Reforming the European Insolvency Regulation – a Legal and Policy Perspective

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Regulation 1346/2000

• Widely criticised but works in practice
• European Commission reform proposals – COM (2012) 743
• Also Commission Report and external evaluation study
• Proposals are modest
• Service rather than complete overhaul
General features of Regulation - Jurisdiction

• Jurisdiction to open main insolvency proceedings where debtor has its COMI
• For companies presumption that COMI is that of registered office
• Secondary insolvency proceedings may be opened where debtor has establishment
• Proceedings recognised throughout the EU – Arts 16, 17 and 25
Applicable Law

• Law of State where proceedings are opened governs those proceedings – Art 4
• But lots of exceptions in Arts 5-15
• Opening of insolvency proceedings shall not affect rights in rem where property situated in another Member State – Art 5
• Reg applies to insolvency proceedings listed in Annex
Reform proposals

• General Philosophy
• Extension of the Regulation to cover pre-insolvency procedures
• Jurisdiction to open insolvency proceedings
• Co-ordination of main and secondary proceedings
• Groups of Companies
• Applicable law
• Publicity and improving the position of creditors
General philosophy

• promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment
• Rhetoric and reality
• Extension of Regulation to debt adjustment and ‘debtor-in-possession’ proceedings
• Conclusive effect of Annex remains
• But Commission to examine whether procedure satisfies definition
Pre-insolvency procedures

- Decision to list a procedure up to States
- May be advantageous not to list a procedure
- No automatic EU wide recognition
- But potentially broader jurisdictional base
- UK schemes of arrangement – not necessarily a collective insolvency procedure
- Can be made in respect of foreign registered company if sufficient connection with UK
Jurisdiction to open proceedings

- No change to COMI test but codification of case law
- New duty on bodies to examine whether they have jurisdiction to open proceedings
- Requirement to inform known foreign creditors of decision opening insolvency proceedings in due time so they can challenge it
Co-ordination of main and secondary proceedings

• Secondary proceedings complicates liquidator’s task in main proceedings
• Secondary liquidator not mere minion for collection of assets
• Proposals to improve co-ordination
• Synthetic secondary proceedings, ‘main’ liquidator to be heard before secondary proceedings opened, need not be liquidation proceedings, co-operation duty on courts
Groups of companies

- Currently no provisions on groups but possibility of single COMI for strongly integrated groups
- Reform possibilities – substantive consolidation, procedural consolidation, procedural cooperation
- Latter provisions – also liquidator has standing in proceedings affecting member of same group of companies – definition of group
- Possibility of competing restructuring plans
- Large egos – procedural chaos?
Applicable law

• Only minor changes proposed
• But new rules on location of assets including bank account
• On netting agreements – art 6a
• On contracts of employment – art 10a
• But no changes to art 5 or where relevant law is not that of an EU State
Publicity - improving the position of creditors

- Proposal that relevant decisions in insolvency cases to be published in free, publicly accessible electronic register interconnected with other insolvency registers
- 2 standard forms - one to be sent to creditors and the other for the lodging of claims
- States to indicate a foreign language it accepts for the lodging of claims.
- Foreign creditors have 45 days to lodge their claims
- Foreign creditors have to be informed if their claim is contested and afforded opportunity of providing supplementary evidence to verify their claim.
- Legal representation not mandatory for the lodging of claims
Conclusion

- Modest set of proposals to improve status quo
- Generally to be welcomed
- But rhetoric overblown – may lead to disappointed expectations
- Also some measures not taken – e.g. clarify art 5 and application of Regulation in ‘non-EU’ contexts