and that (iii) in general there is an inadequate disciplinary system for insolvency office holders (either related to the vague ground for disciplinary action or the limited type of available sanctions). This has the look of a provincial patchwork where confidence and trust in the impartial work of an IOH is concerned. As rightly positioned by Kenneth Cork in the UK: "The success of any insolvency system .... is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse".<sup>72</sup>

37. I therefore welcome the European Parliament's proposal to harmonise general aspects of the requirements for the qualification and work of "liquidators". The recommendation includes the liquidator's approval by a competent authority of a Member State or being appointed by a court of competent jurisdiction of a Member State, with proven reputation, educational background, skills to manage the affairs of the insolvent company, being independent and resigning his office in the event of a conflict of interest. At this juncture I may welcome the initiative taken by INSOL Europe for a thoroughgoing research in the national systems of this area and to draft best practices for insolvency office holders.

#### 3.4. Academia

38. Ladies and gentlemen, dear colleagues, looking into our own mirror, we see that true European comparative research is still in its infants' shoes. The organisation of academic research is rather national, with a majority of PhD-research done by individual researchers, hardly cooperating with others, let alone other colleagues from law schools in other

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<sup>72</sup> Cork Report, *Insolvency Law and Practice – Report of the Review Committee* (Chairman, Sir Kenneth Cork) (June 1982, Cmnd. 8558), London, HMSO ISBN 0 10 185580, at para. 732. The report formed the basis for the reform of insolvency law in the UK, resulting in the Insolvency Act 1986.

jurisdictions. Although I agree with Rebecca Parry that significant progress has been made in the development of insolvency law scholarship in recent years<sup>73</sup>, the European Parliament's call for harmonisation evidently will trigger more focused comparative studies<sup>74</sup>. The basic structure of for instance the Academic Forum of INSOL Europe now in place and substantially active since 2007, should consider to organise itself in such a way that it is well placed to undertake such research, preferably in collaboration with the European Law Institute, established last year, when it should decide to do research in certain areas I mentioned before. Undoubtedly, other areas of research could contribute to the delivery of unity and coherence of the EU law system. For instance, the coherence of the procedural rules, laid down in some fifteen directives and regulations of European procedural law has as far as I know never been a subject of serious research involving researchers from several disciplines of law, whilst for instance a rather new concept in insolvency such as cross-border cooperation and communication between courts and liquidators never has been compared with or tested against similar coordination frameworks in Europe which are in place regarding criminal law or tax law.

39. Another area of interest should be the next generation and their introduction into European Insolvency Law. There is an enormous task of a system of arranging and ordering, so that all relevant EU law documents related to insolvency are available via an online directory, the legislative history of the EU Insolvency Regulation should be publically available and the CJEU cases should be systematically listed. Improving the accessibility of primary and secondary sources in a readily and easy way will certainly assist to accelerate capacity building for courts, practitioners and students.

Ladies and gentlemen,

To conclude

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<sup>73</sup> See her Editorial Preface in: Rebecca Parry (ed.), *The Reform of International Insolvency Rules at European and National Level*, Nottingham, Paris: INSOL Europe 2011, ix.

<sup>74</sup> See Rolef de Weijs, *Towards an Objective European Rule on Transaction Avoidance in Insolvencies*, 20 *International Insolvency Review* (2011), 219ff, presenting "a blue print for future European harmonisation" (at 242). See related to this topic however too INSOL Europe Revision Report 2012, the Appendix "Harmonised rules on detrimental acts".

I have argued that “insolvency” is a true part of the legal skeleton for an internal market in the meaning of Article 114 TFEU. 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, as set out in the Europe 2020 strategy, and its very recent initiative to modernise insolvency proceedings and to contribute to an environment that offers second chances to failing entrepreneurs, in the Single Market II Act. I have given some examples of interaction between EU law and national law, the lack of cooperation between Member State to align their implementation efforts and the necessity for a unified and coherent EU law. With insolvency being one of the essential pillars upon which the internal market rests, we presently lack clear concepts, terms and norms as well as guiding principles. This results in the present rather fragmented and inconsistent nature of European insolvency law.

The challenge is to understand and articulate the paradigm shift in insolvency, from the sacrosanct “pay what you owe” to the balanced promotion of the continuity of companies in distress and reintegration of over-indebted consumers into society. Further research and debate should lead to the creation of a design for an insolvency law that continuously will meet the key objectives within the focus of EU policies on the longer term. Overarching and guiding principles then must fit in the overall legal structure for an internal market. More specific, European insolvency law’s substantial and procedural forms should be brought into alignment with norms and principles which are predominant in non-insolvency law area. European insolvency law, in future, will further challenge the tension which exists between underdeveloped legal policies concerning insolvency in the EU and the traditional sometimes out-moded national concepts of insolvency law. There is much to be done, interaction, synchronisation, adjustment, unity, coherence. In my opinion this calls for a coordinating unit, which will operate at EU institutional level. Such an organisation (I now call it European Insolvency Service) would have as an overall aim to develop and maintain a world-class European insolvency law and regulatory framework, to deliver services to insolvency practice (creating forms and maintaining relevant insolvency databases), to assist in the development of a regulation of the insolvency profession, to coordinate basic information to be of assistance to courts, to ensure and facilitate coordination in cross-border cases, to advise government departments and agencies on insolvency and related issues, to provide

information to the public via its website, and to continuously monitor the efficiency and effectiveness of all matters of European insolvency law.

There is a lot to be done. The Academic Forum can be a forerunner here, by creating awareness on these matters, undertake research and maintain its platform for regular dialogue and outreach.

Thank you for your attention.