A Theory on Abusive Forum Shopping in Insolvency Law

Amir ADL RUDBORDEH*

Introduction

1 The conventional objective of insolvency law is to provide for coordination between creditors in order to maximise the payoffs which they receive, thereby creating efficiencies. Such coordination might not occur naturally as it could demand high coordination costs from creditors.1 It is believed that social welfare will increase when regulations are put in place, facilitating these coordinations.2 The scope of this approach has been extended to that of the EU under the European Insolvency Regulation (the “EIR”).3 Within the era of internationalisation and the EU’s fundamental freedoms, companies establish themselves throughout the EU, bringing with it new problems of coordination, now at a European level. It has been attempted by the EIR to solve these problems, aiming for of coordination, efficiency and effectiveness.4 Yet, after careful review, it would seem that the EIR operates on a system which is far from ideal for the provision of more efficiency in cross-border insolvencies.5 The integrated COMI model was meant to prevent forum shopping by allocating jurisdiction towards the place of the debtor’s ‘true’ location.6 There are however many cases of COMI shifting within the EU after the EIR entered into

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* Amir Adl Rudbordeh is a graduate of the dual LL.M. Corporate and Insolvency Law masters programme of the Nottingham Trent University and Radboud University Nijmegen. This article is based on his graduation thesis, and published book, A. Adl Rudbordeh, Forum shopping in insolvency law (2016, Celsus Juridische Uitgeverij, Amersfoort).


2 Ibid., at 1201.


4 Recital (2) and (3) EIR.

5 See e.g. B. Hess et al., Report on External Evaluation of Regulation N°1346/2000/EC on Insolvency proceedings (JUST/2011/JCIV/PR/0049/A4) (Annex I), at Q12, where 85% of the Member States’ respondents stated that the EIR does not work effectively and efficiently for the insolvency of a multinational group of companies; see also Annex I of the External Evaluation Report, Q7, where 42% of the Member States’ respondents declared to have problems with the interpretation of the COMI concept.

6 That is to say, the place where the company is truly located, as also perceived by third parties, rather than its place of incorporation.
force, demonstrating the realistic opportunity to choose a different forum.\(^7\) In addition, it has been argued empirically that a COMI shift is virtually effortless for multinational enterprises.\(^8\) Although the choice for the creation of a rule which is clear and yet difficult to manipulate would be much more likely to result in less forum shopping, the COMI model seems to contain opposite characteristics of an unclear rule which is easy to manipulate, making it incompatible with the EIR’s objective of restricting forum shopping.\(^9\) The COMI model has been highly criticised in this regard, as it is often construed as ‘fuzzy’ or ‘obscure’.\(^10\) Adversely, it allows for unrestricted forum shopping, while simultaneously producing negative effects due to its unpredictability. Yet, the Recast of the EIR (the “EIR Recast”)\(^11\) continues to apply the COMI model, although it has adjusted its objective towards the prevention of abusive forum shopping rather than forum shopping altogether. Indeed, an aim to prevent forum shopping in itself is arguably an aim to avoid the inevitable. As long as there is no full harmonisation of insolvency law, forum shopping will continue to exist, whether it is under a universal model or a territorial one.\(^12\) Thus, when is forum shopping abusive? While forum shopping could indeed impair the legal position of others due to self-seeking ambitions, as a form of


\(^8\) L.M. LoPucki, "Universalism Unravels" (2005) 79 Am. Bankr. LJ. 143, at 155-158 ("Regardless which characteristics of a company determine a multinational's COMI, the multinational can easily change them"); examples of cases where the COMI was shifted effortlessly have been provided, supporting this plea, in L.M. LoPucki, Courting Failure: How competition for big cases is corrupting the bankruptcy courts (2005, University of Michigan Press, Ann Arbor), at 226-230.

\(^9\) Hess, above note 5, (Annex I), at Q7, where inquiries have shown that 51% of the respondents perceived the COMI concept is as unclear and to cause practical problems, with the most critical being private individuals/self-employed (67%), banks (75%), judges (58%), and insolvency practitioners (61%); see also Impact assessment of the Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings of 12 December 2012, SWD(2012)416 final, at 19 and 57; F.M. Mucciarelli, "Not just efficiency: insolvency law in the EU and its political dimension" (2013) 14 E.B.O.L.R. 175, at paragraph 3.2. See also J.A.E. Pottow, "The Myth (and realities) of Forum Shopping in Transnational Insolvency" (2007) 32 Brook. J. Int'l L. 785, at 797.


\(^12\) Provided of course that forum shopping has not been made impossible by law, e.g. by recognising the place of incorporation as the sole competent authority. See also Mucciarelli, above note 9, at 197.
arbitrage, forum shopping is used to increase, at the very least, personal welfare. This article however contends that forum shopping can benefit the welfare of the general body of creditors, when put to good use. It will start with a short review of the EIR Recast and continue with an assessment of an alternative to the COMI model as has often been proposed in literature. Finally, it will present a theory for possible reform of the EIR Recast from the perspective of preventing abusive forum shopping.

Recast of the European Insolvency Regulation

The COMI & Forum shopping

2 As of 20 May 2015 the new EIR Recast has been adopted and will enter into force on 27 June 2017. This revision of the EIR has brought with it many changes, some of which will be discussed below. Focus will be put on the decisions taken and the effects which the reforms will have on forum shopping.

3 To start with, the EIR Recast has now taken the well-known abstract description of the COMI concept from Recital (13) of the EIR and moved it to Article 3(1). This change was indeed advisable, however, not paramount, as the Recital has already been used in this way for some time, making the shift to Article 3(1) of a formal nature rather than an alteration of law. Also, the circumstances in which the COMI presumption can be rebutted have been codified following the Interedil judgement of the CJEU.13 The more interesting changes made to the COMI concept can be found in the new Recitals of the EIR Recast, which for the most part relate to forum shopping. Emphasis has been put on situations of COMI shifting and abusive forum shopping. Firstly, the EIR Recast has set a suspension period of three months on reincorporations.14 In addition, the EIR Recast strengthens the importance of third parties’ ascertainability of the COMI in cases of a shift, in order to protect creditors against abuse.15 Moreover, it is expected from the national court to require additional evidence from the debtor, supporting its assertions if circumstances raise doubt as to the court’s jurisdiction.16 The EIR Recast also specifically mentions the national courts’ duty to apply the COMI test ex officio17 and deny jurisdiction if it finds that the COMI is not within its territory.18 Perhaps superfluously, as this is already good

14 Article 3(1) second subparagraph and Recital (31) EIR Recast; also dealt with more elaborately in paragraph [4-5].
15 Recital (28) EIR Recast. As is also currently regulated under the English jurisdiction, see, Insolvency Service Technical Manual, Ch 43.0, part 2, at paragraph 43.0.8 et seq.
16 Recital (32) EIR Recast.
17 Recital (27) and Article 4 EIR Recast.
18 Recital (33) EIR Recast.
practice. More importantly, the EIR Recast has adjusted its view on forum shopping by changing its objective to avoid incentives of forum shopping in general, to those which detriment the general body of creditors. The EIR Recast now stipulates that it aims to avoid fraudulent or abusive forum shopping, seemingly making a distinction with non-abusive or legitimate forum shopping. However, what is to be considered abusive or fraudulent still remains unknown.

Suspension Period

Generally, there seem to be no issues with the relocation of companies at an EU level. At least not with regard to legitimate relocations. However, when companies have only briefly established themselves in a particular jurisdiction before applying for insolvency proceedings, this could signal possible abusive forum shopping, primarily to the detriment of unsophisticated creditors who relied on the laws of the previous jurisdiction. In this regard, the EIR Recast has introduced a suspension period of three months, hoping to counter such abusive forum shopping. The suspension period can be seen as a tool to ensure a proper establishment of the COMI within a jurisdiction, rather than a quick relocation.

References

20 Recital (5) EIR Recast.
21 Recital (29) EIR Recast.
22 Centros (Case C-212/97) [1999] ECR I-1459; and Cartesio (Case C-210/06) [2008] ECR I-9641, at paragraph 111-113 where the ECJ again confirms that the freedom of establishment grants companies the right to reincorporate from one Member State to another; see also Impact assessment, above note 9, at paragraph 3.4.1.2.
25 Also referred to as ‘adjusting’ or ‘non-adjusting’ parties, see, L.A. Bebchuk & J.M. Fried, “The Uneasy Case for the Priority of Secured Claims in Bankruptcy” (1996) 105 Yale Law Journal 857. ‘Non-adjusting’ or ‘unsophisticated’ implies that these parties, for some reason, cannot or do not adjust the terms of their loan to reflect the effect on that loan of all the arrangements the borrower enters into. ‘Adjusting’ or ‘sophisticated’ implies that they can and do.
26 LoPucki Courting Failure, above note 8, at 232 stating (“The losers will be the corporate outsiders who have no means of controlling their debtor’s choice of courts: tort victims, employees, suppliers, customers, other stakeholders with small interests, and-as with every strategy game-the less sophisticated players”); A.T. Guzman, “International Bankruptcy: In Defence of Universalism” (2000) 98 Mich. L. Rev. 2177, more specifically at footnote 134; Enriques & Gelter, above note 10, at 430-434; Pottow, above note 9, at 816. Reporting the ‘furious’ responses of junior creditors to the Wind Hellas restructuring see, M. Herman, “Abuse of prepack deals could turn Britain into an insolvency brothel” (The Times, 18 January 2010); E. Moya, “London risks becoming brothel for bankruptcy tourists” (The Observer, 31 January 2010); R. Watts & C. Newell, “Foreign firms use lax UK law to dump debt” (Sunday Times, 7 March 2010).
27 Article 3(1) second subparagraph and Recital (31) EIR Recast; which is against the advice stipulated in Impact assessment, above note 9, at 35.
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thereby aiming to create a more reliable COMI concept. By setting a temporal requirement for company reincorporations, one would have to conclude that a reincorporation of less than three months prior to the application for insolvency proceedings is viewed as abusive forum shopping. A different conclusion would question the reasons behind this restriction of the freedom of establishment. Yet, functionally one could argue that the suspension period has missed the (new) objective of the EIR Recast28 to decrease abusive forum shopping, while allowing for genuine forum shopping to continue.

Interestingly, the suspension period does not apply to COMI-shifts. Therefore, if a company was to shift its COMI within a period of three months prior to a request for insolvency proceedings, it would fall outside the scope of Article 3(1) EIR Recast, puncturing its functionality. The adoption of a suspension period of three months for COMI-shifts was proposed by the Committee on Legal Affairs during the draft of the EIR Recast.29 Unfortunately however, this proposal did not reach the final draft, making the choice for the current suspension period on incorporations all the more curious. Yet, even if the scope of the suspension period would be extended to that of COMI-shifts, one could still argue the objective to decrease abusive forum shopping will not be obtained. If one would set a fixed temporal requirement on the establishment of the COMI concept, one would in fact be giving substance to the requirement of a ‘regular basis’. As mentioned before, the suspension period would then merely harmonise the basis of a reliable COMI, although there appears to be little necessity for this type of harmonisation, as Member States have already applied it in their own ways.30 Hence, the measure would regulate all acts of forum shopping by way of COMI shifting, instead of dealing with abusive forum shopping head-on.31 A company which applies for insolvency shortly after its establishment can very well be forum shopping in order to make use of the more effective and efficient insolvency regimes available in that particular jurisdiction, honouring the objectives which the EIR strives to achieve. A three month suspension period would only make such forum shopping more difficult, as the company might have to wait three months in a state of economic or financial distress, bearing the additional costs.32 Such a suspension period would thus make forum shopping in itself much less appealing.

28 Recital (29) and (31) EIR Recast, stating the (“objective of preventing fraudulent or abusive forum shopping”).
29 Report of the Committee on Legal Affairs and the Internal Market of 20 December 2013 (A7-0481/2013), at 21, amendment 27.
30 For example, Spain with a period of six months, see, Spanish Insolvency Act (22/2003), Article 10(1), available at <http://noticias.juridicas.com/base_datos/Privado/22-2003.t1.html#u10> [last viewed 22 March 2016]; Italy with a period of a year and one day, see, Royal Decree No 267, Article 9 (1), as amended by the Legislative Decree No 5 of 9 January 2006, available at <http://www.altalex.com/documents/leggi/2014/09/12/legge-fallimentare-del-fallimento#titolo2> [last viewed 22 March 2016]; The United Kingdom with a (less vigorous) period of twelve months, see, UK Insolvency Service Technical Manual Ch.41 Pt 5, at paragraph 41.61; and France (very cautiously) with a six month period, see, Circulaire 2003, at paragraph I 2.1.
31 Moss, above note 19, at 56.
32 By contrast, the main attraction of the UK scheme of arrangement procedure is its quick and easy acceptance of jurisdiction, without the need for a COMI or an establishment, which would make forum shopping (legitimate or not) expensive and potentially unviable.
and available, regardless of whether it is for reasons of efficiency and effectiveness, or abuse. This indifference contradicts the EIR’s new assertion of preventing abusive forum shopping and shows that it might have fallen back on its traditional disapproval of forum shopping in itself. It would perhaps prove more beneficial to address the real issue at hand, which is abuse.33

Judicial Review

6 Although very few of the Member States’ respondents in the External Evaluation Report have proposed such an amendment,34 the EIR Recast now provides for the possibility to challenge the decision opening main insolvency proceedings.35 The benefit of this possibility is easy to see. There is currently no judicial remedy under the EIR against the improper establishment of the COMI, even in cases of obvious wrongful establishments. Currently, the EIR only provides the possibility for a national court to deny recognition on grounds of public policy.36 However, this redress is much like that of opening secondary proceedings; it only protects creditors to the extent that there are assets in their jurisdiction. In cases where most or all of the assets are located in other jurisdictions, it will be of little help.

7 This amendment was proposed by the Commission in its 2012 Impact Assessment,37 essentially arguing that judicial review would decrease COMI shifting, consequently improving the protection of the creditor’s right to property. By installing this check companies will indeed be impaired to abusively shift the COMI, either by actively moving assets or passively arguing for a different jurisdiction.38 However, the advantage of this amendment should be moderated. As was also suggested by the ECJ in Eurofood,39 creditors could always challenge the jurisdiction through the remedies prescribed by the national laws of the Member State of the opening decision. The added value of this particular inclusion is thus limited to fostering and somewhat simplifying the judicial remedies for foreign creditors. However, a national court opening main insolvency proceedings will often have to make difficult choices when establishing the COMI of a debtor with equivocal circumstances. In these cases, where there are no real winners, disputes are bound to rise. One could argue that fostering judicial remedies will only weaken the legal certainty of main insolvency proceedings and add to the vagueness of the COMI model by offering the possibility to dispute. Moreover, judicial reviews will frustrate the insolvency process, delaying negotiations, reducing the going concern value and possibly creating additional costs to the detriment of the welfare of the

33 For a proposition, see the theory at paragraph [21 et seq.].
34 Hess, above note 5, (Annex I), at Q1 and Q2 (Czech Republic), and Q7 (Poland).
35 Article 5 EIR Recast.
36 Article 26 EIR.
37 Impact assessment, above note 9, at 38.
39 Re Eurofood IFSC Ltd, above note 7, at paragraph 43.
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general body of creditors. Perhaps by scrutinising the relocation \textit{ex ante}, one could immediately determine its legitimacy, making the need for an \textit{ex post} review of its correctness otiose.\footnote{See further paragraph [21 \textit{et seq}.]}

\textit{Group Insolvencies}

8 Despite the many propositions made to implement a doctrine for the recognition of corporate groups in order to create group insolvency proceedings, this (rather substantive) measure seemed to be a step too far for the Commission. The EIR Recast retains a strict entity approach, corresponding with that of the EIR.\footnote{Recital (54) EIR Recast.} Furthermore, the appropriate method by which one should choose the ‘leading’ corporate entity, and consequently, jurisdiction under such a corporate group doctrine, has so far been observed as insoluble.\footnote{Moss, above note 19, at 57.} Nonetheless, the EIR Recast has managed to accommodate group insolvency proceedings to a considerable extent. As a basis, the EIR Recast has set up rules on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies.\footnote{Recital (6) EIR Recast.} The EIR Recast has defined such a group of companies as “a parent undertaking and all its subsidiary undertakings”.\footnote{Article 2(13) EIR Recast.} Procedural rules are subsequently laid down to ease the coordination between insolvency practitioners and national courts, with each other and between themselves.\footnote{See Chapter V EIR Recast.} The insolvency practitioners appointed in the various insolvency proceedings of the members of the group can agree with a two thirds majority that there will be one Member State with the exclusive jurisdiction over the group coordination proceeding.\footnote{Article 66 EIR Recast.} In addition, an independent insolvency practitioner should be appointed as coordinator, assisting and monitoring the group coordination proceedings.\footnote{Article 61(3), 71 and 72 EIR Recast.} The EIR Recast thereby unifies the different proceedings within a group of companies, while leaving the actual legal entities separated. Hence, the established framework seems to apply a consolidation of insolvency procedures.\footnote{Mevorach, \textit{Insolvency within Multinational Corporate Groups} (2009 Oxford University Press, Oxford), at paragraph 6.2.1.2.} Albeit, there is an intention to use the tools provided, the incentive to actually coordinate and cooperate should derive from the circumstances of the case and the will of the parties.\footnote{See e.g. Article 64(1) and 65(1) EIR Recast, stating the freedom of parties to exclude themselves from the group proceedings.} Ostensibly, these reforms would lead to a significant reduction of passive forum shopping. However, when reasoning further, one should conclude that the EIR Recast has essentially accepted forum shopping in cases of corporate groups. By allowing interlinked corporate entities to choose a different (central) forum\footnote{Article 66 EIR Recast.} and using their synergy to create more
efficiency in cross-border insolvency proceedings,\textsuperscript{51} the EIR Recast seems to embraced forum shopping for the benefit of the general body of creditors.\textsuperscript{52}

9 This is a rationale which is to be encouraged and will form the basis of the theory at the end of this article. However, it also contains a particular draw-back. Namely that such consolidated insolvency procedures will only allocate a central jurisdiction. It does not alter the applicable law. Therefore, the court with the exclusive jurisdiction would have to apply the laws of the various jurisdictions. Although it is understandable that such an alteration in the EIR might be considered as far-reaching, it is nonetheless a reality within forum shopping\textsuperscript{53} and should therefore be addressed. Otherwise, companies or insolvency practitioners might favour forum shopping, as that would possibly create a more beneficial outcome. The possibility of such an approach has even explicitly been left open in Recital (53) EIR Recast. It is anticipated that this draw-back will detract from the success of such consolidated insolvency procedures. One might therefore propose to incorporate the possibility to alter the applicable law as well, provided that there will be additional safeguards, as will be discussed later on.\textsuperscript{54}

\textit{Scope of the Regulation \& Scheme of Arrangement}

10 The scope of the EIR, as established in Article 1, has been extended in its Recast. The EIR Recast applies to insolvency proceedings aimed at rescue, adjustment of debt, reorganisation or liquidation.\textsuperscript{55} The aim of the Commission is to thereby include hybrid and pre-insolvency proceedings, in order to ensure their recognition throughout the EU and mitigate hold-out\textsuperscript{56} problems.\textsuperscript{57} Consequently, parties will be more willing to engage in these procedures; which are usually aimed at corporate rescue.\textsuperscript{58}

\textsuperscript{51}Recital (52) EIR Recast.
\textsuperscript{52}For a similar rationale, see also Recital (35) where (“the insolvency practitioner should be able to bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum”).
\textsuperscript{53}This is currently the case when companies COMI shift by way of active or passive forum shopping, see e.g. \textit{Re Daisytek-ISA Ltd} [2003] B.C.C. 562 where the English High Court accepted a rebuttal of the registered office presumption based on the ‘head office functions’ test, ultimately considering the COMI of all the company’s subsidiaries to be in England; see also \textit{Collins \& Aikman} [2005] EWHC 1754 (Ch); \textit{Re MG Rover Belux SA/NV (In Administration)} [2006] EWHC 1296 (Ch).
\textsuperscript{54}See paragraph [53-55].
\textsuperscript{55}Article 1(1) EIR Recast.
\textsuperscript{56}Refers to the strategic incentive of (often smaller) creditors, who have little to lose, holding-out in order to force larger creditors (with more exposure) to pay them off in restructurings, thus relying on all other creditors to make the necessary concessions.
\textsuperscript{57}EU Commission Report, above note 23, at 6.
\textsuperscript{58}When using the term ‘corporate rescue’, this article refers to the rescue of either the company or its business.
11 The proceedings falling within the scope of the EIR are fixed in Annex (A). However, the scope of the EIR as defined in Article 1 (1) is open. This has created uncertainties in particular situations, which remained unresolved. However, Recital (9) of the EIR Recast has now firmly established that Annex (A) contains an exhaustive list of proceedings falling within the scope of the EIR Recast. This strict distinction will have to be supported by an increased awareness of the Commission and the active participation of Member States in notifying the Commission of their wish to add an insolvency procedure to Annex (A). It has, however, been argued that the Member States’ discretion to add insolvency proceedings to Annex (A) could be misused for nationalistic and opportunistic reasons. This brings us to the interesting debate of whether or not the scheme of arrangement falls within the scope of the EIR Recast. The effects of its inclusion to the EIR are two-sided. While the EIR somewhat complicates a change of jurisdiction (forum shopping) by way of the additional COMI requirement, it simultaneously gives the scheme of arrangement full automatic recognition within the EU, which would otherwise be very much dependent upon the case. Seemly, this shows the duplicity of the COMI model. Moreover, if the scheme of arrangement procedure does not fall within the scope of the EIR, does it fall under that of the Recognition Regulation? Or will it remain in limbo?

12 In theory, the transition between the EIR and the Recognition Regulation should be seamless. However, it has been described as one of the most controversial issues in cross-border insolvencies. Currently, the scheme of arrangement is not listed in Annex (A) of the EIR Recast. Therefore, strictly speaking, one should conclude from

59 See, Radziejewski (Case C-461/11) [2012] ECLI:EU:C:2012:570 on whether the EIR applies to national insolvency procedures which are not listed in the Annexes, but do correspond to the definition of Article 1(1) EIR; and see Bank Handlowy and Adamiak (Case C-116/11) [2012] ECLI:EU:C:2012:739 on whether the Regulation applies to national procedures which are listed in Annex (A), but do not correspond to the definition of Article 1(1) EIR; see also EU Commission Report, above note 23, at 6 and 7.


61 Recital (9) EIR Recast, stating (“Those insolvency proceedings are listed exhaustively in Annex A (…) National insolvency procedures not listed in Annex A should not be covered by this Regulation”).

62 Proposal for a Regulation, above note 13, at 6, (“the Member States decide whether to notify a particular insolvency procedure to be included in that Annex.”).

63 Eidenmüller, above note 59, at 11.


66 M. Virgós & F. García Martín Alférez, The European Insolvency Regulation: Law and Practice (2004, Kluwer Law International, The Hague), at paragraph 77-78; see also Gourdain v Nadler (Case C-133/78) [1979] ECR I-733 where the ECJ describes that the bankruptcy carve-out of Article 1(2)(b) of the Brussels Convention (now Recognition Regulation) extends to all actions deriving directly from the bankruptcy proceeding and those closely connected to it; which is intentionally similar to the scope of the EIR expressed in Recital (6).

Recital (9) EIR Recast and the freedom to exclude proceedings from Annex (A), that the scheme of arrangement definitely does not fall within the scope of the EIR Recast. However, the procedure does not necessarily have to fall outside the scope of Article 1(1) EIR Recast. It could very well be considered a pre-insolvency procedure, despite its multifunctionality. In such a case (as a pre-insolvency procedure), it would also not fall under the scope of the Recognition Regulation, possibly remaining without a basis for EU wide recognition. It seems likely that this will become the scheme of arrangement’s legal status (remaining in limbo), as this fear was also one of the main reasons to include such procedures in the EIR Recast.

**Approach to cross-border insolvency**

**Choice of Law Proposition**

13 Rather than addressing the problems of abusive forum shopping by way of restrictive measures or substantive harmonisation, it has been proposed by various scholars to engage in a choice of law model for the EIR. That is to say, a model by which one could freely and easily change the insolvency law and forum applicable to the company. Under a choice of law model, companies would have the freedom to choose an insolvency law and forum best suiting their circumstances. For the purpose of implementing a choice of law model within the EU, two main notions can be established. Firstly, the ability to freely choose the applicable insolvency law by way of, for example, contract, irrespective of the place of incorporation. And secondly, the allocation of applicable law and forum by way of the place of incorporation (hereafter ‘the incorporation model’). This second notion is more widely conceded upon, and will be discussed in this section. A shift from the prevention of forum shopping within the internal market, to a model of full acceptance might seem rather extreme. On the other hand, we have seen in paragraph [8] that this approach has already been taken by the EU legislature to some extent with regard to groups of companies. The incorporation model could very well lead to considerable advantages in the areas of exertion, efficiency and transparency. For this reason, the next section of this article will seek to build on the conventional doctrine by attempting to further develop the incorporation model.

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68 This comparison relates to the aim of the EU legislature to govern this area of law seamlessly between the two Regulations. The question of whether a scheme will be able to seek recognition on other grounds (such as the Rome I Regulation or private international law) is a different matter and is possible irrespectively. See in that regard, H.L.E. Verhagen & J.J. Kuipers, “De erkenning van een Engelse scheme of arrangement door de Nederlandse rechter” in: N.E.D. Faber, J.J. van Hees & N.S.G.J. Vermunt (eds.), *Overeenkomsten en insolventie* (2012, Kluwer, Deventer) describing the different ways in which a scheme might be recognised within the Netherlands.

Clarification

14 The proposition of an incorporation model is rather simple and familiar to the current model of the EIR. One could simply exclude the possibility to rebut the COMI presumption at the place of incorporation, leaving only the base, which is essentially an incorporation model. The COMI concept would consequently become futile and could possibly be removed in order to spruce up the EIR. If one would reason that the COMI exception was a tool created to restrict forum shopping, then its function could be replaced by another tool achieving the same objective. Considering that the COMI concept has not been particularly successful,\(^7\) or at least, has enough room for improvements, a more advanced tool is to be welcomed. Preferably one which only restricts abusive forum shopping, while allowing genuine forum shopping. However, with the freedom to choose a forum also comes the uncertainty of regulatory competition as we will see later on.

Effects

15 Naturally, the incorporation model has both positive and negative effects. Let us begin with the positive effects. First of all, as a result of the incorporation model, the choice of law approach for applicable insolvency law will be the same as that of company law within the EU.\(^7\) This creates a connection between insolvency law and company law, avoiding the problem of possible frictions due to discrepancies in applicable insolvency law and company law.\(^7\) It has even been argued that this friction, which is caused by the EIR’s current COMI based choice of law approach, contradicts the freedom of establishment, making this alignment all the more favourable.\(^7\)

16 While the incorporation model creates harmony as to the applicable law, it also provides for more clarity in comparison to the COMI model, leading to a reduction

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\(^7\) See critique on the COMI concept at paragraph [1].

\(^7\) Which is also based on the place of incorporation, see Centros, above note 22; Inspire Art (Case C-167/01) [2003] ECR I-10155; Eidenmüller, above note 10, at 425; G. McCormack, “Jurisdictional competition and forum shopping in insolvency proceedings” (2009) 68 Cambridge Law Journal 169, at 191.


\(^7\) Ringe, above note 68, at 608 et seq.
of transaction costs in insolvencies. The COMI model holds the issue of unpredictability due to its vagueness, making it difficult to anticipate upon and consequently creating the burden of a moral hazard. This lack of predictability is the reason why several authors have suggested that an ex ante free choice of forum should be adopted, allowing companies to choose a regime most appropriate to their governance structure and commit to it with certainty, which could then be openly ascertained by creditors. Presumably, this ex ante predictability of applicable insolvency laws will lead to a reduction of ex ante repricing; increasing availability of capital in the market against lower interest rates.

17 Considering that the incorporation model would no longer require COMI shifting, many disadvantages will be eliminated, for instance: The high costs involved with the shift of a large (asset based) company’s COMI and litigation costs resulting from the uncertainties involved with the COMI concept. Hence, the incorporation model has the important advantage to enable the possibility of change to more efficient and effective insolvency laws as the company develops, making use of more suitable legislation. This rationale entails that market actors are allowed and encouraged to make use of the disparities in national laws, provided that there is no harmonisation on a European level. Companies would not be bound to less efficient or restricting national laws, preventing corporate rescue. Moreover,

75 Guzman, above note 26, at 2184; Virgós & Garcimartín Alférez, above note 65, at 13; Enriques & Gelter, above note 10, at 432; G. McCormack, Secured Credit and the Harmonisation of Law: the UNICITRAL experience (2011, Edward Elgar, Cheltenham), at 55-57.
78 Financial lenders would not need to factor additional expected costs of insolvency due to unpredictability into their interest rates. For empirical research on this effect, see, S.A. Davydenko & J.R. Franks, “Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.” (2008) 63 Journal of Finance 565, at section 3; see also, Guzman, above note 26; McCormack, above note 74, at 55-57; Staabitz-Schreiber (Case C-1/04) [2006] ECR I-701, at paragraph 27. Hence, the abolishment of this moral hazard will cause an increase in available credit and simultaneously decrease its cost, see also, Ringe, above note 68, at 602.
79 Rather than the uncertainty of a COMI, which would have to be manipulated.
80 Also followed in, Centros, above note 22.
81 See, Ringe, above note 68, at 617 who also welcomes this idea.
there are still many safeguards in place with regard to a company’s reincorporation in order to protect creditors against abuse during solvency.\footnote[84]{Ringe, above note 68, at 604 et seq., referring (inter alia) to creditor protection mechanisms in case of change of legal form, sale of shares and transfer of registered office; see further paragraph [26].}

18 Despite these strong arguments, the incorporation model also has some weaknesses. It is foremost apparent that the enhanced ease at which one could change the forum and its predictability may increase the opportunities for abusive forum shopping.\footnote[85]{On the correlation between manipulability and predictability, see, Guzman, above note 26, at 2207; Pottow, above note 9, at 788-790; see also, McCormack, above note 10, at 137.} Although, indeed, certain safeguards are in place to protect creditors from abuse, there are legitimate reasons to doubt whether this will suffice to protect the welfare of the general body of creditors in cases of insolvency.\footnote[86]{Different authors have also noted that the incorporation model clearly does not provide for an adequate solution to the problem of group insolvencies, as it possibly separates the legal entities even more.\footnote[87]{Ringe, above note 68, at 618; McCormack, above note 10, at 134-135.} However, despite the fact that group insolvencies are not strictly within the objective of the EIR,\footnote[88]{Ringe, ibid., at 618.} it seems that this argument does not uphold anymore under the EIR Recast. As discussed in paragraph [8], the EIR Recast has introduced the possibility of consolidated insolvency procedures for group companies. Under this new framework, group companies (or rather, insolvency practitioners) will be able to effectively engage in creating a unified procedure for the group as a whole. The aforementioned argument against the incorporation model has therefore become invalidated to the extent that group coordination procedures have been regulated in the EIR Recast. Still, one should consider whether it is not more preferable to put in place an additional explicit mechanism, in order to also alter the applicable law while counteracting abusive forum shopping and allowing for efficient forum dislocations (such as group insolvencies) to continue.\footnote[89]{See paragraph [53-55].}

Regulatory competition

19 The freedom to choose the applicable insolvency law, as provided by the incorporation model, could lead to uncertainties of regulatory competition.\footnote[90]{Eidenmüller, above note 10, at 426 et seq.; Ringe, above note 68, at 603.} Regulatory competition between Member States has, traditionally, been considered an inappropriate paradigm for the European Community (now Union).\footnote[91]{C.M. Schmitthoff (ed.), The Harmonization of European Company Law (1973, UKNCCCL, London), at 3-9; W. Kolvenbach, “EEC Company Law Harmonisation and Worker Participation” (1990) 11 U. Pa. J. Int'l Bus. L. 709.} The majority of the Member States of the EU have chosen to apply the ‘real seat’ doctrine in this regard.\footnote[92]{M.T. Andenas & F. Wooldridge, European comparative company law (2009, Cambridge University Press, Cambridge), at 34-35.} Member States have chosen this path to ensure application of the
law most closely connected with the operations of the company. 93 Regulatory competition has also been an issue in the USA for many years, where concerns were raised of a possible ‘race to the bottom’. 94 That is to say, a regulatory race to create the most favourable laws, continuously lowering standards and ultimately impairing the rights of stakeholders (the so-called ‘Delaware effects’). 95 These concerns were related to regulatory competition in company law and have been reiterated to some extent in the context of the EU, 96 where it was desired to avoid such a ‘race to the bottom’ in the European company law harmonisation project. 97 On the other hand, it has been argued that the EU regulatory competition model of ‘reflexive harmonisation’ is different from the ‘competitive federalism’ model in the US. 98 Consequently, it should be treated differently. 99 Through pluralistic minimum harmonisation, the EU has managed to maintain regulatory competition and national diversity. 100 Important in this respect is also that the European approach considers harmonisation to compliment the market forces, whereas the USA considers them to oppose each another. 101 Thus, the European fear of potential ‘Delaware effects’ would be unfounded. 102 It has subsequently been argued that Member States are losing more than they are gaining by avoiding regulatory competition. 103 Indeed, one could also contend that regulatory competition will have beneficial developments, or result in a ‘race to the top’. 104

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95 Ibid., at 663-666.
101 Deakin, above note 97.
102 Drury, above note 92, at 728-738.
103 See e.g. Holst, above note 95, at 340; R.K. Rasmussen & R.S. Thomas, “Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations” (2001) 54 Vanderbilt Law Review 283, at 291 (“Competition can be a good thing.”); Rasmussen & Thomas, above note 75, applauding jurisdictional competition in certain contexts, such as "prepackaged" bankruptcies.
Although the above mentioned discussions on regulatory competition focus more on company law, it could very well be applicable to insolvency law. The dividing line between company law and insolvency law is not always clear. They are closely related, and in some jurisdictions they are even intertwined. In any case, there is still no direct regulatory competition within the EU in the area of insolvency law, as there is no direct choice of insolvency law. The current COMI model much resembles the ‘real seat’ approach, preventing such direct regulatory competition. Therefore, the incorporation model with its choice of law approach would unleash regulatory competition much like has been done within company law. Hence, such possibilities should be taken into consideration when attempting to improve upon the current model.

Theory on Abusive Forum Shopping

This section of the article attempts to show that forum shopping is able to create more efficiencies in the internal market once it has been accepted and regulated. Accepted by way of the incorporation model. Regulated by way of an overarching European procedure, distinguishing legitimate forum shopping from abusive ones. Let it be clear from the outset that it is not the intention of this section to present a ready-made proposal. Nor does it aim to defend its theory on all accounts. Rather, it seeks to build on the conventional doctrine by introducing a novel approach, ultimately aimed at improving cross-border insolvency proceedings within the EU. This theory is intended for company insolvencies only. Preferably, a distinction should be made between company insolvencies and individual insolvencies, as they differ vastly from each other.

The focus of this section is on the establishment of the most appropriate manner by which one should distinguish between ‘legitimate’ and ‘abusive’ forum shopping. Through the current developments of the EIR Recast, it has become clear that the EU legislature is aiming to restrict ‘abusive’ forum shopping. It follows that the

105 See e.g. Enriques & Gelter, above note 10, at 440 on (“whether ‘relabelling’ corporate law rules as insolvency law rules can be a viable strategy for Member States”).
106 Although, it has been argued that regulatory competition is present indirectly due to possibilities of forum shopping, see, Eidenmüller, above note 10, at 427.
107 Enriques & Gelter, above note 10, at 448.
109 See paragraph [60-62] on the anticipated effects of regulatory competition after application of the proposition under the theory.
110 See also Mucciarelli, above note 9, at 192, on a rather similar line of argumentation for the proposition of a choice of law model.
112 See paragraph [3].
determination of what will have to be considered ‘abusive’ is imminent, from which one will be able to deduce what is to be considered ‘legitimate’. Such an important distinction should be dealt with accordingly, in view of avoiding the undesirable situation where the CJEU and national courts will be compelled to interpret the meaning of ‘abusive’ autonymously, while we await an informative study from the Commission. In this respect, the theory proposed under the present section is rather logically in line with the developments in EU insolvency law. It recognises the importance of political involvement and specialised legislation in determining the concept of ‘abuse of law’ within the area of cross-border insolvency. Furthermore, this proposition provides for a chance to significantly improve the current structure of cross-border insolvency law and the culture of forum shopping.

23 This section will begin by describing the legislative framework necessary to accomplish its endeavour. Such will be followed by an analysis of the abuse of law doctrine within the EU and what should emerge as a test most appropriate for the scrutinisation of forum shopping. A conjecture will subsequently be made of its added value and anticipated development, followed by an illustration. In order to maintain an objective view, this section will conclude with a critical assessment of the theory proposed and a review of its pragmatism.

**Denotation of Forum Shopping**

24 Before continuing, it is important to determine what will be meant by ‘forum shopping’ for the purpose of this theory, regardless of whether that forum shopping should be considered genuine or abusive. It is the author’s opinion that a distinction can be made between active and passive forum shopping. Active forum shopping refers to a conduct or movement of the debtor company which has changed its factual situation in order to influence the forum for insolvency. For example, a reincorporation or a shift of the head office functions to a different jurisdiction.

Passive forum shopping refers to a change of forum due to events other than active forum shopping. For example the persuasion of a national court of the company’s COMI in doubtful situations in order to establish a more favourable forum, while the debtor company itself conducts its business as usual. This is often the case when

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113 Recital (29), (31) and (46) EIR Recast.
114 Article 90 (4) EIR Recast, where it is stated that the Commission shall submit a study on the issue of abusive forum shopping no later than 27 June 2020.
115 That is to say, European laws related to insolvency.
116 The proposition to recognize a European doctrine of ‘abuse of law’ has been proposed in Eidenmüller, above note 59, at 14; notwithstanding its importance in other areas of law as well, see, R. de La Feria, “Introducing the Principle of Prohibition of Abuse of Law”, in: R. de La Feria & S. Vogenauer (eds.), *Prohibition of abuse of law: a new general principle of EU law?* (2011, Hart, Oxford), at XV-XVIII.
117 *Re Hellas Telecommunications (Luxembourg) II SCA*, above note 7.
118 Such as e.g. in the case Rb. Amsterdam 31 Januari 2007, ECLI:NL:RBAMS:2007:AZ9985, *JOR 2008/17 (BenQ)* where BenQ Mobile Holding B.V. managed to convince the national court of its COMI in the Netherlands, although it could very well have been in Germany; T.M. Bos, “Forumshopping in een
attempting to arrange one COMI (forum) for a group of companies.\textsuperscript{119} Although passive forum shopping can definitely be seen as an exploration for a forum which is more favourable, it is much less active as the company itself is not altered. These two situations should be seen separately from each other, as they relate to different degrees of forum shopping. Considering the importance of ascertainability and legal certainty relative to forum shopping, a change in the factual situation of the company should be borne in mind. If however nothing has changed to the debtor company, it could be argued that the COMI has always been in the jurisdiction established. It is merely the interpretation of the COMI under the EIR, without having attempted to factually and actively alter the jurisdiction/forum in any way. To consider an accepted request for insolvency proceedings of a group of companies in (for example) England as forum shopping, when in fact there was no active forum shopping, is to say that the English court has not applied the COMI test properly and has shifted it on its own discretion.\textsuperscript{120} In this regard, one could consider the arguments made by scholars that national courts are rather nationalistic and in competition with one another.\textsuperscript{121} Whereas, if the company has actively moved its business or registered office, one could very well argue that the change in COMI is due to the actions of the debtor, presenting a more distinct or extreme degree of forum shopping. Nonetheless, active as well as passive forum shopping will be considered ‘forum shopping’ for the purpose of this article. Mainly, because they are both discussed as forum shopping in the majority of literature.\textsuperscript{122}

25 In addition, this theory assumes there to be a requirement of direct causality in order to duly refer to an act as ‘forum shopping’. That is to say, the requirement of an intention to forum shop in order to initiate insolvency proceedings in the foreseeable future. In this context, one could rightfully assert that ‘forum shopping’ has occurred as opposed to ‘law shopping’. For the purpose of this theory, ‘law shopping’ will be considered the mere relocation of a company while it is clearly solvent. Although this act could strictly be defined as forum shopping, there is no direct causal link between the change in forum and a possible insolvency proceeding initiated some time after the aforementioned change in forum. Essentially, ‘law shopping’ is an act solely executed as a consequence of regulatory arbitrage.\textsuperscript{123}
Under ‘law shopping’ there should be considerable time for parties to adjust their relations with the debtor company. Consequently, this relocation does not present a situation which is questionable in order to create a relevant dispute. Therefore, if there is no dispute as to the forum of the company by the relevant parties, the shift in forum does not see a specific purpose and is not premeditated. This situation should, and will, therefore more generally be classified as ‘law shopping’ within this section. The distinction made primarily serves the purpose of differentiating situations of possible abusive ‘forum shopping’ from those which clearly are not.124

Solvency & Insolvency

26 As also expressed above, the present theory is based on the incorporation model. It would seem that such a model is a first step in the creation of more efficient insolvency laws within the EU. From this point on, additional measures will be proposed to support the incorporation model where it seems to lack. First off, a distinction should be made within the proposed framework between reincorporations in a state of solvency and those in a state of insolvency.125 In cases of solvency, sophisticated creditors enjoy sufficient safeguards from unexpected or abusive reincorporations due to the possibility of including anti-reincorporation covenants in their contractual provisions.126 Subsequently, the debtor will tend to seek the consent of the creditor, resulting in situations which are likely to prove legitimate. Moreover, it has been stressed that the implemented provisions of the Tenth Merger Directive will provide for the additional protection.127 In certain Member States these provisions translate to a right of veto, in others a right to be paid off or given security.128 In any case, protection is in place. Ordinary creditors (often

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124 Eidenmüller, above note 110, at 149, where Professor Eidenmüller makes a similar distinction.
125 On this distinction, see paragraph [24-25]; see also Schillig, above note 76, at 22 who makes a similar distinction.
127 Eidenmüller, above note 59, at 16 where Eidenmüller describes that under the existing European legal framework, a change in a company’s registered office (which is not an Societas Europea) is only possible by way of the Tenth Merger Directive, which provides for important safeguards; Articles 6(2) (c) and 7(1) Directive (EC) No. 2005/56 of 26 October 2005 (OJ 2005, L310/1); Article 13(2) Directive (EEC) No. 78/855 of 9 October 1978 (OJ 1978, L295/36). Currently, no other general European legal instrument dealing with a shift of registered office is in place, albeit plans continue for the 14th Company Law Directive on the cross-border transfer of company seats, see, European Parliament Resolution of 2 February 2012 with recommendations to the Commission on a 14th Company Law Directive on the cross-border transfer of company seats (A7-0008/2012), where the European Parliament proposes a 14th Directive on reincorporation; and see also, Report of the Reflection Group, above note 99. However, reincorporations are also possible in other (non-standardized) ways, see, paragraph [30].
128 Edwards, above note 96, at 109-110; see also Armour, above note 125, at 161. However, it has also been argued that these safeguards are usually trivial, see, L. Enriques, “EC Company Law Directives and
unsophisticated) and employees, however, do not have the bargaining power required to ensure such protection. Yet, one could argue that, during solvency, these parties are exposed to little risk. First off, if the debtor company is considered to be healthy (solvent), parties can reasonably expect for their claims to be paid. Given the amount of time presumably available to parties in these situations to adjust their relations with the debtor company as they see fit, it is difficult to see a need for additional safeguards. Moreover, unsophisticated creditors can ‘free-ride’ on the actions taken by other creditors against reincorporation. In addition, the reincorporation of the debtor company within the EU is always possible de jure. It is therefore not reasonable to expect additional protection in these cases of solvency, or ‘law shopping’.

27 However, one could very well argue that corporate migration during solvency should be differentiated from situations of (near) insolvency. Admittedly, when insolvency is imminent, the company directors often have a shift of concerns towards the safeguard of the interest of the creditors. It is however questionable if the laws regulating this behaviour will prove sufficient to increase the predictability of the forum. The current dissimilarities in liability rules of the various European jurisdictions generate strong incentives for the management of distressed companies to forum shop for insolvency venues allowing them to avoid personal liability. Therefore, the aforementioned covenants will have much less effect in cases of forum shopping for insolvency proceedings, as the debtor’s concern towards the


129 Eidenmüller, above note 110, at 146; Armour, ibid., at 165.

130 Schillig, above note 76, at 22 (“Obviously, as long as creditors are paid as and when their claims fall due, there is no reason to give them a say in a company’s decision to transfer its seat (although, in practice, the major creditors will be consulted)”)

131 A. Schwartz, “Security Interests and Bankruptcy Priorities: A Review of Current Theories” (1981) 10 Journal of Legal Studies 1, at 11-13 where it is explained that ordinary creditors freeload on the reduction of risks taken by debtors, due to the security interests of other creditors; Enriques & Gelter, above note 10, at 430; Armour, above note 125, at 165.


133 Eidenmüller, above note 110, at 146; Armour, above note 125, at 164-165; Schillig, above note 76, at 19.

134 For example, under UK law there is in principle no duty owed by the directors to the creditors during the course of business, see, P. Loose, M.J. Griffiths & D. Impey, The company director: powers, duties and liabilities (2011, Jordans, Bristol), at paragraph 6.27-6.28; Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] B.C.C. 567. However, the duty of the director changes in case of the insolvency of the company or, arguably, even if insolvency has become a real possibility, see, Companies Act 2006, s172(3); A.R. Keay & L. Kosmin, Directors’ duties (2009, Jordans, Bristol), at paragraph 6.182; Loose, Griffiths & Impey, ibid, at paragraph 6.2. Still, this change does not go so far as to entail a duty towards the creditors or any particular creditor. The duty of the directors is still towards the company as a whole, the content of which is then supplied by the interests of the company’s creditors.

fulfilment of its financial arrangements could very well suffer against its opportunistic behaviour due to economic or financial distress.\textsuperscript{136} Indeed, such covenants would be much more effective in cases of solvency.\textsuperscript{137} Additional protection provided by the EU Directives\textsuperscript{138} will become unimportant as well. It has been acknowledged that creditors will ‘obviously’ not be protected if the debtor was to reincorporate without the use of the mechanism provided by the Tenth Merger Directive.\textsuperscript{139} Hence, such provisions would fail to contain any meaningful prohibition, requirement, or enabling rule.\textsuperscript{140} The situation is worse for unsophisticated creditors and other stakeholders, who will be sensitive to the abuse of law.\textsuperscript{141} In this regard, it is important to note the frequent corroboration or even initiation by strong/sophisticated creditors in cases of forum shopping,\textsuperscript{142} often to the detriment of other stakeholders. For this reason, it is proposed to differentiate reincorporations in a state of insolvency. Furthermore, such situations should be classified as forum shopping. As described in paragraph [25], this theory requires an additional element of direct causality in order to establish situations of forum shopping, rather than law shopping. This article presumes that such a direct causal link\textsuperscript{143} exists once the debtor company has proposed to reincorporate in a state of insolvency. Therefore, reincorporations during a state of insolvency will henceforth simply be referred to as ‘forum shopping’.

\textit{Reincorporation & Exit Solvency Test}

28 The regulation of the aforementioned distinction between situations of solvency and insolvency of the debtor company during reincorporation, require the establishment of a suitable test. This theory proposes the establishment of a solvency test upon the exit of a company from its place of incorporation; an ‘exit solvency test’.\textsuperscript{144} The solvency of the debtor company should be established by the ‘home

\textsuperscript{136} Eidenmüller, above note 110, at 146; Schillig, above note 76, at 19.

\textsuperscript{137} As also noted in Enriques & Gelter, above note 10, at 433 (“Such clauses may be sufficiently deterrent in many cases, at least as long as bankruptcy is not immediately impending”); see also Eidenmüller, above note 110, at 146 (“anti-COMI-covenants’ certainly do not deter debtors that are determined to effectuate a COMI shift in order to benefit at the expense of their creditors”).


\textsuperscript{139} Eidenmüller, above note 110, at 145 under note 37. On the (alternative) possibilities of reincorporation, see paragraph [30].

\textsuperscript{140} Enriques, above note 127, at 44 et seq.

\textsuperscript{141} Schillig, above note 76, at 21-22.

\textsuperscript{142} Impact assessment, above note 9, at 20; EU Commission Report, above note 23, at 10; Ringe, above note 68, at 604-605.

\textsuperscript{143} Which is described as the intention to initiate insolvency proceedings in the foreseeable future, see paragraph [25].

\textsuperscript{144} A similar test has been reasoned in Schillig, above note 76, at 22; see also J. Rickford, “Legal Approaches to Restricting Distributions to Shareholders: Balance Sheet Test and Solvency Tests”, in: H. Eidenmüller & W. Schön (eds.), \textit{The Law and Economics of Creditor Protection: A Transatlantic Perspective} (2008, T.M.C. Asser Press, The Hague), at paragraph 4.4-4.8.
state, according to its national conceptions, before accepting reincorporation. If the debtor company is solvent and wishes to reincorporate, it should be allowed to do so without further requirements; seeing as that is a company’s right under the freedom of establishment. Where the company is insolvent and wishes to reincorporate to a different jurisdiction, the pre-emptive reincorporation-test must be applied.

29 In order to govern such a rule properly, a company should be obliged to report its intention to reincorporate within the EU, for the purpose of analysing its case ex ante. In anticipation of the debtor company’s insubmission to report its plans of reincorporation, a similar right to report should be granted to creditors when confronted with an unexpected reincorporation. Such checks and balances will save considerably in (national) monitoring costs and, more importantly, they will provide creditors with the necessary reassurances. Should a debtor company wish to go insolvent in the ‘host’ state after unreported reincorporation, creditors will have the opportunity to call upon the violation of mandatory EU law and the evasion of the reincorporation-test. Such a conduct should subsequently result in the denial of access to the ‘host’ state’s forum and a referral back to the jurisdiction of the ‘home’ state, restoring legal certainty. The prospect of such a framework is to prevent economically or financially distressed debtor companies from forum shopping without reviewing its effects towards its stakeholders.

30 Crucial to the application of the aforementioned framework are the definitions of ‘solvency’ and ‘reincorporation’. Reincorporation is possible in various ways. However, irrespective of the method chosen, what is in fact considered a ‘reincorporation’ seems to be universally unambiguous. Ultimately there can only be one corporate entity. Therefore, a separate definition of ‘reincorporation’ does not seem necessary in order to create uniformity on a European level. Moreover, despite its unambiguity, ‘reincorporation’ would be difficult to define and possibly only create problems where there are none. Defining solvability, however, is somewhat different. Where reincorporation could be scrutinized factually, solvability should be assessed with more precaution. Due to the variation in appreciation of national laws towards solvability, it is important to take the

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145 That is to say, the jurisdiction in which they are originally incorporated.
146 In accordance with European Parliament Resolution of 2 February 2012 with recommendations to the Commission on a 14th Company Law Directive on the cross-border transfer of company seats (A7-0008/2012), at recommendation 5 of the Annex (“The home Member State should verify the legality of the transfer procedure in accordance with its legislation”).
147 Articles 49 and 54 TFEU.
148 That is to say, the jurisdiction to which the debtor company wishes to reincorporate.
149 Mainly, one could reincorporate by way of a merger under the Directive (EC) No. 2005/56 of 26 October 2005 (OJ 2005, L310/1); or, in case of a Societas Europea, by changing its registered office under Article 7 and 8 Council Regulation (EC) No. 2157/2001 of 8 October 2001 (OJ 2001, L294/1). However, reincorporation is also possible in other (non-standardized) ways. See, for example, the methods used in the cases of Schefenacker, Deutsche Nickel, and Hans Brochier. For a detailed description of these reincorporations, see Ringe, above note 68, at 585-586.
company’s jurisdiction into account. Although, further harmonisation would be acquired through codification in EU law, such a measure might disregard the appropriate context. Additionally, one should take regard of the possibility of group insolvencies. Situations could arise where a single company within a group structure wishes to reincorporate. In order to properly assess its ‘solvency’, one should contemplate its position within the relevant enterprise. Although considerable thought has been put to the possibility of treating groups of companies as a single economic entity, such an approach does not yet hold a European consent. Therefore, a pluralistic approach would be more preferable and pragmatic. It is thus proposed to entrust the definition of ‘solvency’ to the discretion of the Member States, more specifically, the ‘home’ state.

EU Norm

31 In order to implement an effective enforcement of the proposition, cooperation between EU law and national law is required in the form of additional legislation. If one were to establish that particular actions are considered abusive under EU law (id est, contrary to the principle of abuse of law), the consequences (in the context of forum shopping) would merely entail that one could not rely on the EIR or the freedom of establishment. A company would still be able to apply national law, without the use of EU law (although, it would become less easy and less effective). On the other hand, merely national legislation would possibly contradict EU law (for example, the freedom of establishment) and also have sub-optimal effect, as there is no harmonisation throughout the EU. The most effective way of achieving enforcement would therefore be by EU legislation, more specifically, a regulation.

150 For example the possibilities under UK law of a cash flow test, see, Goode, above note 120, at paragraph 4.15-4.21, and a balance sheet test, see at paragraph 4.22-4.39.
152 Recital (54) EIR Recast.
153 Community law cannot be relied on for abusive or fraudulent ends, see, Kefalas (Case C-367/96) [1998] ECR I-2843, at paragraph 20; Diamantis (Case C-373/97) [2000] ECR I-1705, at paragraph 33; Fini H (Case C-320/03) [2005] ECR I-1599, at paragraph 32; Halifax (Case C-255/02) [2006] ECR I-1609, at paragraph 68.
155 A Directive would create problems of avoidable rules, similar to the problem described in paragraph [27] on cases of insolvency.
One should therefore incorporate all of the proposed changes, which will be further elaborated below, within the legislative framework of the EIR Recast. For the purpose of this article, this newly reformed regulation will be named the Insolvency Reincorporation Regulation (hereafter “IRR”).

32 Considering that the EIR Recast is a subordinate piece of legislation, it should be interpreted in accordance with the superior EU law governing it, inter alia, the general principles of EU law. In particular, account should be taken of the principle of proportionality. This principle implies that an individual should not have his freedom of action limited beyond the degree necessary in the public interest. Read in the present context, one could say that an individual should be free to forum shop (which is essentially the exercise of the freedom of establishment), unless it is necessary to prohibit such actions in the interest of the EU. With regard to the principle of subsidiarity, thought has been put on the addition of a threshold. In this respect, abusive forum shopping could be compared to other EU legislations (for example, on state aid or mergers) which aim to protect parties otherwise overruled or unfairly dominated in the market, consequently restricting economic growth and common welfare. Rationale being that such behaviours are generally considered not to affect the EU whenever they are under a certain threshold. However, it seems that with regard to forum shopping, market effect can be established purely on the basis of the cross-border dimension enabled by way of reincorporation. Market effect should not be required additionally in cases of insolvency to justify European intervention, as such legislation is already justified by virtue of the fact that such a harmonisation cannot be sufficiently achieved by the Member States. The proposed restriction of reincorporation during insolvency in cases of abuse should thus be perceived as necessary for the proper functioning of the internal market, as delegated to the EU in article 81 TFEU. Indeed, the reincorporation-test restricts the freedom of establishment, contrary to Articles 49 and 54 TFEU. However, such a restriction can be justified as it would fall within the margin of discretion granted to the EU legislature. More specifically, granted by Article 81 TFEU for the purpose of developing judicial cooperation in civil

156 Moss, Isaacs & Fletcher, above note 131, at paragraph 2.19.
158 Article 5(3) TEU.
161 Article 5(3) TEU; Recital (5) EIR.
162 See Article 81(2) TFEU, more specifically under sub (f).
163 Edeka Zentrale (Case C-245/81) [1982] ECR 1-2745, at paragraph 27 (“since the Community institutions enjoy a margin of discretion in the choice of the means intended to implement their policy, operators cannot claim to have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary powers will be maintained”); see also Faust v Commission (Case C-52/81) [1982] ECR I-3745, at paragraph 27; Afrikanische Frucht-Compagnie v Council (Joined Cases T-64/01 and T-65/01) [2004] ECR I-521, at paragraph 83; Spain v Council (Case C-342/03) [2005] ECR I-1975, at paragraph 49.
matters. In addition, the competence of the EU legislature to regulate the subject of abuse of law can be found in legislation, case law and literature.

Procedure of Reincorporation

33 The requirement of a reincorporation-test poses an exception to the general right to freedom of establishment (still fully available during solvency), for reasons of legal certainty which benefits the welfare of the general body of creditors. Such benefits derive firstly from the certainty provided towards creditors’ claims, which are protected in cases of forum shopping of the debtor company. Furthermore, it provides a certainty towards the debtor company, which is able to foresee possibilities of reincorporation, as long as it meets the reincorporation-test. To this end, the following procedure is proposed for the reincorporation-test: after a company has been declared insolvent, an approval will be required by its creditors, followed by a judgement of the national court of the debtor company’s plan to reincorporate. A plan to reincorporate (forum shop) should be judged by the national court of the ‘home’ jurisdiction. Substance should be given to this judgement by way of national parameters established. Once the national court has ruled that the debtor company passes the reincorporation-test, it is allowed to forum shop to the ‘host’ jurisdiction, despite its state of insolvency. It would subsequently be to the discretion of the ‘host’ jurisdiction to determine the debtor company’s competence in applying for a particular insolvency proceeding according to its national laws. The theory aims to establish a common framework while allowing for the possibility of weighing in the views of the different constituencies. Such a tool would require stringency in areas where one could rationally predetermine the relevant variables, yet, flexibility in areas of rather subjective and non-economic values. It is these intangible values which require the discretion of national courts, completing the assessment by taking into account the circumstances of the case. Due to the miscellaneous valuations within the EU, Member States should be able to adjust the parameters of the reincorporation-test by way of national law to suite the public interest. This method of regulation could also result in reflexive

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164 See also the Preface of the EIR Recast.
165 Recital (29) EIR Recast, aimed at regulating abusive forum shopping; if this were always the intention of the EU legislature, then by extension one could refer to Recital (4) EIR; and also Opinion of Advocate General Colomer in Staubitz-Schreiber, above note 23, at paragraph 74.
166 See e.g. J. Knows v. Secretary of State for Economic Affairs (Case C-115/78) [1979] ECR I-399, at paragraph 27 (“virtue of the powers conferred upon it by Article 57 of the Treaty, to remove the causes of any abuses of the law by arranging for the harmonisation”).
168 Which requires the consent of the creditors, as will be discussed later on.
169 To be discussed in the following paragraph.
170 To be discussed in paragraph [40].
171 That is to say, a numerical or other measurable factor defining the system or setting the conditions of its operation. See also paragraph [60-62].
harmonisation, ultimately increasing knowledge and experience by benefitting from national diversity.\textsuperscript{172}

\textit{Insolvency Reincorporation Regulation}

34 For the establishment of a basic framework within the EIR Recast, making it the IRR which is to be further developed by national parameters, three main stakeholders should be taken into account: Creditors, employees and shareholders. However, it is the author’s opinion that all parties relevant in a case of insolvency could be considered as creditors. Employees and shareholders both participate in insolvency proceedings by virtue of their claims towards the company. Yet, these stakeholders are treated differently due to their distinct legal positions and pre-insolvency entitlements, which are valued and regulated variably throughout the EU.\textsuperscript{173} It should, however, not be the objective of EU insolvency law to concern itself with matters such as employee protection or other social interests.\textsuperscript{174} Rather, it should intend to allocate the common pool of assets in such a way as to maximise benefits towards the creditors (which essentially encompass all relevant stakeholders).\textsuperscript{175} Without such regulation, creditors would potentially take unilateral actions, to the detriment of the general body of creditors. Hence, EU insolvency law should essentially prevent a prisoners dilemma between stakeholder by promoting a mandatory and collective corporate insolvency regime within the EU.\textsuperscript{176}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{176} The most renowned justification for the existence of a mandatory and collective corporate insolvency regime has been presented by Thomas Jackson by way of the ‘creditors’ bargain theory’, see: Jackson 1982, above note 173, at 858-863; Jackson 1986, above note 173, at 7-19; Jackson & Scott 1989, idem.; which was later critically reviewed in, D.G. Carlson, “Bankruptcy Theory and The Creditors’ Bargain” (1992) 61 \textit{University of Cincinnati Law Review} 453. Still, however, the notion of viewing insolvency law as a way to overcome a prisoners dilemma (or “tragedy of the commons”) has strong merits, see also L.A. Fennell, “Commons, Anticommons, Semicommons”, in: K. Ayotte & H. Smith (eds.), \textit{Research Handbook on the Economics of Property Law} (2011, Edward Elgar, Cheltenham), at 35-36.
\end{itemize}
\end{footnotesize}
A plan made by a debtor company under the IRR to forum shop should be compared to an insolvency plan like any other. An insolvency practitioner might wish to exploit the insolvency procedures available under a different jurisdiction in order to best achieve the aforementioned goals. Usually in order to effectuate a restructuring.\textsuperscript{177} For reasons of legal certainty, one should provide for an adequate system of appreciation of the rights of creditors within such a case of reincorporation during insolvency. In this regard, INSOL Europe advocates the requirement of consent by all creditors before accepting a relocation of the debtor company.\textsuperscript{178} Although, indeed, the requirement of unanimity is a very safe and certain option, it also bluntly disregards the possibility to maximise welfare by way of forum shopping. Such problems are amplified when creditors are not locked into a procedure, as there will be no incentive to cooperate.\textsuperscript{179} Mandatory procedures would provide for the coordination of creditors necessary in order to maximise the value of a debtor’s assets in cases of insolvency. However, under such mandatory procedures, without further regulation, a ‘tragedy of the anticommons’ could arise.\textsuperscript{180} That is to say, that such veto rights (under unanimity) will result in the underuse of the common resources provided, due to the creditors’ incentives to misuse their powers. Certain parties might hold-out of proposed relocations, as their leverage may incentivise them to request more returns.\textsuperscript{181} Other creditors would subsequently be pushed into either accepting or losing out.\textsuperscript{182} Such a ‘tragedy of the anticommons’ could be avoided by requiring a majority of votes and imposing a cramdown, instead of requiring unanimity.\textsuperscript{183} The binding of parties against their will can be justified on account of the necessity to decide in favour of the common

\textsuperscript{177} Von Wilcken, above note 24, at 74; De Weijs & Breeman, above note 121, at 501-502.

\textsuperscript{178} See INSOL Europe, “Revision of the European Insolvency Regulation” (2012) INSOL Europe, available at http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe, at paragraph 3.5 where it is proposed to initiate a suspension period of one year, except when all creditors have conceded to the relocation.

\textsuperscript{179} In such cases, each creditor would be better off enforcing its claim, to the detriment of the general body of creditors, see, T.H. Jackson, “Bankruptcy, Nonbankruptcy and the Creditors’ Bargain” (1982) 91 Yale Law Journal 857, at 861; Schillig, above note 76, at 8.

\textsuperscript{180} Fennell, above note 175, at 42-43; De Weijs & Breeman, above note 121, at 512-513; Schillig, above note 76, at 20.

\textsuperscript{181} Schillig, above note 76, at 8-9 where a clear explanation is given of this problem.

\textsuperscript{182} Schillig, above note 76, at 8-9 where a clear explanation is given of this problem.

\textsuperscript{183} C. Pilkington, Scheme of arrangement in Corporate Restructuring (2013, Sweet & Maxwell, London), at paragraph 2.3.3.1; Schillig, above note 76, at 3 and 9. The hold-out problem has also been taken into account under the proposed Dutch ‘dwangakkoord buiten faillissement’, see, B. Wessels, Het akkoord (2013, Kluwer, Deventer), at paragraph 6202; see also paragraph [10].
Moreover, the cramdown mechanism is an accepted phenomenon within the EU.\textsuperscript{184} 36 Additionally, a moratorium is required in order to stay creditors’ enforcements in the interim.\textsuperscript{185}  Generally, such a moratorium will provide the insolvency practitioner with the time necessary to examine and make use of the insolvency possibilities in order to maximising the value of the debtor’s assets.\textsuperscript{186} A moratorium also provides parties with the time imperative for the consideration of such insolvency proceedings. Such a moratorium will only be effective, if there is a stay of creditors’ enforcement rights and termination clauses. Otherwise, creditors would still be able to enforce their securities or terminate their services, causing the business to lose its value. Such actions would pose a significant defect in the proposed model, as creditors would not be locked into the procedure and could very well decide to take unilateral actions. Hence, in practice, the success of an insolvency procedure aimed at retaining or maximising value is very much dependent on the ability to stay unilateral actions and retain the going concern. It is therefore firstly proposed to establish a general moratorium on creditors’ enforcement rights and termination clauses once an application for reincorporation during insolvency has been made. With regard to the termination clauses, it should be provided that such a moratorium will not cause damages or adverse effects towards the relevant creditor(s).\textsuperscript{187} 37 It is secondly proposed to establish a system of voting within the IRR by which creditors would be able to vote on the plan to forum shop. It is subsequently proposed to implement a mandatory division of creditors into different creditors’ classes, each reflecting their respective interests.\textsuperscript{188} Within these classes, creditors would meet to consider and debate on the merits of the plan, which will ultimately have to be approved by a requisite majority of creditors. The percentage of majority required

\textsuperscript{184} See e.g. Memorie van Toelichting bij het conceptvoorstel Wet Continuïteit Ondernemingen II (MvT WCO II), available at <http://www.internetconsultatie.nl/wco2> [last viewed 22 March 2016], at 66-67 where the Dutch legislator justifies the binding of parties against their will for reasons of serving the general interest (survival of the company, maximisation of value, and the preservation of jobs) against Article 1 of Protocol 1 to the ECHR; Wessels, ibid., at paragraph 6016; R.D. Vriesendorp, “Het buitenrechterlijk akkoord en het conceptvoorstel WCO II”, in: D. Busch and others (eds.), \textit{Wet continuïteit ondernemingen (delen I en II) en het bestuursverbod} (2014, Uitgeverij Paris, Zutphen), at paragraph 2.3.2.4.

\textsuperscript{185} See, P.M. Veder, T.E. Booms & N.B. Pannevis, \textit{Rechtsvergelijkinge verkening in het kader van het programma Herijking Faillissementrechts} (2013, Radboud Universiteit Nijmegen, Nijmegen), where the comparative law research of six different EU jurisdictions (Belgium, England, France, Germany, Italy and Spain) concludes that all legal systems allow a certain majority of creditors to bind the dissenting minority to an arrangement against their will. The majority required varies per country. Moreover, in the greater part of the legal systems (Germany, England, France and Italy), voting takes place in classes. The Netherlands will soon join these groups.


\textsuperscript{188} This could be avoided, for example, by prioritizing such post-insolvency claims.

for the acceptance of a plan should be left to the discretion of the Member State.\textsuperscript{190} In addition, it is advised to include a minimum amount of representation in value of claims.\textsuperscript{191} In this way, once the requisite majority is reached, the plan to forum shop will have been accepted by the creditors in a fair, yet, efficient manner. Due to the separation of classes, account will be taken of the diversity of interests. Furthermore, it has become conventional to differentiate the treatment of creditors with an economic interest from those without such an interest.\textsuperscript{192} The latter of which are often considered ‘out of the money’ creditors as opposed to ‘in the money’ creditors. Such creditors are treated differently, as one could reasonably argue that they can hold no valid reason as to object any proposed restructuring plans.\textsuperscript{193} If a party would initially receive nothing, an obstruction of the proposed insolvency plan could be viewed as an abuse of rights in itself. Hence, creditors with no economic interest can be denied a vote, or presumed to vote in favour.\textsuperscript{194} Moreover, the exclusion of ‘out of the money’ creditors would prevent hold-out problems.\textsuperscript{195} By extension, one might argue that creditors which will benefit upon the proposed reincorporation similarly have no legitimate reason to vote against it. Notwithstanding the preferred and advocated notions described above, this theory leaves such choices to the discretion of the Member States. Once an agreement between the creditors (and thus stakeholders) has been reached, it is subsequently proposed to assess a possible abuse of EU law. Such a judgement should be conducted by the relevant national court, taking into account the factors as will be discussed in paragraph [40] and further.

\textsuperscript{190} Although the majority requirement prescribed in the part III, C (18) Commission Recommendation 2014/135/EU of 12 March 2014 (OJ 2014, L74/65), is advisable.
\textsuperscript{191} In order to acquire an accurate representation and avoid problems of artificial votes.
\textsuperscript{192} This distinction is made e.g. under the UK scheme of arrangement, see, Pilkington, above note 182, at paragraph 8.2.3 and 8.8; G. O’Dea et al., (eds.), Schemes of arrangement: Law and Practice (2012, Oxford University Press, Oxford), at paragraph 3.28 and 8.89; under the proposed Dutch ‘dwangakkoord buiten faillissement’, see, Article 373(2) Voorstel van Wet Continuïteit Ondernemingen II (WCO II), available at <http://www.internetconsultatie.nl/wco2> [last viewed 22 March 2016]; MvT WCO II, above note 183, at 16 and 28; and also the US Chapter 11 reorganisation procedure when determining if a plan is fair and equitable towards unsecured creditors for a cramdown, see, United States Code, Title 11, Section 1129(b)(2)(B)(i); see also, EHYA, Submission on Insolvency Law Reform (2007, EHYA, London), at 5 on propositions from the association which represents participants in the European high yield bond markets.
\textsuperscript{193} Provided that their claims have been treated appropriately from a procedural perspective and classified correctly.
\textsuperscript{194} E.g. under the UK scheme of arrangement, the votes of ‘out of the money’ creditors are not taken into account, see, Pilkington, above note 182, at paragraph 8.2.3 and 8.8; O’Dea, above note 191, at paragraph 3.28 and 8.89; under the proposed Dutch ‘dwangakkoord buiten faillissement’, such creditors are given a vote, however, they are not able to vote against the proposed plan, see, Article 373(2) WCO II, above note 191; MvT WCO II, above note 183, at 16 and 28.
Maximisation & Efficiency

38 As construed in paragraph [1], one should stimulate coordination between creditors in insolvency proceedings. Forum shopping is a way of achieving such coordination. As scholars have argued, there is no ‘one size fits all’ insolvency procedure within the EU. Therefore, forum shopping is sometimes necessary in order to maximise the value of assets or achieve efficiency. One could discuss extensively on what is to be considered ‘value maximising’ or ‘efficient’, and whether ‘legitimate’ forum shopping should be considered the same as ‘efficient’ or ‘value maximising’ forum shopping. However, if one were to allow only ‘legitimate’ forum shopping, arguably, the aim of the proposed model is achieved. Whether or not the forum shopping plan proposed will in fact be successful is irrelevant, as it has been the decision of the creditors as a collective. It is the anticipated contribution of the reincorporation which should be assessed. To that end, considering that ‘abusive’ forum shopping will be restricted, a change of forum without any contribution is unwanted by all stakeholders. If the proposed forum shopping incurs problems of valuation or unexpected costs, then such issues should be considered as externalities of the attempt. The practice of forum shopping, once it has become accepted, will adjust accordingly and optimize itself to effectuate ‘efficient’ forum shopping. It is only necessary to ensure the protection of creditors’ rights with respect to their pre-insolvency entitlements as a minimum requirement of legal certainty, before such attempts to forum shop are rationally dared to be made. Hence, it is presumed that if forum shopping is not ‘efficient’ or ‘value maximising’, it will not be attempted. Still, one could also argue persuasively that, considering the ‘derivatives revolution’, the market could also create situations where creditors are widespread and not interested in maximisation, sometimes even the opposite. Such a counterproductive movement would signify the failure to achieve the primary goal of insolvency law. However, this possibility will be avoided by way of a majority requirement in collective procedures and a cramdown of the dissenting minority, as has been explained in the previous paragraphs. Notwithstanding the aforementioned, the valuation of the efficiency will be necessary for the purpose of

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197 Jackson 1986, above note 173, at 21 et seq.
199 H.T.C. Hu & B. Black, “Debt, Equity, and Hybrid Decoupling: Governance and Systemic Risk Implications” (2008) 14 European Financial Management 663, at 666 where it is explained as (“the growth of sophisticated, lightly regulated hedge funds, and the related growth in the share lending market”) making it (“easy to decouple voting rights from economic ownership, and to further decompose economic ownership”).
200 Hu & Black, ibid., at 687.
201 Hu & Black, ibid., at 693-694; Schillig, above note 76, at 10-12.
202 Schillig, above note 76, at 13.
establishing whether or not a reincorporation (forum shopping) is abusive.\textsuperscript{203} However, valuations for the purpose of ensuring value maximisation should be differentiated from valuations for the purpose of preventing abuse, as the latter should only be marginal.

**Abuse of Law**

**Genuine or Legitimate**

39 The author does not believe that one should aim to advance on the possibility of either a ‘genuine’ relocation or a ‘sham’, as referred to by the European Commission.\textsuperscript{204} Primarily by virtue of the formalistic and definitive establishment of the applicable jurisdiction through reincorporation,\textsuperscript{205} such a distinction is rendered needless. More substantially, it should be noted that the application of a jurisdiction is rather factual. Either there is jurisdiction, or there is not. A ‘sham’ would imply that one has been deceived as to believing that one has jurisdiction, when in fact one does not. Possibly, by way of distorting or falsifying facts. Such conduct, if performed by a debtor company during insolvency, should be translated to fraud rather than an abuse of law, placing its assessment outside the scope of this article.\textsuperscript{206} Hence, this theory will focus on establishing a distinction between ‘legitimate’ and ‘abusive’ forum shopping.

**Approval by the Court (National Parameter)**

40 An approval by the national court after creditors have reached an agreement is quite common within the EU.\textsuperscript{207} Taking as an example the considerations of the UK court of the purpose of sanctioning a scheme of arrangement, one could imagine a court’s necessity to review the fairness\textsuperscript{208} of the procedure; the statutory and procedural requirements;\textsuperscript{209} adequate provision of information to creditors;\textsuperscript{210} a fair

\textsuperscript{203} See paragraph [47 and 51].
\textsuperscript{204} Impact assessment, above note 9, at 21.
\textsuperscript{205} See paragraph [28-30].
\textsuperscript{206} For a more detailed explanation of this distinction, see, Eidenmüller, Engert & Hornuf, above note 122, at 9; and, Eidenmüller, above note 110, at 142 where the Hans Brochier case is used as an example.
\textsuperscript{207} Veder, Booms & Pannevis, above note 184, where the comparative study concludes that all six EU jurisdictions require court approval for a proposed agreement within insolvency to have effect.
\textsuperscript{208} Re Alabama, New Orleans, Texas and Pacific Junction Railway Co Ltd [1891] 1 Ch 213; Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723; Re National Bank Ltd [1966] 1 W.L.R. 819; Re Telewest Communications plc [2004] EWHC 924 (Ch); Re TDG Plc [2008] EWHC 2334 (Ch); Pilkington, above note 182, at paragraph 8.4; O’Dea, above note 191, at paragraph 4.45. See also, Re British Aviation Insurance Co Ltd [2005] EWHC 1621 (Ch), where it was determined that a low turn up of creditors is not unfair; Re Chevron (Sydney) Ltd [1963] VR 249, where it was determined that voting by creditors to their benefit in some other capacity than as creditor to the relevant company might be seen as unfair.
\textsuperscript{209} Re Alabama, New Orleans, Texas and Pacific Junction Railway Co Ltd, idem.; O’Dea, idem.
\textsuperscript{210} Re Dorman Long & Co Ltd [1934] Ch 635; Pilkington, above note 182, at paragraph 8.2.1.
representation of the classes, acting bona fide; and possible oppression of minorities. Accordingly, one could determine whether forum shopping is good or bad – legitimate or abusive – in each case, taking into account its particular circumstances. Protective and nationalistic legal measures from the ‘host’ state will no longer be desired, considering that, under the proposed model, Member States are ensured of the legitimate interest of the debtor company and the appropriate protection of the relevant stakeholders. Accordingly, it is devoted to the ‘home’ state to apply an abuse of law test. The ECJ has firmly established that a Member State is entitled to take measures designed to prevent parties from abusing EU law.

However, what should be regarded as an abuse of EU law? An explicit description of this legal doctrine (within the IRR) would not be superfluous for reasons which have been explained in paragraph [22], and will become increasingly apparent below.

**Principle of Abuse of EU Law**

41 It is proposed to codify the abuse of EU law (more specifically, in the IRR) so that national courts may apply it as part of the reincorporation-test. With regard to an abuse of law assessment, the importance of a case-by-case analysis of the national court on the basis of objective evidence, has frequently been emphasised by the CJEU. It is therefore important to leave some discretion to the national court when creating a rule on the abuse of law. In this way, the national court will be able to interpret the general rule on a case-by-case basis.

42 When advancing a general rule on the abuse of law, one should take account of the developed principle of ‘prohibiting abusive practices’ by the CJEU in *Halifax* and the abuse of law test in *Emsland-Stärke*. Admittedly, these cases do not concern insolvency law, but agricultural law (*Emsland-Stärke*) and tax law (*Halifax*). Nonetheless, these cases demonstrate the principal reasoning of the ECJ (now CJEU) and are useful insofar as they can be applied in a more general context. Moreover, the Court often applies general principles recognised in one area of law, in other areas later on. In any case, one should include the established practices of

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211 *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co Ltd*, above note 207; *O’Dea*, above note 191, at paragraph 4.46.

212 Such as a suspension period, see paragraph [5].

213 *Centros*, above note 22, at paragraph 24 where reference is made to the established body of case law of the ECJ (now CJEU).

214 This requirement can be found in various cases, e.g. *Leclerc* (Case C-229/83) [1985] ECR I-1, at paragraph 27; *Leur-Bloem* (Case C-28/95) [1997] ECR I-4161, at paragraph 41; *Imperial Chemical Industries* (Case C-264/96) [1998] ECR I-4695, at paragraph 26; *Centros*, above note 22, at paragraph 25; *Emsland-Stärke* (Case C-11/099) [2000] ECR I-11569, at paragraph 39.

215 *Halifax*, above note 152, at paragraph 70.

216 *Emsland-Stärke*, above note 213, at paragraph 52-53.

217 See e.g. the line of arguments in *Manfredi* (Joined Cases C-295/04 to C-298/04) [2006] ECR I-6619, at paragraph 95-97, where the Court allowed a claim for compensation for loss of profits and interest in a competition law case with reference to older administrative law cases.
the CJEU when contemplating on a possible harmonisation. In brief, the aforementioned cases establish two essential requirements for the determination of an abuse of law. Firstly, it requires a combination of objective circumstances which fulfil the conditions of EU law, yet do not achieve the purpose of those rules. Secondly, it requires an intention to obtaining an advantage from EU rules by artificially creating the conditions laid down for obtaining it.

The first requirement of the CJEU is a rather conventional one, examining the purpose of the law used. An effect is generally considered positive (or ‘good’) if it is desirable and negative (or ‘abusive’) if it is undesirable. So then, when is an effect desirable? It could be argued that an effect caused by insolvency law could only be desirable if it would meet its purpose, which is in this case, the objectives of cross-border insolvency law. If the objectives set out by the law are fulfilled, the forum shopping is arguably serving the purpose of the law, thereby creating the intended and thus desired effect. On the other hand, if it does not meet the objectives of insolvency law, it could be seen as infringing or abusing the law and thus negative. Therefore, in this particular case, one should analyse the purpose of the EIR Recast in order to determine what could be regarded as abusive. To this end, it again becomes clear that an autonomous assessment by a national court would be unachievable without properly designated EU legislation. National courts would be required to constantly refer preliminary questions to the CJEU in order to obtain the correct interpretation and purpose of EU law, as this task has been attributed to the CJEU.

The second requirement is a subjective one, scrutinizing the conduct of the relevant party in order to confirm its intent. Although, the need for a subjective requirement has been criticized by some authors, it has been viewed valuable by others. For the present purpose, one would have to take into consideration the intent of the company concerned to abuse the law. The word ‘artificial’ as used here by the CJEU implies that a situation is created, purely to obtain an advantage. Thereby giving it an artificial flavour instead of a natural one. Nonetheless, such a situation is in fact created; there is no

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218 For an extensive study on the abuse of EU law, see, Saydé, above note 153.
219 Emsland-Stärke, above note 213, at paragraph 52; Halifax, above note 152, at paragraph 74.
220 Emsland-Stärke, ibid., at paragraph 53; Halifax, ibid., at paragraph 75.
221 Article 267 TFEU; see also paragraph [31-32].
222 D. Weber, “Abuse of Law in the Context of Indirect Taxation: Why We Need the Subjective Intentional Test, When is Combating Abuse an Obligation and Other Comments”, in: R. de La Ferré & S. Vogenauer (eds.), Prohibition of abuse of law: a new general principle of EU law? (2011, Hart, Oxford), at 379-380 where it is elaborately described how one may take a pragmatic approach when determining the subjective part of the abuse of law test.
224 Weber, above note 221, at 397-399.
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...falsification of facts. Rather, the facts are genuine and have been made in order to assist the company in obtaining the privileges of the law (active forum shopping). Much like the case of *Centros*, where a company was incorporated (fact created) in order to obtain the advantages of English law. Such a situation is different from the situation of, for example, *Hans Brochier*. In that case, the facts were somewhat altered or concealed, making it seem as if the company’s COMI was in the UK, when in fact it was not. By applying these two requirement to the EIR Recast, one could extract the types of conduct which should be considered abusive.

**Objectives of the EIR Recast**

44 The focus of the current section will be to determine the objectives of the EIR Recast in order to establish afterwards what can be constituted as ‘abusive’ forum shopping, and for that reason, be codified within the IRR. Within the context of cross-border insolvencies, certain aspects become important which differ somewhat from those of national insolvency law. Consequently, the objectives pursued are also slightly different. In addition, EU law has precedence over national law, which should leave the divergence in national objectives on insolvency law out of the equation. Once the objectives of the EIR Recast have not been met, the possible consequence would be to deny the right to reincorporate. Seeing as this should be the only way for Member States to grant access to insolvent companies into its jurisdiction, such abusive reincorporations would not be possible. Thus, if the EIR Recast applies and its objectives are met, despite forum shopping, it could be argued that the company should be able to rely on the EIR Recast for its choice of forum.

45 After contemplating the Recitals of the EIR Recast, one might argue that they show three main objectives. These are: to allow for cross-border insolvency proceedings within the internal market to operate effectively; efficiently; and without incentives for abusive forum shopping. From the objectives of effectiveness and efficiency, there are two supplementary objectives that follow. Namely: to secure coordination of the measures to be taken with regard to the insolvent debtor’s assets; and to provide for legal certainty in cross-border insolvency.

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225 Saydé, above note 153, at 87.
226 The objective of the EIR Recast is not much different from that of the EIR. Still, one should review the EIR Recast as it has already been adopted.
227 *Costa v E.N.E.L.* (Case C-6/64) [1964] ECR I-585.
228 Recitals (3), (5) and (8) EIR Recast.
229 Recital (4) EIR Recast; *Re Eurofood IFSC Ltd*, above note 7, at paragraph 48; Moss, Isaacs & Fletcher, above note 131, at paragraph 6.12.
230 *Staubitz-Schreiber*, above note 77, at paragraph 26; Virgós & Garcimartín Alférez, above note 65, at paragraph 5; Opinion of Advocate General Colomer in *Staubitz-Schreiber*, above note 23, at paragraph 57 and 75.
46 First is the principle of effectiveness, which has been recognised as a general principle of EU law by the CJEU.\(^{231}\) The principle requires the effective protection and enforcement of EU law within the Union.\(^{232}\) In the context of the EIR Recast, effectiveness could be explained as the objective to ensure the *effet utile* of EU law on cross-border insolvency proceeding with European dimension, for the benefit of the internal market. For the purpose of this article, the objective of effectiveness is in itself relatively immaterial as it can only be achieved or infringed by Member States, rather than companies. Therefore an act of forum shopping will not (in all probability) deter or stimulate the effectiveness of the EU law, other than by way of the supplementary objective of legal certainty which derives from it.

47 The second main objective is that of efficiency, which has a strong connection with forum shopping. In the context of the EIR Recast, efficiency could be achieved by providing for cross-border recognition and coordination of EU insolvency proceedings for the benefit of the internal market.\(^{233}\) Efficiency itself can be interpreted linguistically as achieving maximum productivity with minimum wasted effort or expense, which is quantifiable in capital (value in monies). The EIR Recast seems to take an analogous approach.\(^{234}\) Hence, if a novel forum would retain or increase the overall efficiency, one could argue that it would meet this main objective of the EIR. Whereas, if forum shopping would decrease overall efficiency, it could be considered abusive.

48 Next are the supplementary objectives of effectiveness and efficiency. The first supplementary objective of coordination is most likely not to be affected by forum shopping, as it relates to the coordination between different jurisdictions. This coordination has been established by the EIR by way of its regulations on recognition. Only the rule of law and practice of the Member States could influence this basic objective, for example by refusing the recognition of particular foreign insolvency proceedings. Conversely however, the coordination of measures could impact forum shopping, as they influence the effects of the cross-border insolvency

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\(^{232}\) Tridimas, above note 156, at 418 et seq.

\(^{233}\) Virgós-Schmit Report, above note 172, at paragraph 147.

\(^{234}\) See, Recital (35), (40), (45) and (48) EIR Recast on main and secondary proceedings, in conjunction with Recital (51), (52) and (54) on group insolvencies, from which one may derive that the EIR Recast seeks to increase the value of the common pool of assets by way of efficient insolvency proceedings.
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proceeding. The second supplementary objective of legal certainty is very much affected by forum shopping. Forum shopping can create situations in which there is a sudden change in applicable law, potentially to the detriment of creditors or other stakeholders who anticipated and trusted otherwise. However, if the relevant parties are aware of the possibility and engagement of a new forum, there will be no threat to legal certainty. It should therefore be noted that forum shopping which has a negative effect on legal certainty should be considered as contrary to the supplementary objective of the EIR Recast.

Abusive Forum Shopping

49 Lastly, in order to meet the final objective of the EIR Recast, which is to disincentivise abusive forum shopping, one would have to ask: When is abusive forum shopping incentivised? Arguably, an incentive to forum shop abusively has already been created under the current COMI model.235 Constructions which would reduce manipulability and provide safeguard against abuse would probably obtain this aspired objective much more effectively. Yet, such objectives regard the system itself, rather than its use. Analogically, one might reason that the objective of the EIR Recast is, by extension, to avoid the act of abusive forum shopping. Therefore, one would have to ask: When is there abusive forum shopping? Ironically, we find ourselves in a circular reasoning. The objective of the EIR Recast is to end abuse, which is again conditional upon the Regulation’s aim to end abuse. One could break this circular reasoning by determining what it is that the EIR Recast considers as ‘abusive forum shopping’, rather that the CJEU. For this, one would have to examine its primary codification in Recital (5) EIR Recast, which has been amended from the original Recital (4) of the EIR. An exegesis of Recital (4) EIR should conclude that it aims to prevent the opportunistic conduct of forum shopping to the detriment of the creditors as a whole,236 leading to unjustified inequalities.237 A value towards the welfare of the general body of creditors is distinctly overt from this analysis. This valuation has been confirmed by the amendment of the Recital in the EIR Recast, which has now added that forum shopping should be avoided if it is “to the detriment of the general body of creditors”. It would therefore seem most sensible to determine the final objective of the EIR Recast as obtained, if forum shopping is not to the detriment of the general body of creditors.

50 Taken together, the objectives by which forum shopping should be examined are that of efficiency, legal certainty and welfare of the general body of creditors. It should thus be established that forum shopping is legitimate if it meets the aforementioned objectives, and abusive if it does not. These objectives should be included in the assessment of the national court as part of the reincorporation-test.

235 See paragraph [1].
236 Virgós-Schmit Report, above note 172, at paragraph 7; Virgós & Garcimartín Alférez, above note 65, at paragraph 12(a); M. Arnold, “Truth or Illusion? COMI Migration and Forum Shopping under the EU Insolvency Regulation” (2013) 14 Business Law International 245, at 252.
237 Opinion of Advocate General Colomer in Staubitz-Schreiber, above note 23, at paragraph 70-77.
Accordingly, a plan to forum shop should at least: Retain efficiency; retain legal certainty; and preserve the welfare of the general body of creditors. These are the cumulative requirements which are to be met in order to pass as a legitimate attempt to forum shop. Its application will however be left to the discretion of the national courts, which will have to adjust according to circumstances of the case and the parameters established by the Member State.

Valuation

51 The distinction between ‘efficient’ forum shopping and ‘inefficient’ forum shopping, or ‘in the money’ and ‘out of the money’ creditors is difficult to make. The decision on efficiency and consequently allowance of forum shopping, altering the anticipated rights and obligations of parties, primarily relies on calculations based on valuations of the business. It has been argued in this regard that much could depend on debatable assumptions and contentious modes of calculation, leading to an increase of litigation. Indeed, such valuations seem inevitable for the assessment of pre-insolvency entitlements and eventually, the overall desirability of forum shopping. However, one could argue that once the majority of creditors have agreed to the proposed plan, the valuations used have been accepted by the general body of creditors. Consequently, the integrity of the valuation has surpassed a particular threshold, giving the court more ground to accept it as a basis of further judgement. Still, national courts will be required to have a certain amount of skill in order to properly evaluate the situation. It could very well be argued that such an expertise on valuations does not yet exist under most national courts within the EU. Therefore, this method becomes sensitive to abuse by malicious parties seeking to manipulate the actual values with more favourable ones. Or at least, it becomes sensitive to injustice due to wrongful valuations. This problem could be solved by increasing knowledge on finance and valuations within the judicial systems. However, that would impose concomitant high costs on Member States and an increase in the judicial workload. Why should one then still bring about such changes? Firstly, it could be argued that these costs and efforts are inevitable. As it currently stands, the aforementioned problems with valuations exist. They appear (for example) under the extensively used UK scheme of arrangements, where, despite the experience of the UK courts, criticism has been placed on its valuations. In addition, valuations are very common in insolvencies, as they are

238 See paragraph [51] on the valuation involved in this regard.
240 On the frequent forum shopping to the UK in order to use its scheme of arrangement, see e.g. Re Equitable Life Assurance Society [2002] EWHC 140 (Ch); Re Drax Holdings Ltd [2003] EWHC 2743 (Ch); Re Hellas Telecommunications (Luxembourg) II SCA, above note 7; La Seda de Barcelona SA [2010] EWHC 1364 (Ch); Re Rodenstock GmbH [2011] EWHC 1104 (Ch); Re Dtek Finance BV [2015] EWHC 1164 (Ch).
indispensable for rationally arguing towards the most ‘appropriate’ procedure to follow, often segmenting generally between liquidation or corporate rescue. Moreover, the EIR Recast demands the implementation of ‘abusive forum shopping’ and the assessment of ‘effective administration of the insolvency proceedings’ with a ‘positive impact for the creditors’ within group coordination proceedings. To this end, the development of legal systems by instilling expertise on finance should be welcomed, if not inevitable.

Employees

52 Employees’ rights are important within insolvencies and undoubtedly to the economy as a whole. The protection of these rights should however be provided by national security systems or specialized multilateral agreements such as the Transfers of Undertakings Directive, rather than the proposed IRR. Such national or transnational rights should subsequently be taken into account by the national court, as a reincorporation could very well adjust the legal status of the employees. In addition, one should consider the valuation of employees during reincorporations. Currently, there is no particular universally accepted method of valuation of employees. Within the area of personnel economics, there are struggles in creating an appropriate way to valuate workers. Perhaps such efforts could someday provide better results, which could be used to create more objective and harmonised valuation of workers. However it seems that, for the time being, such valuations will depend on the expertise of national courts.

Group Insolvencies & Forum Shopping

53 It has been discussed above that consolidated insolvency procedures are possible under the EIR Recast for groups of companies. Such procedures will be able to continue under the proposed IRR. However, such procedures would not require reincorporation, as they only allocate an exclusive forum. The applicable law will remain unaltered under such procedures. The draw-backs of such an approach and the need for uniformity of the applicable law in cases of groups of companies has been addressed in paragraph [9].

54 The IRR as proposed under this theory provides for the additional possibility to forum shop all legal entities of a group of companies to a single jurisdiction in order

shortcomings of scheme/intercreditor release mechanisms” (2013) 6 Corporate Rescue and Insolvency 49, at 52 on the same comparison and the uncertainty of the UK courts’ approach to valuation.

242 Recital (29) EIR Recast.
243 Recital (57) EIR Recast.
246 For more on this subject, see, Lazear, ibid.
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to have a single insolvency procedure for the whole of the group. The inclusion of the entire corporate structure of a company within one insolvency procedure will often prove advantageous for the purpose of: value maximisation; post-commencement financing; and increasing the ‘fairness’ of liabilities. However, one might argue that such inclusions also have a downside. Namely, that a change in applicable law might very well alter creditor’s ranking of security rights and claims. Hence, value maximisation and ‘fairness’ may not be presumed against all parties. Indeed, group insolvencies would entail forum shopping which could impede the legal certainty of parties anticipating the application of the ‘home’ jurisdiction. Due to the increasing complexity of corporate structures, information asymmetry regarding a company’s ownership and further intercompany entanglements pose a reality. Therefore, leaving a change of forum and applicable law to the discretion of the insolvency practitioner (as under the EIR Recast’s group coordination proceedings) does not seem reasonable. The inclusion of creditors in such a shift will be necessary in order to maintain legal certainty. Although, safeguards are already provided for creditors by way of the possibility to initiate secondary proceedings, such remedies would impede the very purpose of consolidated insolvency procedures. It would thus seem most advisable to implement the tests proposed under this theory within such consolidated insolvency procedures in order to justify such reincorporations like any other, and give creditors a voice. This advice results from a trade-off between legal certainty and expeditiousness. It is however inevitable for the present purpose to uphold legal certainty; as a rejection of creditor’s rights to a vote in such situations would create an unjustifiable distinction between group insolvencies and non-group insolvencies. Yet, a compromise between legal certainty and expeditiousness could be formed by requiring the consent of a two thirds majority rather than all of the relevant legal entities for the establishment of a single jurisdiction, as is also currently the case within the consolidated insolvency procedures of the EIR Recast.

55 In conclusion, for forum shopping of a group of companies to take place under the IRR, all of the separate companies would have to request reincorporation to a single ‘host’ state. Subsequently, if the proposed plan would be accepted, all entities within the group of companies would have to reincorporate to the ‘host’ state. It is proposed to require the acceptance by a two thirds majority of the ‘home’ states in order to allow for such a group-reincorporation.

Added Value

56 The original incorporation model has the deficiency of allowing forum shopping on a rather extensive scale, with little protection in place against abuse and

247 Mevorach, above note 48, at 36; Finch, above note 150, at 583-584.
insufficient reckoning of the possibility of group insolvencies. The proposed changes under the present theory will allow for the legitimate appreciation of the efficiency which forum shopping can provide. Inherently, the theory desires a positive approach to forum shopping, instead of retaining a defensive approach by way of indirect safeguards. This will stimulate companies to engage in finding the most efficient procedure or remain in their ‘home’ jurisdiction. Making forum shopping more acceptable and transparent will also benefit corporate rescue. Once forum shopping has become a more regularly applied phenomenon, it should get rid of the stigma attached to it. As some scholars have stated, there is no “one size fits all” insolvency system. Subsequently, managers will feel free to propose the use of more appropriate insolvency procedures, possibly switching to a pre-insolvency agenda and a rescue of the debtor company. Of course, this argument is based on the assumption that corporate rescue is in itself preferable above liquidation. For the purpose of this article, it should suffice to make some general remarks. Firstly, one should observe the EU legislature’s like-minded view to promote corporate rescue. One should subsequently note the generally accepted benefits which could derive from a going-concern value. And finally, it has been argued that social welfare is maximized if viable firms are continued while those unfeasible are liquidated, showing (equally) the importance of corporate rescue.

Although, indeed, the proposed framework promotes legitimate forum shopping, it also provides safeguards for creditors by way of: Voting powers; judicial supervision; and an abuse of law test. The proposed model has the intention of protecting creditors’ pre-insolvency entitlements in order to maintain legal certainty. Importantly, the problems relating to unsophisticated creditors will be resolved significantly as they will have a say in the matter and are ensured of the assessment of the national court. Employees and others non-economic values will be protected

249 See paragraph [18].
250 See also K. Crawford, “Forum Shopping and the Global Benefits of Soliciting Insolvency”, in: International Insolvency Law Conference 2010, 15 September 2010, Nottingham Law School, at 3, (“It is useful to view forum shopping itself as a form of investment; choosing a regime in which to invest compromised capital in a not entirely dissimilar way to how banks sell bad debts to credit recovery agencies. The act of seeking best returns from an investment is not substantially different from recovering the least bad returns”).
251 Franken, above note 10, at 242; Kastrinou, above note 195, at 22; see also S. Djankov et al., “Debt Enforcement Around the World” (2008) 116 Journal of Political Economy 1105, at 1146 showing empirically that mimicking other countries’ laws and systems does not work.
252 One might also argue that liquidation is the inevitable natural course of the economy and should not be frustrated by stimulating corporate rescue of companies which are not viable.
253 Recital (10) EIR Recast; Commission Recommendation (EU) 2014/135 of 12 March 2014 (OJ 2014, L74/65), calling Member States to adopt rescue orientated insolvency proceedings.
254 See, Jackson 1986, above note 173, at 14 stating (“To the extent that a non-piecemeal collective process (whether in the form a liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group. This is derived from the commonplace notion: that a collection of assets is sometimes more valuable than the same assets would be if spread to the winds. It is often referred to as the surplus of a going-concern value over a liquidation value”).
255 Schwartz, above note 1, at 1200-1201 stating (“Social welfare is maximized when economically distressed firms are liquidated but financially distressed firms are continued.”).
in a similar fashion. Moreover, these values could gain safeguards from additional national and transnational regulations, depending on the policy of the Member State. Additional advantages are gained due to the pre-emptive approach of the IRR. Its active ex ante assessment and constraint of abuse makes additional ex post judicial reviews superfluous.256 Or, as Mark Arnold has thoughtfully phrased:

“A right to challenge a decision once made is clearly important. Far better, however, if the abuse (if such it be) is detected before the decision is even made, so that the time and expense of a subsequent challenge is avoided.”257

58 The ability to plan legitimate forum shopping ex ante also creates more efficiency possibilities for creditors. Due to the substantial increase in predictability and legal certainty, parties will be able to calculate the insolvency costs and possibilities of forum shopping more accurately. This increase of legal certainty will benefit debt finance and consequently, the capital market.258 Similarly, efficiencies will be gained by the elimination of suspension periods. The proposed reincorporation-test confronts the company’s plan and analyses for a possible abuse of law, making the suspension period needless. Cross-border insolvencies would benefit from such a removal, as the insolvency procedure’s speed will be increased, which is paramount to the effectiveness and efficiency of corporate rescue.259 Furthermore, the proposed model retains the advantages of an incorporation model, as discussed in paragraph [15-17]. The model of this theory also has advantages in its future perspective. By providing for a level playing field, making subdivisions and concretising the area of law, it will become more feasible to harmonise insolvency law within the EU.260

Scheme

59 The procedure proposed should be visualised in the following way:

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256 See paragraph [6].
257 Arnold, above note 235, at 259.
258 See paragraph [16].
260 E.g. by way of the national parameters or the exit solvency test.
Regulatory Competition of National Parameters

60 Under the proposed model, Member States are able to adjust their national parameters to meet their national values. However, such a model could possibly lead to regulatory competition. In order to analyse the possible effects, one would first have to determine whether there will be regulatory competition at all. Regulatory competition implies that national legislatures compete to attract companies to perform subject to their laws. For this to occur, there are two preconditions.

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261 Armour, above note 68, at 375.
Firstly, there will have to be regulatory arbitrage. Secondly, Member States must have something to gain by this attraction and performance of firms.\textsuperscript{262} Due to the different systems of insolvency law, there seems to be regulatory arbitrage within the EU.\textsuperscript{263} Also, within the area of insolvency law Member States have already adjusted their national laws to compete with other jurisdictions’ legislation.\textsuperscript{264} The benefits of attracting firms to a particular jurisdiction have been discussed in various literatures,\textsuperscript{265} from which one might conclude that there are plenty. One might therefore decide that regulatory competition within the area of insolvency law is very well possible. However, regulatory competition will be relativised to some degree due to the incorporation model. The applicable insolvency law and company law will be dependent on the same criteria, increasing the scope of regulatory competition. Member States could consequently be ‘weak’ in one area of law and compensate by being ‘strong’ in another area. Hence, the overall desirability or popularity of the jurisdiction will count, rather than only the insolvency forum. Generally, there are two extreme possibilities for Member States to adjust their national parameters in respect of forum shopping. Either they could apply very stringent or very loose parameters. The consequences and anticipated applications of such parameters are described in the chart below. This approach is based on the assumption that Member States’ primary drive to adjust national parameters will be dependent on its ability to attract business and its ability to unwind the insolvency procedure in a lawful manner. Now that the latter is difficult to predict due to the differences in value attached by the various Member States, this section will attempt to predict the possible approaches taken by Member States based on its ability to attract business. The predictions in this chart result from a series of deductions which are based on the topics discussed earlier within this article.

\textsuperscript{262} Armour, above note 68, at 376.

\textsuperscript{263} Van Hoek, above note 122, at 60 and 82; see also Impact assessment, above note 9, at 21, stating that (“The problem of forum shopping is essentially driven by differences in national insolvency and company laws”).


It is firstly anticipated that Member States which have ‘bad’ insolvency laws will have an incentive to apply loose parameters. For these Member States, loose parameters will have more beneficial effects than stringent parameters. Initially, investors might be attracted to invest in businesses within these Member States. However, ‘bad’ insolvency laws might cause investors to refrain from such investments, considering their position within the insolvency procedure or the potential uncertainty of their rights. Hence, such Member States could apply loose parameters by which it would become more easy to forum shop to a Member State with ‘good’ insolvency laws. Consequently, ‘bad’ insolvency laws would not pose an obstacle any more. Within situations where the investor would become the primary or principal creditor of the company, one might even argue that ‘bad’ insolvency laws will not matter at all. Investors would be able to anticipate on their rights and position within the jurisdiction most favourable to them. In this way, such Member States will gain business by way of their liberal approach to forum shopping, potentially maximising their national assets (indirect positive effects). This ‘use’ of the ‘good’ insolvency laws of other Member States will cause a win-win situation. The home state will not have to experiment and adjust its ‘bad’ insolvency laws any time soon, while potentially increasing business. And the host state will receive more insolvency cases, which will also increase its business. On the other hand, Member States with ‘good’ insolvency laws will have more beneficial effects from stringent parameters, as they will want to make use of their ‘good’ insolvency laws by retaining the business it provides. Investors might attach value to the legal certainty, allocation of rights or beneficial position provided by the ‘good’ insolvency laws. Member States could therefore potentially loose business by allowing forum shopping too easily, as this would decrease legal certainty and jeopardise the anticipated allocation of rights or beneficial position. Such legal systems might attract syndicates or other situations where there are multiple large creditors.

Admittedly, there are downsides to these choices. A Member State with loose parameters will potentially lose out on insolvency cases. However, one could argue

| ‘Good’ insolvency laws: Stringent parameters | ‘Bad’ insolvency laws : Loose parameters |
| Effect: | Difficult to forum shop | Effect: | Easy to forum shop |
| Positive: | More protectionism | Positive: | More possibilities during insolvency |
| | More legal certainty | Creditor has more influence |
| | Lower interest rates & More capital | Indirect positive effects |
| Negative: | Less possibilities during insolvency | Negative: | Less protectionism |
| | Creditor has less influence | | |

266 That is to say, insolvency laws which are not used frequently and which are not considered effective in obtaining their objectives.
267 That is to say, insolvency laws which are used frequently and which are considered effective in obtaining their objectives.
268 Provided that this change in forum will not be abusive.
that this will be a consideration of the advantages of business gained, and the disadvantages of insolvency cases lost. A Member State might not have much business from insolvency cases in the first place. Furthermore, a Member State with stringent parameters might become less attractive, as it provides for less possibilities for restructuring, particularly with regard to groups of companies. Yet, such stringent parameters could provide for an increase in business. It thus becomes a consideration of applying the appropriate parameters for the purpose of creating more legal certainty or allowing for more restructuring. It would seem that, ultimately, regulatory competition should result in a mixed application of loose and stringent parameters. These variations of parameters should slowly grow towards each other, if competition retains. The anticipated result is that the market of forum shopping will develop itself and ultimately create one set of balanced parameters, from which more harmonisation of insolvency law would be within reach. In this respect, it is important that the drive to improve insolvency laws will be retained. Inherent to forum shopping is the competition which arises out of the fact that an ‘exit’ becomes more allowed and in particular situations even stimulated. With regard to Member States with ‘bad’ insolvency laws, it is anticipated that such states will want to also gain insolvency cases in the long run. There should be an incentive to develop insolvency laws which are more competitive with that of other Member States, potentially increasing business from insolvency cases. Over time, Member States with ‘good’ insolvency laws will also become more specialised, as they would initially receive more insolvency cases. This competition between insolvency laws should result in more efficient and expeditious procedures. Overall, such an alteration of the approach towards forum shopping could lead to a more general acceptance of these procedures, making harmonisation more accessible.

**Example**

63 Under this section an example will be made in order to illustrate the effects of the proposition on the basis of this theory. Let us first consider what would happen if a company were to approach insolvency under the EIR with its current COMI model. Imagine that a company is incorporated in jurisdiction A, but that one could make a case for insolvency proceedings in jurisdictions A and B. Assume that the insolvency system of jurisdiction A is manager-displacing. Managers fear displacement and usually avoid such insolvency proceedings if possible. Should the company’s creditors be a homogeneous group, then they will want to submit a petition for bankruptcy in the jurisdiction maximizing the expected value accrued to them, which is not necessarily the jurisdiction maximizing the total value. Let us assume that this

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The prospect of the initiation of insolvency proceedings by creditors may incentivise managers to file for bankruptcy first. If jurisdiction A favours the creditors and jurisdiction B favours the managers and shareholders (for example because laws on directors’ liability and veil piercing are lenient), a conflict of interest will arise between managers and creditors, and simultaneously for the managers as such. Generally, there are sound reasons to believe that managers will have an advantageous position over creditors when it comes to insolvency. As insiders, they will possess considerable information advantages with regard to the company’s finances. Furthermore, managers will have better knowledge over the options available for active or passive forum shopping, thereby making a better case for a particular COMI. Rational managers with sophisticated counsel should therefore be able to use forum shopping opportunities to their advantage, possibly abusively. However, this rather simplistic example should be nuanced to some extent. The reasoning of managers will not only be monetary, but will also take account of the stigma attached to forum shopping or having run the company into insolvency. In addition, the upper hand of managers as insiders will depend on its relationship with the particular creditors. If the company is tightly supervised by a financial institution, the advantage may be close to non-existent. Such circumstances could result in managers cooperating with senior creditors on jurisdiction A, even though the laws of jurisdiction B favour them in purely financial terms. Also, creditors will often prefer to initiate insolvency proceedings in the state where they reside and deem insolvency proceedings abroad more costly. However, such coalitions between managers and sophisticated creditors might be to the detriment of the overall welfare, more specifically that of unsophisticated parties. By contrast, if creditors are heterogeneous and the law of jurisdiction A is favourable to group 1 (secured creditors), while jurisdiction B is more favourable to group 2 (unsecured secured creditors or employees), a contest to advocate for main insolvency proceedings between creditors may arise. The outcome could depend on: Prerequisites for bankruptcy; procedural rules; information advantages; or even chance. None of which are factors which should be important when allocating jurisdiction. In any case, there will be no coordination to stop these prisoners dilemma’s where parties will antagonise each other, abusing the law in some cases. Even if there would be consensus amongst parties to forum shop, the company will always need to shift its COMI, possibly bearing considerable costs which in itself might render a beneficial forum unattainable.

64 Now let us consider what would happen if a company were to approach insolvency under the IRR with its incorporation model. Assuming the same

270 Considering that managers will usually also have to take the interest of creditors into account, see e.g., Companies Act 2006, s172(3); Keay & Kosmin, above note 133, at paragraph 6.182; Loose, Griffiths & Impey, above note 133, at paragraph 6.2, on UK law relating to directors' duties towards the company as a whole, the content of which is then supplied by the interests of the company’s creditors.

271 Either active or passive forum shopping.

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possibilities and benefits towards parties, the situation would differ considerably. Firstly, managers would not have the possibility to relocate in a state of insolvency. Considering that jurisdiction A is the place of incorporation and manager-displacing, an insolvency practitioner would have to propose a plan to the creditors. Such a plan might indeed involve forum shopping to a more beneficial forum, merely requiring the consent of creditors (sophisticated and unsophisticated). Hence, there would be much more coordination between parties and an incentive to cooperate, as the dissension of one class might jeopardise the welfare of the general body of creditors. Also, there will be no ‘race’ to file for proceedings in a particular jurisdiction (amplifying inequality), as forum shopping will always have to undergo the reincorporation-test.

Weaknesses & Pragmatism

65 This theory has been reviewed by practitioners\textsuperscript{273} for its weaknesses and pragmatism, which has resulted in the following criticisms. The primary remark made was that the procedure proposed under this theory might take a long time to complete, making it unattractive for certain companies, and undermine its success. It requires a rather active involvement of creditors and a sanction from the national court after careful valuation, only to be followed by a full insolvency procedure in the ‘host’ state. It has been argued that this will be at the expense of the pragmatism of the procedure. Generally, expeditious insolvency procedures are considered more helpful, as a company will normally lose its value through time. Hence, the longer the procedure, the more the insolvent company will decrease in value. In order to counteract such adverse effects, the additional proposition could be made for Member States to exempt particular stages of national insolvency procedures in order to progress the efficiency and speed of the overall procedure. Provided that the national parameters applied by the ‘home’ state correspond to those of the ‘host’ state, a Member State could possibly accelerate the procedure by skimming over certain stages already conducted by way of the IRR. An example can be taken of the UK scheme of arrangement, which works similarly to the procedure proposed and could perhaps exempt the directions hearing or even class meetings. Considering that creditors will have voted on an insolvency plan which is targeted at effectuating an insolvency procedure in the ‘home’ jurisdiction, rather than a mere reincorporation of the company, one could argue that creditors have already voted and accepted the successive national procedure.\textsuperscript{274} Hence, a second round of voting for the same plan would become superfluous, making the approval of the initial procedure more acceptable. In addition, such exemption measures would advance EU harmonisation.\textsuperscript{275} Despite the possibility that such accelerating exemptions will not be allowed by the relevant jurisdiction, the successive procedure should nevertheless somewhat compensate in time since it has in essence become a more

\textsuperscript{273} Specialised in cross-border insolvency law.
\textsuperscript{274} Provided that the plan remains unchanged.
\textsuperscript{275} Considering that exemptions could essentially be seen as an additional national parameter determining the legal alignment of a state.
formal process from which the bulk of negotiations will have taken place within the initial forum shopping procedure. Moreover, under the incorporation model, there is no requirement of a ‘regular basis’ or a suspension period as under the COMI model of the EIR Recast. Therefore there will be no time spent to establish a new COMI. Ultimately however, if a company is not able to withstand the length of the proposed procedure (despite its moratorium) then it might not be appropriate to allow such a company to forum shop.

66 Secondly, companies are still able to incorporate themselves in state A, while operating in state B. Under such a ‘letter-box’ company structure, employees and third parties might be under the impression that national laws and procedures of state B will apply in cases of insolvency, while this is not the case. However, it is here that secondary procedures will provide for necessary safeguards if parties are poorly informed by the relevant company. Although secondary procedures will frustrate a unitary resolution of the company, there are also possibilities to avoid such discrepancies in the EIR Recast.  

67 Thirdly, it should be noted that thought has been put to the notion that companies might want to remain anonymous in their filing of insolvency. However, full anonymity does not seem achievable under the proposed model, as it relies on the involvement of all creditors. Motives to stay anonymous normally derive from the fact that creditors (such as financial investors and suppliers) might react adversely or even impair corporate rescue due to the stigma attached to the initiation of insolvency. However, such negative effects will be avoided by way of an appropriate moratorium. As has been proposed in paragraph [36], such a moratorium would stay creditors’ enforcement rights and termination clauses once an application for reincorporation during insolvency has been made. These safeguards should retain most of the adverse effects which could be caused by the disclosure of the company’s insolvency. However, other adverse effects caused by third parties (such as customer) will remain.

Conclusion

68 This article has concluded that although, ostensibly, the EIR seems to be aimed at avoiding forum shopping all together, it should be steered towards its true objective: The avoidance of abusive forum shopping. This has been clarified by the EIR Recast, which has been specifically amended in that regard. After analysing the EIR and its Recast however, is becomes clear that little has been done to obtain this objective. Primarily, it seems that the choice to implement a COMI model is one which has incentivised forum shopping and this will remain the case, whether abusive or not. Although efforts have been made to prevent abuse by way of safeguards such as secondary proceedings and suspension periods, such measures seem to be holding back efficient insolvency proceedings, rather than abuse alone.

276 For example the possibility of synthetic secondary procedures, adopted under Article 36 EIR Recast.
The subsequent omission of the EIR Recast to address these inefficiencies and describe its intentions behind ‘abusive forum shopping’ leaves much unresolved. Primarily, the unpredictability of the COMI, its manipulability and possible abuse against sophisticated as well as unsophisticated parties necessitates a different approach. This article has identified these issues and proposed a theoretical model which might improve upon the current system. While attempting to identify when one should consider forum shopping ‘abusive’, the theory also provides for the framework necessary to achieve a more efficient regulation of forum shopping. It seems however that, although the model proposed might increase legal certainty and enhance the current system, it also has its disadvantages. Generally, the model proposed may turn out to be too lengthy for it to be practical. Also, parties might refrain from its use due to its disclosure of insolvency. Yet, in the end, such pragmatic draw-backs should not allow the theory to be presumed incorrect. Overall it would seem that the propositions made could indeed improve the regulation of forum shopping and might even be inevitable in some cases, in spite of political hardship.