An analysis and hypothesis on forum shopping in insolvency law:

From the European Insolvency Regulation to its Recast

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# Table of contents

Research questions & Hypothesis ........................................................................................................... 1
Demarcation ................................................................................................................................................. 1
Terminology .................................................................................................................................................. 2
Introduction .................................................................................................................................................. 4
Chapter 1 - The European Insolvency Regulation .................................................................................. 5
  §1.1 Purpose of the European Insolvency Regulation .......................................................................... 5
    §1.1.1 Historical background ............................................................................................................... 5
    §1.1.2 Outset of forum shopping ......................................................................................................... 6
  §1.2 System of the European Insolvency Regulation ............................................................................. 8
    §1.2.1 Recital (4) .................................................................................................................................... 8
    §1.2.2 Recital (13) .................................................................................................................................. 8
    §1.2.3 Article 3(1) .................................................................................................................................. 11
    §1.2.4 Article 3(2) & 16 ....................................................................................................................... 14
    §1.2.5 Article 26 ..................................................................................................................................... 15
  §1.3 Logic of forum shopping under the European Insolvency Regulation ......................................... 16
    §1.3.1 Insolvency law matters .............................................................................................................. 16
    §1.3.2 The meaning of forum shopping ............................................................................................... 17
    §1.3.3 Forum shopping within the European Insolvency Regulation ............................................. 18
    §1.3.4 Denotation of forum shopping ................................................................................................. 20
  §1.4 European Insolvency Regulation's choice of model ..................................................................... 21
    §1.4.1 COMI model ............................................................................................................................. 21
    §1.4.2 COMI's time of establishment ................................................................................................. 24
    §1.4.3 Shift of incorporation & Real seat ............................................................................................ 28
Chapter 2 - Examining the paradigm of forum shopping ....................................................................... 30
  §2.1 England ............................................................................................................................................ 30
    §2.1.1 Common practice ..................................................................................................................... 30
    §2.1.2 Schemes of arrangement ........................................................................................................ 31
  §2.2 Germany ......................................................................................................................................... 34
  §2.3 The Netherlands ............................................................................................................................ 35
  §2.4 Problems of forum shopping ......................................................................................................... 37
    §2.4.1 Main problems ......................................................................................................................... 38
    §2.4.2 Magnitude of the problems ..................................................................................................... 41
Research questions & Hypothesis

Shopping for an insolvency forum within the EU appears to have become a rather popular topic of debate in the recent years. In particular after the entry into force of the European Insolvency Regulation (hereafter ‘EIR’),\(^1\) which has been designed to prevent forum shopping. Forum shopping is often stigmatized and can sometimes bring a company into disrepute. The starting questions of this dissertation is therefore: How is forum shopping perceived from the perspective of the EU? What are considered to be the problems of forum shopping? And what has been proposed to solve these problems? Now that the Recast of the EIR (hereafter ‘EIR Recast’)\(^2\) has been adopted, it is interesting to ask how the EIR Recast responds to these problems and propositions? Is it going to solve the problems of forum shopping? If not, what might be a more correct approach?

With regard to the final question, this dissertation will seek to establish an hypothesis on the current key problem(s) of forum shopping and a theory on how one might be able to solve it.

Demarcation

This dissertation will examine the forum shopping of companies within the area of insolvency law. The forum shopping of individuals will not be discussed. The focus of this dissertation will lie on forum shopping within the EU, more specifically, under the EIR and its Recast. Reference will be made to the Member States of the EU towards which the EIR applies. It should be noted that Denmark has opted out of the area of judicial cooperation in civil matters pursuant to Protocol (No 22) of the TFEU on the position of Denmark. The EIR therefore does not apply to Denmark. The UK and Ireland have the possibility to opt-in to the instruments in the area of judicial cooperation in civil matters on the basis of Protocol (No 21) of the TFEU on the position of the UK and Ireland in respect of area of freedom security and justice. They have opted in to the EIR, and it therefor also applies to them.

Although forum shopping for insolvency law within the EU relates to many jurisdictions, this dissertation will focus mainly on the EU as a whole, and more specifically discuss forum shopping with respect to England, Germany and the Netherlands.

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\(^1\) Regulation (EC) 1346/2000 on insolvency proceedings (OJ 2000, L 160/1) [hereafter ‘EIR’].
Terminology
The terms used in this dissertation and their intended meanings are as follows:

• ‘economic distress’ or ‘financial distress’
   This dissertation makes a distinction between financial distress and economic distress. When using the term ‘economic distress’, this dissertation refers to the situation in which a company cannot earn sufficient revenues to cover its costs. When using the term ‘financial distress’, this dissertation refers to the situation in which a company would have positive earnings, were it not required to service its debt.\(^3\)

• ‘company’ or ‘business’
   This dissertation can use the term ‘company’ or its ‘business’. When using the term ‘company’, this dissertation refers to the legal entity including its business, unless specifically mentioned otherwise. When using the term ‘business’, this dissertation refers to the business within a company, which can be separated from the legal entity of the company.

• ‘corporate rescue’
   When using the term ‘corporate rescue’, this dissertation refers to the rescue of either the company or its business.

• ‘insolvency’
   A company can find itself in a financial state of insolvency. When using the term ‘insolvent’ or ‘insolvency’, this dissertation refers to the financial state in which a company is not able to pay its debts as they become due. The term ‘insolvency’ can also be used in the context of an insolvency procedure, in which case, reference is made to the legal procedure which regulates the legal status of insolvency.

• ‘bankruptcy’
   When using the term ‘bankrupt’ or ‘bankruptcy’, this dissertation refers to the legal status of a company which has been declared bankrupt as a result of a bankruptcy (liquidation) procedure. The term ‘bankruptcy procedure’ can also be used, in which case, reference is made to the legal procedure (liquidation) which regulates the legal status of bankruptcy.

• ‘insolvency law’ or ‘bankruptcy law’
   This dissertation will generally use the term ‘insolvency law’. When using the term ‘insolvency law’, this dissertation refers to law(s) regulating the procedures possible in cases of insolvency. However, the term ‘bankruptcy law’ will be used when referring to the specific law(s) of a state in which such laws regulate bankruptcy (liquidation) and are commonly referred to as ‘bankruptcy laws’.

• ‘the collective’
   When using the term ‘the collective’ this dissertation refers to the general body of creditors which are involved and have an interest in the insolvency proceedings.

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\(^3\) On this distinction, see, Schwartz, p. 1200; Kammel 2008, p. 64.
• ‘the common welfare’
This dissertation uses the term ‘common welfare’ as a synonymous for the welfare of ‘the collective’.

• ‘COMI concept’ or ‘COMI model’
When using the term ‘COMI concept’, this dissertation refers to the legal concept of the ‘centre of main interest’, which will be described in paragraph [1.2.2]. When using the term ‘COMI model’, this dissertation refers to a legal model which is based on the COMI concept.

• ‘EU legislature’
The term ‘EU legislature’ is used to refer to the law-making bodies of the EU, according to the ordinary or special legislative procedure, as a whole. Although the law-making bodies of the EU could vary depending on the circumstances, when using the term ‘EU legislator’, this dissertation refers generally to the law-making bodies which decide within the context in which the term is used.

• ‘English law’
When using the term ‘English law’, this dissertation refers to the law or legal system of England and Wales.
Introduction
The structure of this dissertation can essentially be divided into three main parts. The first part is introductory and provides for the building blocks essential to the understanding of the issues at hand. This part is contained in Chapter 1, which analyses the EIR and seeks to clarify the logic behind forum shopping within this Regulation. The second part is aimed at providing an insight into forum shopping and establishing its key issues. It starts in Chapter 2 and consists of a glance over the practice of forum shopping within a few jurisdictions, which is pursued by an assessment of the current problems and propositions on forum shopping. In order to review the legal developments, the EIR Recast will be examined in Chapter 3, reflecting upon the established issues and demands from its original. The final part of this dissertation will analyse the key obstacles of regulating forum shopping, and seek to overcome them. Therefore, this dissertation will finish with an insight into the incorporation theory in Chapter 4 and establish an hypothesis on a possible solution to the key problems of forum shopping in Chapter 5.
§1.1 Purpose of the European Insolvency Regulation

§1.1.1 Historical background

Within the internal market of the EU, internationalisation has been stimulated by eliminating obstacles for companies to cross national borders. For some 45 years it has been common for large companies to vest themselves in multiple jurisdictions, taking advantage of its laws, customs and markets. Throughout the years it can be said that the EU has successfully achieved its goal of creating a common market, built upon the free movement rights and upheld by the Court of Justice of the European Union (hereafter ‘CJEU’). However, as in any normal functioning economy, there are also losses. While the EU has been active in its promotion of a successful European economy, it has been rather fruitless in the creation of European insolvency legislation. Although, as early as the 1960s efforts have been made to regulate this area of law, they have unfortunately been rather unsuccessful. Still, the EU remained determined, acknowledging the importance of harmonisation, and the need to address cross-border issues arising in the event of European insolvencies. As appropriately stated in the Virgós-Schmit report:

“It seems hard to accept that undertakings’ activities are increasingly being regulated by Community law while national law alone continues to apply in the event of the failure of an undertaking”.

The EU legislature acknowledged from an early stage that the area of insolvency law is one which should be dealt with separately. It is for this reason that insolvencies were excluded from the scope of the 1968 Brussels Convention, which dealt with the recognition and enforcement of court judgements within the

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4 Article 26(1) and (2) TFEU; D Swann 1992, p. 11-12, on the different forms of economic integration; P Craig & G de Búrca 2011, p. 594-609, on the conscious shift of the European Community from a ‘single market’ to an ‘internal market’.

5 J. Noël & J. Lemontey, ‘Report on the Convention Relating to Bankruptcies - Composition and Analogous Procedures’, 16.775/XIV/70-E, p. 7, (“The intention of the Member States of the European Economic Community is to establish between themselves a genuine and vast internal market conforming to the rules of free competition. Everything must therefore be done not only to eliminate obstacles to the functioning of this market, but also promote its development.”)


7 The free movement provisions are described in Article 26(2) and codified in Titles II and IV TFEU.


9 Report Committee on Legal Affairs, p. 12.


EU. It has thus been the intention of the EU legislature to create a separate convention dealing with the recognition of European cross-border insolvency proceedings. In 1970 and subsequently in 1980 drafts for a Bankruptcy Convention have been proposed. These proposed conventions, however, proved to be quite complex and irrational at certain areas, leading to a discreet abandonment of any further attempts to promote the adoption of the drafts. Consequently, in 1989 the Council of Ministers established a new Working Party on the Bankruptcy Convention, dedicated to the creation of a more simplified, practical and politically acceptable set of rules. The persistency of the EU, through the efforts of the Working Party, resulted in the creation of the 1995 Convention on Insolvency Proceedings. Ostensibly, the 1995 Convention on Insolvency Proceedings contained many positive virtues, however, it was regrettably not signed in time by all fifteen Member States due to reasons that only subsequently became overt. Hence, the 1995 Convention on Insolvency Proceedings never came into force. Following this unfortunately narrow shortcoming, it was on the initiative of Germany and Finland that a slightly reconstructed version of the 1995 Convention on Insolvency Proceedings was proposed and ultimately developed into the EIR as we know it today.

§1.1.2 Outset of forum shopping

As mentioned before, the EIR is substantially similar to the 1995 Convention on Insolvency Proceedings. Most of its articles are reproduced word-for-word. In this way, one could analogically reason that guides explaining the articles of the 1995 Convention on Insolvency Proceedings, similarly annotate on the articles of the EIR. Considering the fact that there are no explanatory guides to the EIR, scholars often consult the explanatory Report to the 1995 Convention on Insolvency Proceedings, or the so-called ‘Virgós-Schmit Report’. The Virgós-Schmit Report provides for an annotated guide to the text, giving background information and explaining the reasoning behind the text. Although, some reticence is appropriate, for the purpose of this dissertation, it will be assumed that it is correct to acknowledge the text of the Virgós-Schmit Report as an appropriate source for a better understanding of the EIR. In support of this assertion, it should be noted that the wording of the Virgós-Schmit Report has been used in the recitals

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13 Moss 2009, par. 1.10.
15 Moss 2009, par. 1.15-1.18.
16 Moss 2009, par. 1.04.
17 1995 Convention on Insolvency Proceedings; Moss 2009, par. 1.05.
18 Namely, the convention’s failure to clarify and guarantee its application on the colony of Gibraltar, which only ensued after the pretext of a disagreement over the agricultural crisis caused by the BSE epidemic; see Moss 2009, par. 1.06.
19 For a more elaborate historical overview of the EIR and its predecessors, see, Moss 2009, Ch. 1; Omar 2004, Part II.
20 Opinion of the Economic and Social Committee no. C75/01 of 2000, par. 1.1.
22 Moss 2009, par. 2.27 under note 99.
of the EIR.\textsuperscript{23} In addition, the Virgós-Schmit Report has also been acknowledged by Advocate General Jacobs in the delivery of his Opinion on the \textit{Eurofood}\textsuperscript{24} case of the European Court of Justice (hereafter ‘ECJ’), as providing for useful guidance when interpreting the EIR.\textsuperscript{25}

When studying the Virgós-Schmit Report, the connection between the EIR and forum shopping becomes more clear. It mentions the necessity of a legal framework in order to avoid parties from transferring their disputes or goods to a different Member State, where they would have a more favourable legal position.\textsuperscript{26} Subsequently, it states that only a multilateral agreement among Member States could discourage this opportunistic behaviour of debtors or creditors and allow for an efficient administration of a company in financial distress.\textsuperscript{27} In this respect, one could argue that the EIR seeks to avoid forum shopping by providing for cooperation between Member States through universal recognition of insolvency proceedings.\textsuperscript{28} A transfer of assets from one Member State to another would consequently become useless, as it would invariably fall under a main, EU recognised, insolvency proceeding. In this way, a Regulation could nullify incentives to forum shop within the EU. This notion is thus principally focused on asset transfer, and understandably so. At that time, forum shopping ineluctably required a transfer of assets. Once the assets of a company were transferred to a different jurisdiction, it would generally become subject to its rule of law through \textit{in rem} jurisdiction.\textsuperscript{29} Consequently, the debtor could misuse its power of disposal and forum shop to a more favourable jurisdiction, making the recognition of established security rights questionable due to the new jurisdiction. Relocation could also have isolated these assets completely from foreign proceedings which were not recognised under the new jurisdiction. Outside of insolvency, there is very little harmonisation with respect to these rules of private international law.

Thankfully however, in case of insolvencies the EU has established the EIR, regulating: International jurisdiction; applicable law; recognition of insolvency proceedings; and coordination of parallel proceedings.\textsuperscript{30} These rules of private international law seek \textit{inter alia} to address the issue of forum shopping by establishing connection criteria which are difficult to manipulate.\textsuperscript{31} In addition, it has been expressed that the EIR reduces the possibilities of opportunistic behaviour on the part of Member States by removing regulatory competition and

\begin{footnotesize}
\begin{enumerate}
  \item For example, Recital (13) EIR on the centre of main interest, which has been adopted word-for-word from paragraph 75 of the Virgós-Schmit Report.
  \item ECJ EC 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd).
  \item Opinion of Advocate General Jacobs, delivered on 27 September 2005, ECJ EC 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 1.
  \item Virgós-Schmit Report, par. 7.
  \item Virgós-Schmit Report, par. 7.
  \item See further paragraph \[1.2.4\].
  \item Before the EIR, territorialism prevailed over Europe, making a simple transfer of assets sufficient to forum shop in most cases, see, Bufford 2005, p. 137; see more generally, Pottow 2007, p. 800.
  \item Virgós 2004, par. 5; see further paragraph \[1.2\].
  \item Virgós 2004, par. 6.
\end{enumerate}
\end{footnotesize}
protectionism in these areas.\textsuperscript{32} Albeit that manipulation of applicable law has been limited by the creation of rules on private international law through the EIR, it cannot be said that forum shopping has been put completely at a halt.\textsuperscript{33}

\section*{§1.2 System of the European Insolvency Regulation}

The EIR provides for a legal framework which should be considered holistically when discussing its relevance to forum shopping. However, certain recitals and articles deserve extra attention. These recitals and articles shall be dealt with sequentially.

\subsection*{§1.2.1 Recital (4)}

Recital (4) stipulates the necessity to avoid incentives for forum shopping in order to ensure a proper functioning of the internal market. The Recital relates to incentives of forum shopping as such. It also explicitly mentions the transfer of assets or judicial proceedings between Member States. Recital (4) is based on paragraph 7 of the Virgós-Schmit Report, which (similar to the Recital) outlines forum shopping as the transfer of disputes or goods, seeking to obtain a more favourable legal position. Luckily, the Virgós-Schmit Report goes further in explaining that institutional cooperation (by way of the EIR) is necessary in order to prevent this ‘opportunistic conduct’ of forum shopping to the detriment of ‘the creditors as a whole’.\textsuperscript{34} Professor Virgós has subsequently expanded on this notion of opportunism in forum shopping, describing that forum shopping could be used to the detriment of (unsophisticated) creditors.\textsuperscript{35} Advocate General Colomer describes the issue of forum shopping similarly in his Opinion on \textit{Staubitz-Schreiber}\textsuperscript{36}, where he prompts that forum shopping could lead to ‘unjustified inequality’.\textsuperscript{37} In this way, the rationale behind Recital (4) and its distaste for forum shopping can be delineated more clearly. Although, the text of Recital (4) describes the objective to avoid incentives for forum shopping as such, one could argue that this ostensibly general objective should be nuanced.\textsuperscript{38}

\subsection*{§1.2.2 Recital (13)}

The EIR contains a new and autonomous\textsuperscript{39} concept named the ‘centre of main interests’ (hereafter ‘COMI’), which refers to a territory where certain rights are reserved for the purpose of cross-border insolvencies. Its importance with regard

\begin{footnotesize}
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\item Virgós 2004, par. 6.
\item Virgós 2004, par. 6; Torremans 2002, p. 139; Hoek 2014, p. 82.
\item See in this regard also, Arnold 2013, p. 252.
\item Virgós 2004, par. 12(a); on the distinction between sophisticated and unsophisticated creditors, see paragraph [2.4.1].
\item ECJ EU 17 January 2006, C-1/04 (\textit{Staubitz-Schreiber}).
\item Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (\textit{Staubitz-Schreiber}), par. 70-77.
\item Opinion of Advocate General Colomer, delivered on 16 October 2008, ECJ EU 12 February 2009, C-339/07 (\textit{Seagon v Deko Mart}), under note 49, (“The Community legislation counters the opportunistic and fraudulent use of the right to choose a forum, which is very different to the demonisation for the sake of it of a practice which on occasions it is appropriate to encourage”); also discussed more elaborately in paragraph [1.3.3].
\item ECJ EU 2 May 2006, C-341/04 (\textit{Re Eurofood IFSC Ltd}), par. 31; Virgós 2004, par. 45.
\end{enumerate}
\end{footnotesize}
to forum shopping is substantial. First off, the EIR only applies if the debtor’s COMI is within the EU.\textsuperscript{40} The jurisdiction subsequently allowed to open main insolvency proceedings is determined on the basis of the debtor’s COMI, as codified in Article 3(1) EIR.\textsuperscript{41} Once main proceedings have been opened, they must be recognised by all other EU jurisdictions.\textsuperscript{42} The law applicable to insolvency proceedings and their effects shall be determined by the main proceedings (the \textit{lex concursus}).\textsuperscript{43} One could reason that the COMI functions as a guide by which one can establish beforehand the jurisdiction able to open universal main insolvency proceedings.\textsuperscript{44} For creditors, it is important to know the COMI beforehand in order to clarify their rights in case of a debtor’s insolvency. When considering a corporate rescue for example, it will be imperative to distinguish the applicable law in order to work out legal possibilities. This all is determined on the basis of the debtor’s COMI, fabricating it as one of the most important concepts within the EIR. Considering that, within forum shopping, one will want to influence the applicable law and forum, the COMI concept can be seen as the main tool to forum shopping within the EU.\textsuperscript{45} In this regard, it is important to examine Recital (13), which describes the place that should correspond to the COMI. It states that the location of the COMI should be:

\textbf{“the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”}\textsuperscript{46}

From this sentence, it becomes clear that: Firstly, the place of ‘administration’ of the debtor will determine the COMI to a considerable extent; and secondly, that this ‘administration’ should be on a ‘regular basis’ as well as ‘ascertainable by third parties’. While the text of Recital (13) provides for clarification with regard to particular aspects of the COMI, there are other aspects which remain unclear.\textsuperscript{47} In order to award substance to the text of Recital (13), one should reasonably consult the Virgós-Schmit Report in conjunction with the ruling of the ECJ, which explain the interpretation and reasoning behind the text.

The main component determining the COMI, is the place of ‘administration’. Influence on the place of ‘administration’ will mean influence on the company’s COMI, resulting in control over the allocation of international jurisdiction by virtue of Article 3(1) EIR. It is therefore important with regard to forum shopping to clarify this main component. Considering that the place of ‘administration’ has primarily been dealt with by the ECJ during its interpretation of Article 3(1), it would be more appropriate to address this matter in the section of Article 3(1) and continue now with the component of ‘ascertainability’.

\textsuperscript{40} Recital (14) EIR.
\textsuperscript{41} Article 3(1) EIR.
\textsuperscript{42} Article 16(1) EIR.
\textsuperscript{43} Article 4(2)(g), 4(2)(i), 21(1) and 40(1) EIR; Moss 2009, par. 4.05. Exceptions to this rule are codified in Articles 5-15 EIR.
\textsuperscript{44} On the subject of universality, see paragraphs [1.2.4].
\textsuperscript{45} Moss 2009, par. 8.72-8.74.
\textsuperscript{46} Recital (13) EIR; derived from the Virgós-Schmit Report, par. 75.
\textsuperscript{47} McCormack, \textit{Time to Revise} 2010, p. 77-78.
The Virgós-Schmit Report explains that the rationale behind the requirement of ‘ascertainability’ of the COMI is to establish international jurisdiction on a place known to the debtors’ potential creditors in order for them to foresee and calculate the insolvency risks.  

When reasoning this rationale a contrario, one could argue that Recital (13) seeks to ensure any ‘administration’ of the debtor company not ‘ascertainable by third parties’ to be left out of consideration when determining the COMI. This would ensure transparency and foreseeability to the debtor’s creditors, as they should be able to rely on the expectations reasonably concluded from the conduct of the debtor, preventing malicious debtors from deceiving its creditors.

The ECJ has given further clarification on Recital (13) for the purpose of determining the COMI. In Interedil the ECJ explains that Recital (13) provides for guidance as to the scope of the COMI. Furthermore, the ECJ in Interedil confirms its previous considerations in Eurofood on the requirement to identify the COMI with reference to factors which are both objective and ascertainable to third parties. The ECJ in Interedil continues by clarifying when the requirement for objectivity and ascertainability will be met, namely: If the factors have been made public; or if the factors have been made sufficiently accessible as to enable third parties to become aware of them.

Thus, factors as reasonably perceived by third parties are necessary for the determination of the COMI. So much in fact, that it is arguably indispensable to its establishment. Which parties are subsequently to be considered as ‘third parties’ has been clarified to some extent by the UK courts.

Despite the importance of a ‘regular basis’ for the establishment of the COMI, this requirement seems to be rather underexposed. A ‘regular basis’ is mainly relevant for the purpose of preventing forum shopping. First off, it is important to realise that the COMI concept is open and mobile, meaning that it is able to shift to different jurisdictions as the company develops, only to be crystallised once the debtor has lodged a request to open main insolvency proceedings. In principle, a company has the right to migrate itself freely within the EU based on the freedom of establishment. Hence, the COMI can be moved freely, and does not go so far

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48 Virgós-Schmit Report par. 75, second subparagraph.
49 Moss 2009, par. 3.11.
50 CJEU EU 20 October 2011, C-396/09 (Interedil), par. 47.
51 CJEU EU 20 October 2011, C-396/09 (Interedil), par. 49.
52 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 33.
53 CJEU EU 20 October 2011, C-396/09 (Interedil), par. 49.
54 See in this regard, CJEU EU 20 October 2011, C-396/09 (Interedil), par. 49-51, where the CJEU explicates the influence of third party perceptions.
55 High Court of Justice (Chancery Division) 1 April 2010, Re Kaupthing Capital Partners II Master LP Inc. [2010] EWHC 836 (Ch), par. 22-26, where the High Court accepted the submission that investors were not to be considered as ‘third parties’; see also, High Court of Justice (Chancery Division) 16 May 2003, Re Daisytek-ISA Ltd [2003] B.C.C. 562, par. 14-16; and, High Court of Justice (Chancery Division) 8 June 2004, Re Ci4Net.com Inc. [2004] EWHC 1941 (Ch), par. 17, putting the emphasis on (“the most important ‘third parties’ referred to in recital 13 were the potential creditors, which in case of a trading company are likely to be its financiers and its trade suppliers”).
56 Virgós 2004, par. 47; Moss 2009, par. 3.14.
57 This topic will be discussed in more detail in paragraph [1.4.2].
58 ECJ EC 9 March 1999, C-212/97 (Centros).
as to imply immutability once established.\(^\text{59}\) It is however condemned for a debtor to shift its COMI shortly before the opening of insolvency proceedings. This sudden change of the company’s place of administration could lead to the derogation of legal certainty (mainly with regard to creditors). The requirement of a ‘regular basis’ guarantees a certain amount of continuity of the debtor company’s conduct before a COMI can be established.\(^\text{60}\) In addition, the notion of a ‘regular basis’ restrains the possibility of the debtor to demand recognition of a newly developed COMI by requiring a particular transitional period in order to generate more time and security for third parties, thereby restricting possible abusive behaviour.\(^\text{61}\) The English court has ruled that an ‘element of permanence’ is required in order to establish a COMI.\(^\text{62}\) Still, there is no fixed time limit that may be established for the requirement of a ‘regular basis’.\(^\text{63}\) The relevant court should assess every situation on the basis of the particular facts and circumstances of the case.\(^\text{64}\)

**§1.2.3 Article 3(1)**

While Recital (13) provides for guidance on the scope and interpretation of the COMI concept, Article 3 determines its function and application within the EIR.\(^\text{65}\) Article 3(1) allocates international jurisdiction on the basis of the territory in which the debtor’s COMI is situated. In the same paragraph it is subsequently stated that the place of a company’s registered office is presumed to be the debtor’s COMI, in the absence of proof to the contrary.

When analysing the use of the COMI concept under Article 3(1), it becomes clear that its current formulation is a compromise between the two leading approaches in the EU: The ‘real seat’ approach and the ‘incorporation’ approach.\(^\text{66}\) Briefly explained, the ‘real seat’ approach determines the applicable law by reference to the country in which a company has its main centre of operations, head office or principal place of business\(^\text{67}\) (depending on the specific national legal doctrine); whereas the ‘incorporation’ approach asserts that one should simply look at the country in which a company is incorporated.\(^\text{68}\) Considering that a company is able to displace the conduct of its ‘administration’ to a different jurisdiction, it would seem that, ultimately, the ‘real seat’ approach prevails, placing substance over

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\(^\text{59}\) Court of Appeal (Civil Division) 27 July 2005, *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, par. 50.

\(^\text{60}\) Virgós 2004, par. 69, where it is referred to as a requirement of ‘regularity’ or ‘temporal stability’; Arnold 2013, p. 250.

\(^\text{61}\) Virgós 2004, par. 69.

\(^\text{62}\) High Court of Justice (Chancery Division) 8 June 2004, *Re Ci4Net.com Inc.* [2004] EWHC 1941 (Ch), par. 26; Court of Appeal (Civil Division) 27 July 2005, *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, par. 53.

\(^\text{63}\) Virgós 2004, par. 69; see also High Court of Justice (Chancery Division) 19 June 2007, *Official Receiver v Eichler* [2007] B.P.I.R. 1636.

\(^\text{64}\) For a comparative study on this subject (mostly with regard to individuals) see Wessels, *Moving House* 2003. On the establishment of fixed suspension periods in national law see, paragraph [2.4.3].

\(^\text{65}\) However, this separation has been merged into a new Article 3(1) under the EIR Recast, see paragraph [3.1.1].

\(^\text{66}\) McCormack, *Time to Revise* 2010, p. 77; Virgós 2004, par. 60; Moss 2009, par. 3.12.

\(^\text{67}\) See also, Westbrook 2000, p. 2276, somewhat analogizing the USA’s ‘principal place of business’ doctrine to that of the COMI.

\(^\text{68}\) Virgós 2004, par. 46; Deakin 2006, p. 448.
form. However, the EIR creates a concession with the ‘incorporation’ approach by determining the place of registered office to be presumed as the COMI until proven otherwise.

With regard to the registered office presumption, the Virgós-Schmit Report explains that: “This place normally corresponds with the debtor’s head office”. This rationale could be seen as a mere clarification as to why the registered office is chosen as a starting point. However, it could also be reasoned that the main goal of Article 3(1) it to allocate jurisdiction to the territory of the company’s head office. Thus, reasoning analogically, if the head office of a company is elsewhere, potentially the company’s COMI is elsewhere. This type of reasoning has created an opening for what has resulted in the ‘head office functions’ test within the EU, rebutting the registered office presumption.

This brings us to the next important point of the COMI, the possibility to rebut the presumption through ‘proof’, antithetical to the location of the registered office. However, it is unclear what the EU legislature expects as ‘proof’ for a rebuttal of the registered office presumption. Although, it can be said that Recital (13) will underlie the arguments against the presumption, it is uncertain from its text which particular factors should be taken into account.

It was subsequently in 2006 that the ECJ answered important preliminary questions in the famous Eurofood case. Unfortunately, however, the ECJ did not provide for much enlightenment on the particular factors which should be considered when determining the COMI. Still, the ECJ has clarified a number of important issues. Primarily, it can be noted that the ECJ attaches more value to the presumption laid down in Article 3(1) by stating that it cannot be rebutted merely by the exercise of parental control. Secondly, the ECJ confirms the importance of the factors rebutting the presumption to be “objective and ascertainable by third parties”. In addition, the ECJ gives the example of a ‘letter box’ company, which should be seen as a primary situation in which the presumption would be rebutted. Also, the ECJ has used the word ‘definition’ in relation to Recital (13). In this regard, it has been argued that the ECJ did not

69 Moss 2009, par. 3.12.
70 Virgós-Schmit Report par. 75, fifth subparagraph.
71 High Court of Justice (Chancery Division) 4 July 2002, Enron Directo Sociedad Limitada, www.iiglobal.org (search for Enron Directo), it should be noted that there is no reasoned opinion available for this case, as the court accepted the skeleton argument of the counsel; High Court of Justice (Chancery Division) 20 May 2003, Crisscross Communications (unreported); High Court of Justice (Chancery Division) 7 February 2003, Re BRAC Rent-a-Car International Inc [2003] EWHC 128 (Ch), par. 4-5; High Court of Justice (Chancery Division) 16 May 2003, Re Daisytek-ISA Ltd [2003] B.C.C. 562, par. 15-16; High Court of Justice (Chancery Division) 15 July 2005, Collins & Aikman [2005] EWHC 1754 (Ch); Ringe 2008, 594-95; Moss 2009, par. 8.80.
72 Moss 2009, par. 3.13.
73 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd).
75 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 34; see also paragraph [1.2.2].
76 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 35.
77 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 33.
attempt to declare Recital (13) as the definition of the COMI concept, but rather (taken in its context) referred to the previous paragraph of the case, in which the ECJ described the Recital as a highlighting of the scope of the COMI principle.\textsuperscript{78} The English court has also rejected the argument that Recital (13) of the IER should be seen as the COMI definition in \textit{Re Stojevic}.\textsuperscript{79}

Interestingly, the ECJ does not mention the ‘head office functions’ test, which has been endorsed by the Advocate General in his Opinion on \textit{Eurofood} as the means of determining the COMI of the debtor company.\textsuperscript{80} This silence of the court has been interpreted in different ways. Some argue that the court’s omission does not necessarily present a rejection of the ‘head office functions’ test, but rather is the simple result of the court’s \textit{modus operandi} to only consider the questions put before it.\textsuperscript{81} Others suggest that this clearly indicates that the court’s disapproval of the approach.\textsuperscript{82} In any case, many jurisdictions (such as: England, France, Germany and Hungary) have chosen to follow the ‘head office functions’ theory, specifically considering that the factors rebutting the presumption should be ‘objective and ascertainable by third parties’.\textsuperscript{83}

For a long time, the determination of ‘proof’ was left open to the discretion of national courts until further guidance from the CJEU. After some years of uncertainty and debate about the correct interpretation of ECJ’s judgement in \textit{Eurofood}, the \textit{Interedil} case provided for further guidance on the matter. Here, the CJEU answered some question which were left unclear from its \textit{Eurofood} case.\textsuperscript{84} In \textit{Interedil}, the Court mentions the relevant factors to be taken into account when determining the place where the debtor company conducts the ‘administration’ of its interests on a regular basis. One will have to take into account the location of the company’s registered office as a starting point.\textsuperscript{85} Subsequently, one should assess its consistency with the location of the bodies responsible for the management and supervision of the company\textsuperscript{86}, as well as the place where management decisions of the company are taken.\textsuperscript{87} In addition, when considering to rebut the presumption, one should assess the places in which the debtor company pursues economic activities and all those in which it holds assets.\textsuperscript{88}

\begin{footnotesize}
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\item \textsuperscript{78} ECJ EU 2 May 2006, C-341/04 (\textit{Re Eurofood IFSC Ltd}), par. 32; Moss 2009, par. 8.77.
\item \textsuperscript{79} High Court of Justice (Chancery Division) 19 April 2007, \textit{Official Receiver v Stojevic} [2007] EWHC 1186 (Ch), par. 31-33; Moss 2009, par. 8.78.
\item \textsuperscript{80} Opinion of Advocate General Jacobs, delivered on 27 September 2005, ECJ EU 2 May 2006, C-341/04 (\textit{Re Eurofood IFSC Ltd}), par. 111-112.
\item \textsuperscript{81} Kastrinou 2010, p. 13; Schmidt 2010, p. 22; Moss 2010, p. 148.
\item \textsuperscript{82} Ringe 2008, p. 589; Sarra 2009, p. 558; Kastrinou 2010, p. 13; Schmidt 2010, p. 22-23.
\item \textsuperscript{83} See, Moss 2009, par. 8.85, which lists the numerous cases that show the application of the ‘head office functions’ test in the different EU jurisdictions; more specifically, see, High Court of Justice (Chancery Division) 20 June 2008, \textit{Re Lennox Holdings Pte} [2009] B.C.C. 155; see also, Kastrinou 2010, p. 16; Moss 2010, p. 148; Moss 2011, p. 126.
\item \textsuperscript{84} Namely, the particular factors which should be considered when determining the COMI. Primarily when examining ‘proof’ of a possible rebuttal of the presumption.
\item \textsuperscript{85} CJEU EU 20 October 2011, C-396/09 (\textit{Interedil}), par. 50.
\item \textsuperscript{86} CJEU EU 20 October 2011, C-396/09 (\textit{Interedil}), par. 50.
\item \textsuperscript{87} CJEU EU 20 October 2011, C-396/09 (\textit{Interedil}), par. 50; These clarifications of the CJEU have now been codified in the EIR Recast, as will be discussed further in paragraph [3.1.1].
\item \textsuperscript{88} CJEU EU 20 October 2011, C-396/09 (\textit{Interedil}), par. 52.
\end{itemize}
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However, these factors must be assessed in a comprehensive manner, taking account of the individual circumstances of each particular case.\footnote{CJEU EU 20 October 2011, C-396/09 (Interedil), par. 52.} Finally, the CJEU emphasizes only to acknowledge factors insofar as they are ‘ascertainable by third parties’.\footnote{From this point on it can be said that the COMI concept has become relatively clear. The CJEU provides enough material for the national courts to work with and narrows down the discretion in determining the COMI. It seems from Interedil that the ‘head office functions’ test previously used by the national courts has ultimately prevailed. \footnote{CJEU EU 20 October 2011, C-396/09 (Interedil), par. 53; see also paragraph [1.2.2].} When taking together the considerations mentioned above, one should conclude that Article 3(1) allocates international jurisdiction to the registered office, unless it can be proven that this does not correspond with the place where the debtor conducts its ‘head office functions’ on a regular basis, insofar as the factors taken into consideration have been made public or, at the very least, made sufficiently accessible to third parties and are assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.}

§1.2.4 Article 3(2) & 16

According to Article 3(2), it is possible under the EIR to open secondary proceedings after the opening of the main insolvency proceedings. For this, it is merely required that the company has an establishment in the territory of the secondary Member State.\footnote{Article 3(2) EIR.} The EIR applies the principle of universality on the main proceedings opened under Article 3(1), utilizing a system of automatic recognition throughout the EU by means of Article 16. In addition, Article 25(1) EIR in conjunction with Recital (22) stipulate that the judgement opening main insolvency proceedings shall be recognised with no further formalities.\footnote{This recognition includes: All of the debtor’s assets (wherever they are located);\footnote{This is based on the principle of mutual trust, see ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 38-44; CJEU EU 21 January 2010, C-444/07 (MG Probud Gdynia), par. 27 et seq.; see also ECJ EU 12 February 2009, C-339/07 (Seagon v Deko Marty), par. 15-28, where the ECJ ruled that the possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of the objective to avoid incentives to forum shop; see also Virgós-Schmit Report, par. 202.} the opening, conduct and closure of the proceeding;\footnote{Recital (22) and Article 17(1) EIR.} and finally the effects attributed by the law of the Member State of the relevant proceeding.\footnote{Recital (22) and Article 17 EIR.} The principle of automatic recognition extends to secondary proceedings as well,\footnote{Recital (22) and Article 17(1) EIR.} meaning that secondary proceedings will have to be respected separately from the main proceedings. Consequently, the secondary proceedings will also have to be respected by the main proceedings. The main proceedings will thus enjoy universal effect over all the debtors assets, with the carve out of assets located within the jurisdiction of (possible) secondary proceedings. This shows the combined approach between universality and

\footnotetext[89]{Virgós 2004, par. 339; Moss 2009, par. 8.262.} \footnotetext[90]{Recital (22) and Article 17(1) EIR.} \footnotetext[91]{Recital (22) and Article 17 EIR.} \footnotetext[92]{Article 16(1) and 3(2) EIR; Moss 2009, par. 8.261.} \footnotetext[93]{Virgós 2004, par. 339.
territorality as adopted by the EIR, also referred to as modified or mitigated universality.\textsuperscript{99}

Effectively, this model creates the possibility for stakeholders to shield themselves against recognition of the main insolvency proceedings with regard to assets located within the territory of a different establishment.\textsuperscript{100} Thereby, providing for safeguards to local creditors. However, secondary proceedings may only be winding-up proceedings\textsuperscript{101} and are restricted to assets located within the territory of that secondary Member State;\textsuperscript{102} whereas main insolvency proceedings can also effectuate a corporate rescue and in principle affect all of the debtors assets, wherever situated. Assuming that corporate rescue will often generate higher realisations than are likely to be achieved in liquidation, one could say that there will be leverage to cooperate with the main insolvency proceedings. Also, secondary proceedings can have an auxiliary function towards the main insolvency proceedings.\textsuperscript{103}

§1.2.5 Article 26

In addition to secondary proceedings, the EIR has also created a public policy exception in Article 26 to ensure the protection of national interests. In principle, as stated in Recital (22), the recognition of a judgement given by the court of a Member State is based on mutual trust.\textsuperscript{104} Therefore, Member States should recognise each other’s judgements without scrutinising the court’s decision or setting additional requirements.\textsuperscript{105} Member States may, however, object against recognition of the main insolvency proceedings in exceptional circumstances. Only if the effects of recognition would be “manifestly contrary to the Member State’s public policy”\textsuperscript{106} could a Member State justify non-recognition.\textsuperscript{107}

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\item[	extsuperscript{99}] Recital (11) EIR; Virgós-Schmit Report, par. 12; Virgós 2004, par. 17 \textit{et seq.}; Wessels 2012, p. 363; the subject of the EIR’s normative model is discussed more detailed in paragraph [2.4.4].
\item[	extsuperscript{100}] This possibility has however been moderated with the addition of a so-called ‘synthetic secondary’ into the EIR Recast, see Article 36(1) and 38(2); see also paragraph [2.4.1].
\item[	extsuperscript{101}] Article 3(3) and 2(c) EIR; however, this has been broadened to ‘insolvency proceedings’ within the EIR Recast under Article 3(3) and 2(4).
\item[	extsuperscript{102}] Recital (12) and Article 3(2) and 27 EIR.
\item[	extsuperscript{103}] For example, if local proceedings would produce a more efficient outcome to the insolvency practitioner in the main proceeding (Article 29(a) EIR), or if the insolvency practitioner wishes to convert earlier proceedings (Article 37 EIR); Virgós-Schmit Report, par. 33; McCormack 2009, p. 170-175.
\item[	extsuperscript{104}] Virgós-Schmit Report, par. 202.
\item[	extsuperscript{105}] Recital (22) EIR.
\item[	extsuperscript{106}] Article 26 EIR.
\item[	extsuperscript{107}] See also ECJ EU 2 May 2006, C-341/04 \textit{(Re Eurofood IFSC Ltd)}, par. 66-68 on the refusal of recognition on the grounds of a breach of the fundamental right to be heard.
\end{enumerate}
\end{footnotesize}
§1.3 Logic of forum shopping under the European Insolvency Regulation

§1.3.1 Insolvency law matters

Before elaborating on the meaning of forum shopping, it is first important to assess why insolvency law matters. The IMF has published a Report\(^{108}\) in 2000 and UNCITRAL has published a Legislative Guide on Insolvency law (hereafter ‘UNCITRAL Legislative Guide’) in 2004.\(^{109}\) Both publications identify objectives of insolvency law which are generally shared by most systems around the world. In these publications, particular corresponding objectives can be identified, namely: The allocation of risk among participants in a market economy in a predictable, equitable and transparent manner;\(^ {110}\) and the protection and maximization of the value of assets.\(^ {111}\) In addition, it should be considered that a collective proceeding solves the traditional problem of coordination between creditors of an insolvent firm in order to maximise the value of assets.\(^ {112}\) For example, by creating the possibility of a sale of the business as a going concern. Moreover, assuming that there will always be insolvencies within a free market economy,\(^ {113}\) it has generally been accepted that well-functioning economies will need good insolvency laws in order to efficiently process those businesses which inevitably fail as a result of the market’s workings.\(^ {114}\)

EU insolvency laws have shown until now a divergence in the appropriate balance to be struck between debtors and creditors due to difference in cultural and societal views about the moral character of debt accumulation, repayment and forgiveness.\(^ {115}\) For instance, it is commonly known that French insolvency law attaches great value to the position employees.\(^ {116}\) Whereas, on the other hand, English law attaches more value to the protection of creditor’s rights.\(^ {117}\) These differences in appreciation\(^ {118}\) and its consequences\(^ {119}\) have also been subject to empirical research. It should however be noted that the differences have somewhat been moderated by law amendments in recent years, possibly indicating regulatory


\(^{111}\) IMF Report 2000, p. 7; UNCITRAL Legislative Guide, p. 10-11; see further paragraph [5.6], on the law and economics rationale behind this objective.


\(^{113}\) Gaa 1993, p. 885; this notion has also been taken into account in the Report Committee on Legal Affairs, p. 7; and the Debate of the EP, by Kurt Lechner.

\(^{114}\) Dahiya 2007.

\(^{115}\) Recital (11) EIR, acknowledging the ‘widely differing substantive laws’ of the Member States; Virgós-Schmit Report, par. 12; Efrat 2002; Martin 2005.

\(^{116}\) See e.g. P. Théry 2009, p. 1; Dupoux 2012, p. 284.


\(^{118}\) Davydenko 2008 showing the different levels of creditor protection between France, Germany and the UK.

\(^{119}\) See, Lopez Gutiérrez 2012 where it is concluded that creditor-oriented systems cause a decrease in the value of both financially distressed firms and those filing for bankruptcy.
competition. It is in any case important to notice that there have been many cases of company relocations throughout the years, indicating in itself that there are enough dissimilarities to prompt companies in spending time and resources to shift to another jurisdiction (regulatory arbitrage). Therefore, insolvency law matters to these companies. Likewise, insolvency law matters to senior creditors, who will adjust their credit in accordance with the applicable jurisdiction. In this respect, there have been some famous leximetrics, aiming to numerically valuate the protection provided for different parties. Moreover, insolvency risks calculated by creditors have been taken into account during the draft of the EIR, as they form an essential part of the economy. Considering the importance of insolvency law as examined above, it becomes very logical that there is also forum shopping for it.

§1.3.2 The meaning of forum shopping

Multiple authors have expressed their understanding of what is to be constituted as forum shopping. For example Wolf-Georg Ringe, who describes:

“At its simplest, forum shopping means little more than identifying the optimal jurisdiction for a certain transaction [...] and taking measures so that the law of that jurisdiction is applied.”

In the Opinion of Ruiz-Jarabo Colomer on Staubitz-Schreiber, the Advocate-General suggests that forum shopping is:

“The search by a plaintiff for the international jurisdiction most favourable to his claims” involving “merely the optimisation of procedural possibilities”.

After examining the various perceptions on forum shopping, one can conclude that there is a general agreement that forum shopping consists of: An exploration; for a jurisdiction (the forum); which is more favourable. The act of forum shopping, however, is different from one area of law to another. For example, what is constituted as forum shopping under the EIR is different from what is constituted as forum shopping in the jurisdiction of the USA.

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120 Hoek 2014, p. 60 and 82.
121 Hoek 2014, p. 60 and 82; see also Impact assessment of the Revision of Regulation (EC) No 1346/2000 on insolvency proceedings of 12 December 2012, SWD(2012) 416 final [hereafter ‘Impact Assessment 2012’], p. 21, stating that (“The problem of forum shopping is essentially driven by differences in national insolvency and company laws”); for more on regulatory arbitrage, see paragraph [1.3.4].
122 Davydenko 2008, section 3; Guzman 2000; McCormack 2011, p. 55-57; ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 27. See also paragraph [2.4.1].
123 La Porta 1998; Djankov 2008.
124 Virgós-Schmit Report, par. 75.
126 Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 71-72.
127 In the USA, bankruptcy laws are federal law and thus substantively the same across all States. Consequently, forum shopping is concerned with the selection of a specific court more likely to rule in favour of the insolvency or restructuring proposition, rather than a change of applicable insolvency law; for more information on USA forum shopping see Whytockt 2011; McCormack 2014.
shopping for the purpose of the EIR has already been discussed briefly in paragraph [1.1.2]. Based mostly on the transfer of assets, the description of forum shopping in the EIR seems to be rather outdated.\textsuperscript{128} The question to ask thus becomes: What is understood as forum shopping under the EIR in practice? Or perhaps more importantly, what should be?

\textbf{§1.3.3 Forum shopping within the European Insolvency Regulation}

The EIR makes no distinction within forum shopping.\textsuperscript{129} It sets out to counteract incentives of forum shopping as such, regardless of its positive or negative effects. This, however, is rather peculiar considering that such an aim would comprehend a tendency to deny the right of a company to shift its business on account of a change in forum. Such an interpretation would be very much inconceivable and in all probability contrary to the free movement of establishment.\textsuperscript{130} Moreover, there are many examples of cross-border insolvency cases within the EU where forum shopping was relatively apparent, yet was still accepted by the relevant courts.\textsuperscript{131} It would thus seem that forum shopping is in itself not considered objectionable, as also many authors have expressed.\textsuperscript{132} In addition, one could establish this notion somewhat from the wording of Recital (4) EIR, which explains the aim ‘to avoid incentives’ rather than the act of forum shopping itself. Nevertheless, following the reasoning of the EIR, forum shopping is ultimately considered a detriment to the proper functioning of the internal market.\textsuperscript{133} It is thus important to assess what exactly is considered forum shopping within its context in order to establish the boundaries of international insolvency law. Through the course of time, it has become clear from various sources that the EIR does not aim to oppose forum shopping in itself, but rather its abuse. After defining the term ‘forum shopping’ in his Opinion in \textit{Staubitz-Schreiber}, Advocate General Colomer specified that Recital (4) of the EIR was directed at forum shopping leading to:

“unjustified inequality between the parties to a dispute with regard to the defence of their respective interests”.\textsuperscript{134}

\begin{footnotesize}
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\item \textsuperscript{128} Mucciarelli 2013, p. 188-191.
\item \textsuperscript{129} See paragraph [1.2.1].
\item \textsuperscript{130} Virgós 2004, par. 69; Marshall 2007; Moss 2009, par. 8.102; Walters 2010, p. 202.
\item \textsuperscript{131} Amstericht Köln 19 February 2008, 73 IE 1/08, ZIP 2008, 423 (\textit{PIN Group}), where the German court stated that COMI relocation to a more favourable legal environment is not in itself objectionable; High Court of Justice (Chancery Division) 26 November 2009, \textit{Re Hellas Telecommunications (Luxembourg) II SCA} [2009] EWHC 3199 (Ch); High Court of Justice (Chancery Division) 6 December 2010, \textit{Re European Directors (DH6) BV} [2010] EWHC 3472 (Ch); High Court of Justice (Chancery Division) 3 December 2013, \textit{Re Magyar Telecom BV} [2013] EWHC 3800 (Ch); High Court of Justice (Chancery Division) 23 January 2013, \textit{DNick Holding plc} [2013] EWHC 68 (Ch); also in this regard, see, \textit{DNick Holding Report 2005}; for a report on the successful restructuring of Schefenacker after forum shopping, see, Quenby 2007; and, Goetker 2007.
\item \textsuperscript{132} See e.g. Eidenmüller, \textit{Abuse of Law} 2009, p. 15; Moss 2009, p. 262; Arnold 2013, p. 252.
\item \textsuperscript{133} Recital (4) EIR.
\item \textsuperscript{134} Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (\textit{Staubitz-Schreiber}), par. 73.
\end{enumerate}
\end{footnotesize}
Likewise, in the Seagon\textsuperscript{135} case, he suggested that the EIR:

“counts the opportunistic and fraudulent use of the right to choose a forum, which is very different from the demonisation for the sake of it of a practice which on occasions it is appropriate to encourage”.

As also mentioned in paragraph [1.2.1], one could argue that the aim of the EIR is to avoid incentives for parties to act opportunistically by forum shopping to the detriment of the collective. This view can be supported by the Impact Assessment of the Commission of 12 December 2012.\textsuperscript{136} Here, the Commission clearly states that the migration of a company has in general been accepted by the ECJ in Centros\textsuperscript{137} as a legitimate exercise of the freedom of establishment, despite the lack of a specific directive.\textsuperscript{138} The Commission also recognises that forum shopping only becomes a problem if it is abusive, stating:

“A genuine relocation to another Member State is an exercise of the right to freedom of movement and establishment and justifies the application of the insolvency regime of that other country; a sham move does not”,\textsuperscript{139}

In addition, the External Evaluation Report on the EIR has indicated that COMI shifts are not considered abusive if they are genuine and not merely virtual.\textsuperscript{140} Indeed, the more important question to answer thus becomes: When is forum shopping considered genuine and when is it abusive?\textsuperscript{141} It follows from the Commission’s Impact Assessment 2012 that the views as to whether a COMI relocation is abusive or not are divergent.\textsuperscript{142} Hence, up to now, no clear distinction can be established. Still, Chapter 5 of this dissertation will attempts to clarify this distinction.

\textsuperscript{135}Opinion of Advocate General Colomer, delivered on 16 October 2008, ECJ EU 12 February 2009, C-339/07 (Seagon v Deko Marty), under note 49.
\textsuperscript{136}Impact Assessment 2012, par. 3.4.1.2.
\textsuperscript{137}ECJ EC 9 March 1999, C-212/97 (Centros); see also ECJ EU 16 December 2008, C-210/06 (Cartesio), par. 111-113 where the ECJ again confirms that the freedom of establishment grants companies the right to reincorporate from one Member State to another.
\textsuperscript{139}Impact Assessment 2012, par. 3.4.1.2.
\textsuperscript{141}See, however, paragraph [5.8.1] which deals with the use of the correct term ‘legitimate’ instead of ‘genuine’.
\textsuperscript{142}Impact Assessment 2012, p. 27.
§1.3.4 Denotation of forum shopping

Before continuing, it is important to determine what will be meant by ‘forum shopping’ for the purpose of this dissertation, 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 that 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.¹⁴³ 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.¹⁴⁴ This is often the case when attempting to arrange one COMI (forum) for a group of companies.¹⁴⁵ Although this can definitely be seen as an exploration for a forum which is more favourable (forum shopping), it is 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, 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 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 has been 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.¹⁴⁶ In this regard, one could consider the arguments made by scholars that national courts are rather nationalistic and in competition with one another.¹⁴⁷ 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 dissertation. Mainly, because they are both discussed as forum shopping in the majority of literature.¹⁴⁸

¹⁴³ High Court of Justice (Chancery Division) 26 November 2009, Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).
¹⁴⁴ 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; Bos 2008, p. 183–213; see also LoPucki, Global and out of control? 2005, p. 89.
¹⁴⁵ High Court of Justice (Chancery Division) 16 May 2003, Re Daisytek-ISA Ltd [2003] B.C.C. 562.
¹⁴⁷ Tung 2001, p. 82-83; LoPucki, Universalism Unravels 2005, p. 148 and 150; Pottow 2007, p. 812; Goode 2011, par. 15-08; Von Wilcken 2011, p. 73; see also, LoPucki, Global and out of control? 2005.
¹⁴⁸ See e.g. De Weijs 2014, p. 500, under note 18, where the BenQ case is recognized as an example of forum shopping, however acknowledge that it is debatable, as there was no active COMI-migration. The case of BenQ should be considered as an example of passive forum shopping; Rb. Amsterdam 31 Januari 2007, ECLI:NL:RBAMS:2007:AZ9985, JOR 2008/17 (BenQ).
In addition, this dissertation 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 dissertation, ‘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. 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 dissertation. The distinction made primarily serves the purpose of differentiating situations of possible abusive ‘forum shopping’ from those which clearly are not.

§1.4 European Insolvency Regulation’s choice of model

§1.4.1 COMI model

This dissertation has elaborated on the concept of the COMI in paragraph [1.2.2] to some extent, also mentioning its importance to forum shopping. The aim of this section is to study the EU legislature’s choice for the COMI concept and the model by which it operates. The COMI model will be critically perlustrated in order to surface its strengths and weaknesses.

Although the term COMI has been created within the EU as an autonomous concept, it has also been used by UNCITRAL in its Model Law on Cross-Border Insolvency. The UNCITRAL Model Law is an example of an (aspired) optimal national law, providing for the basis on which enacting states determine whether or not to recognise a foreign insolvency proceeding. It aims to provide for: Better and uniform cooperation between states; more legal certainty; more efficiency; and centrally organized insolvency proceedings in cross-border situations. As a result, the COMI concept is used by various states around the world through their adoption of the UNCITRAL Model Law. The interpretation of the COMI concept

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149 On what is considered ‘regulatory arbitrage’, see Armour 2005, p. 375-376; Eidenmüller, Incorporation 2009, p. 2-4 (where it is referred to as ‘legal arbitrage’); Hoek 2014, p. 60; see also paragraph [1.3.1].

150 Eidenmüller 2011, p. 149, where Professor Eidenmüller makes a similar distinction.


153 Preamble of the UNCITRAL Model Law.
and consequently the determination of the COMI through the enactment of the UNCITRAL Model Law does not necessarily have to be in line with that of the EU, as it is independent of the EU legal order. Still, the UNCITRAL Model Law tries to steer the (not yet defined) COMI concept towards the EU’s interpretation. In this way the UNCITRAL Model Law very much encourages a uniform interpretation of the COMI concept. One could argue that, throughout the world, the COMI concept has largely been interpreted consistent with that of the EU. This is with the possible exception of the United States, in respect of which it has been argued that factors are not always ascertainable by third parties or required to be readily ascertainable.

Many scholars have argued credibly that the COMI model is (intended to be) anti-form shopping. Reasoning primarily that, while the place of incorporation initially determines the choice of law, it is protected by the COMI rebuttal possibility, seeking the true place of the head office functions in case there would be forum shopping through reincorporation. Yet, now that forum shopping through reincorporation is (assumedly) protected by the COMI test, what if one

154 See, UNCITRAL Guide, par. 81, where it clarifies that the definition of a ‘foreign main proceeding’ under the UNCITRAL Model Law, which is determined by the COMI concept, corresponds with the formulation under Article 3 of the EIR in order to build on the emerging harmonization with regard to the jurisdiction to be recognised as having the ‘main’ proceeding; see also UNCITRAL Guide par. 82 where it continues by stating that, although the COMI concept under the IER has a different purpose than it has under the UNCITRAL Model Law, case law under the IER may also be relevant to the COMI interpretation under the UNCITRAL Model Law; Finally, see UNCITRAL Guide par. 83-84 where it elaborately explains the COMI interpretation under the EIR by reference to the relevant EIR Recitals and the Virgós-Schmit Report.

155 [England] Court of Appeal (Civil Division) 25 February 2010, Re Stanford International Bank (In Receivership) [2010] EWCA Civ 137, par. 54. [Greece] Piraeus court of Appeal Decision no 670/2009, in DEE 2010/64; Ho 2010, p. 252, 253 and 260; the Greece Bankruptcy Code has also included a definition under Article 4 (2) which is similar to Recital (13) of the EIR. [Canada] The Ontario Court of Justice 11 July 2011, Re Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201, par. 30, where the Court essentially applied the ‘head office functions’ test and recognised the importance of the factors ‘ascertainable by third parties’, following the EU COMI interpretation; Ho 2012, p. 88.

156 U.S. Bankruptcy Court for the Southern District of New York 30 August 2007, Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, 374 B.R. 122; and, District Court, Southern District New York 27 May 2008, In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (in provisional liquidation), 389 B.R. 325, where the court applies the USA ‘principal place of business’ theory; for its application by other USA courts see, Schmidt 2010, p. 27, under note 41. It has been argued, however, that factors under this theory are not always ascertainable by third parties, nor are they required to be readily ascertainable, see Supreme Court of the United States 23 February 2010, Hertz Corp. v. Friend et al., 559 US 77, par. 14 and 17; McCarthy 2013, p. 375.

157 See e.g. Supreme Court of the United States 23 February 2010, Hertz Corp. v. Friend et al., 559 US 77, par. 14 and 17; McCarthy 2013, p. 375. However, in United States Bankruptcy Court (District Nevada) 9 February 2009, Re Betcorp Limited (In Liquidation), 400 B.R. 266, par. 289; and, subsequently in District Court (Southern District New York) 16 April 2013, Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), No. 11-4376, 2013 BL 102426 (2d Cir. Apr. 16, 2013), p. 26, the USA courts have attached greater importance to the Eurofood case and have chosen to consider the objectiveness and ascertainability by third parties.

158 See e.g. Pottow 2007, p. 794; Szydlo 2010, p. 270; more generally, Guzman 2000, p. 2214.

159 See e.g. Mucciarelli 2013, p. 190-191.
could influence the COMI instead? Is that much harder? In other words, does the COMI concept truly obstruct forum shopping?

Firstly, it should be recognised that the ease at which a company is able to influence and manipulate the COMI is the key concern determining the effectiveness of the COMI model relative to forum shopping. The COMI is a concept of open character, meaning that it can be applied in any case and at any time, giving it much flexibility. The advantage of this open character is that it follows the business, and allows for it to relocate as it changes over time. However, this openness simultaneously presents its weakness. The flexibility of the rule creates room for manipulation, potentially leading to forum shopping. The ease of manipulation is enhanced by the fact sensitivity of the COMI concept. This way of manipulation is however largely capped by virtue of the requirement of ascertainability, assigning notable value to the legitimate expectations of third parties and thereby creating more legal certainty.

The ease of manipulation also generally has a high correlation with the clarity of the choice of law rule, in this case, the COMI concept. This assertion is very logical. A clear rule creates the reliability necessary for proper manipulation; whereas if a choice of law were truly random, forum shopping would be impossible. However, the clarity of a rule and the ease of manipulation should ultimately be considered separately. It is conceivable to have a rule which is clear but difficult to manipulate due to preventive regulations put in place, and vice versa. From these options, the choice for a clear but difficult to manipulate rule would seem most likely to result in less forum shopping, rather than one which is unclear and easy to manipulate. The COMI model seems to entail the latter and has been highly criticized in this regard, as it is often construed as ‘fuzzy’ or ‘obscure’. This ambiguity has led to international conflicts between jurisdictions on the determination of the COMI and consequently the opening of main

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160 Virgós 2004, par. 47.
163 See paragraph [1.2.2].
164 Guzman 2000, p. 2207; Pottow 2007, p. 796.
166 Pottow 2007, p. 796.
167 Pottow 2007, p. 797, under note 49; see also paragraph [4.1.3].
168 See, Annex I of the External Evaluation Report, 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 2012, p. 19 and 57; 2013 Muciarelli, par. 3.2.
insolvency proceedings.\textsuperscript{170} There are many cases of COMI shifting within the EU following the EIR, demonstrating the realistic opportunity to choose a different forum.\textsuperscript{171} In addition, it has been argued empirically that a COMI shift is virtually effortless for multinational enterprises.\textsuperscript{172} One should therefore consider the high risk of manipulation which the COMI model entails.\textsuperscript{173} The possibility of forum shopping \textit{ex post} reduces \textit{ex ante} predictability for creditors, which consequently increases agency costs of debt.\textsuperscript{174} Although there has also been case law of unsuccessful COMI shifts,\textsuperscript{175} these failings were due to a reasonably apparent incompatibility with the EIR, rather than a hardship to influence the COMI.\textsuperscript{176}

\section*{§1.4.2 COMI's time of establishment}

Apart from the COMI concept and its application, equally relevant with regard to forum shopping is the COMI's time of establishment. As described above, forum shopping is indirevitably influenced by the clarity and predictability of the rule of law. Therefore, it is important to know what point in time shall be chosen for the crystallization of the facts on the basis of which the COMI is to be determined. It is defined in Article 2 (f) of the EIR that the time of the 'opening of proceedings' is:

\textit{“The time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not”}. 

Two elements can be abstracted from this definition. First, the judgement opening the proceeding does not have to be effective immediately. If the effectiveness of a

\textsuperscript{170} See e.g. High Court of Justice (Chancery Division) 16 May 2003, \textit{Re Daisytek-ISA Ltd} [2003] B.C.C. 562; see also Belohlevek 2008, par. 5.9.

\textsuperscript{171} See e.g. ECJ EU 2 May 2006, C-341/04 (\textit{Re Eurofood IFSC Ltd}); Amstericht Köln 19 February 2008, 73 IE 1/08, ZIP 2008, 423 (PIN Group); High Court of Justice (Chancery Division) 26 November 2009, \textit{Re Hellas Telecommunications (Luxembourg) II SCA} [2008] EWHC 3199 (Ch); High Court of Justice (Chancery Division) 6 December 2010, \textit{Re European Directors (DH6) BV} [2010] EWHC 3472 (Ch); High Court of Justice (Chancery Division) 3 December 2013, \textit{Re Magyar Telecom BV} [2013] EWHC 3800 (Ch); High Court of Justice (Chancery Division) 23 January 2013, \textit{DNick Holding plc} [2013] EWHC 68 (Ch); see in this regard also DNick Holding Report 2005; on the successful restructuring of Schefenacker after forum shopping see, Quenby 2007; and, Goetker 2007.

\textsuperscript{172} LoPucki, \textit{Universalism Unravels} 2005, p. 155-58 ("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 LoPucki, \textit{Courting Failure} 2005, p. 226-230.

\textsuperscript{173} Wessels, \textit{Shaken or Stirred} 2011, p. 6 under (X).

\textsuperscript{174} Franken 2005, p. 236; see further paragraph [2.4.1].

\textsuperscript{175} See e.g. the German case of Amtsgericht Mönchengladbach 27 April 2004, \textit{EMBIC I}, 19 IN 54/04; or the more famous case of \textit{Hans Brochier} where both German and UK courts determined that the COMI of a German construction company, that had been taken over by a UK investment conglomerate, did not shift from Germany to the UK, see, High Court of Justice (Chancery Division) 15 August 2006, \textit{Hans Brochier Holdings Ltd v. Exner} [2006] EWHC 2594 (Ch); and, Amtsgericht Nuremberg 15 August 2006, (8004 IN 1326-1331/06), ZIP 2/2007 (\textit{Hans Brochier}).

\textsuperscript{176} High Court of Justice (Chancery Division) 8 December 2006, \textit{Hans Brochier Holdings Ltd v. Exner}, [2006] EWHC 2594 (Ch), where the High Court rejected the request to open secondary proceedings, declaring that the applicant did not have an ‘establishment’ in England (let alone its COMI), as required by Article 3(3) of the EIR; see also McCormack 2009, p. 184 (“admittedly on promptings from the administrators, the English court declared that the COMI of a German incorporated company was not in the UK”); 2008 Ringe, p. 588.
judgment depends on additional acts, then those acts determine the time at which the opening takes place. Secondly, the decision does not have to be final, it can for example still be subject to review. Hence, there are two points in time to be set with regard to the establishment of the COMI. The first point in time is that of the judgement opening the proceedings, and the second point is that on which the aforementioned opening judgement becomes effective. The English Court of Appeal in Shierson v Vlieland-Boddy ruled that the time at which the COMI is to be determined, is when the opening judgement becomes effective. Subsequently, the Court of Appeal reasoned that a jurisdiction should be satisfied that the debtor’s COMI is situated within the territory of that state before opening main insolvency proceedings. According to the Court of Appeal, the time at which Article 3(1) EIR requires the court to look at the COMI, is: 

“at the date of the decision to assume (or decline) jurisdiction, not at the position as it was at some earlier date”.

However, for the purpose of avoiding forum shopping, a third point in time has been set following the ECJ’s judgement in Staubitz-Schreiber. In this case, the ECJ ruled that the court of the Member State within the territory of which the COMI is situated at the time when the debtor lodges the request to open insolvency proceedings, retains jurisdiction to open those proceedings. This is the principle of perpetuatio fori. The ECJ ruled that it would be contrary to the objective of the EIR, which is to avoid incentives of forum shopping, if it were to allow a debtor to move its COMI to another Member State after a request to open insolvency proceedings has been issued, but prior to the determination of that request by the relevant court. This principle, in effect, creates a third point in time at which the facts of the case are crystallized in order to establish the COMI later on. The moment a debtor lodges a request to open insolvency proceedings,

177 Moss 2008, p. 33.
180 Court of Appeal (Civil Division) 27 July 2005, Shierson v Vlieland-Boddy [2005] EWCA Civ 974, par. 41.
181 ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber).
182 ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 29; confirmed in CJEU EU 20 October 2011, C-396/09 (Interedit), par. 55; also e.g. followed by the Dutch Supreme Court in Hoge Raad 22 December 2009, ECLI:NL:PHR:2009:BK3574, JOR 2010/247 (Handelskwekerij Lidia & Willem van Kester v.o.f.); and the German Court in Amstericht Köln 19 February 2008, 73 IE 1/08, ZIP 2008, 423 (PIN Group); it has also been stated in the UK Insolvency Service Technical Manual Ch.41 Pt 5, par. 41.66.
184 ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 24-25.
185 Eidenmüller 2011, p. 151-152.
the COMI is locked for the purpose of Article 3(1) EIR. It is thereby ultimately the point in time which is most relevant to forum shopping.

As a result, one could conclude that, in a normal case, the following course of events will occur. Once a request to open insolvency proceedings has been filed, the facts of the case will be crystallized for the purpose of establishing the COMI, as decided in Staubitz-Schreiber. Next, the relevant court will give its judgement, opening the case before it. If one would follow the ruling of the English Court of Appeal in Shierson v Vlieland-Boddy, one should assume that the relevant court will only open the main insolvency proceedings if it is satisfied that the COMI is located within its jurisdiction. Finally, the aforementioned judgement will only be considered a ‘judgement opening proceedings’ within the meaning of the EIR, once the judgement has become effective, dependent upon acts necessary according to national law. Once the opening judgement has become effective, it will be considered a ‘judgement opening proceedings’, giving it the appropriate related effects generated via the EIR.

In literature, much is written on the ‘race’ to open insolvency proceedings. It is often explained or insinuated that the insolvency proceeding which is first to open, is the one which will have the right to open main insolvency proceedings. This notion is, however, very difficult to apprehend under the system of the EIR. The COMI model stipulates that there is only one COMI within the EU, as has also been concluded by many scholars. The jurisdiction in which the COMI is situated, subsequently has the right to open main insolvency proceedings. Theoretically, one should be able to determine the COMI autonomously and objectively in every case without large discrepancies. Which court has been put forward the task of determining the COMI should not matter. Although, indeed, national courts could certainly be biased in some way, this is how the EIR is intended to effectuate itself. This intended application is simultaneously the correct approach for the interpretation of the law, following the rationale of the EU legislature. Assuming that such a correct and ideal interpretation is applied in a cross-border insolvency case, one should conclude that, regardless of which court has been presented the insolvency case, the determination of the COMI should be the same in every court. Therefore, if one would strictly interpret and apply the law, the time at which the debtor lodges the request to open insolvency proceedings is only relevant for the determination of the moment of crystallization of the facts for the establishment of the COMI. It does not matter at which court the debtor

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187 See e.g. Belohlavek 2008, par. 5.9.
188 Virgós-Schmit Report, par. 15; Court of Appeal (Civil Division) 27 July 2005, Shierson v Vlieland-Boddy [2005] EWCA Civ 974, par. 49; High Court of Justice (Chancery Division) 22 March 2006, Cross Construction Sussex Ltd v Tseliki [2006] EWHC 1056 (Ch), par. 5; also, Recital (13) (“the place”), Recital (14) (“is located”) and Article 3(1) of the EIR which are all written in singular.
189 Belohlavek 2008, par. 5.9; Walters 2010, p. 188; Stone 2014, p. 527-528.
190 See e.g. High Court of Justice (Chancery Division) 15 August 2006, Hans Brochier Holdings Ltd v. Exner [2006] EWHC 2594 (Ch); and, Amtsgericht Nuremberg 15 August 2006, (8004 IN 1326-1331/06), ZIP 2/2007 (Hans Brochier), where both the UK and German courts agree that the company’s COMI is in Germany.
191 See also paragraph [1.3.4].
chooses to lodge his request. The fact that a court is the first to open insolvency proceedings is a result of its right to open main insolvency proceedings due to the COMI being located within its jurisdiction. It is not the right of the first court which opens insolvency proceedings to deem the COMI to be within its jurisdiction. Therefore, the chronological order referred to in the EIR and by the ECJ, is based on the actual situation resulting from the application of the rule rather that implying a chronological order as a basis.\(^\text{192}\)

When, however, reading the arguments of the aforementioned scholars more carefully, it becomes clear that the true reason why there is a ‘race’ to lodge insolvency proceedings in practice, is not due to the interpretation of the law. It is due to the vagueness of the COMI concept combined with national prejudice and pride, leading to different interpretations by the various courts and consequently a ‘race’ to lodge insolvency proceedings in the most favourable jurisdiction.\(^\text{193}\) In order to address this problem, a solution has been suggested in the Virgós-Schmit Report,\(^\text{194}\) which is further elaborated on in Virgós and Garcimartin, *The European Insolvency Regulation: Law and Practice* (2004).\(^\text{195}\) This solution boils down to a ‘first in time’ rule by which every national court within the EU would have to abide.\(^\text{196}\) Under this rule a national court would have to stay its proceedings until the jurisdiction of the court first seized is established. In the interim, the national court may only order provisional (including protective) measures.\(^\text{197}\)

Although this solution seems to be able to resolve the problem at first sight,\(^\text{198}\) it has disappointingly not evolved itself in that way. The *Eurofood* case, for example, was an ideal case in which the ECJ could have established this solution as part of EU law. However, the ECJ chose a different path. In this case a provisional liquidator was appointed between the request to open insolvency proceedings and the judgement opening insolvency proceedings, in order to preserve the rights of the relevant parties. It would be logical to place this situation within the context of Article 38 and Recital (16) of the EIR, meaning that the insolvency proceedings have not yet been opened.\(^\text{199}\) The ECJ has, however, explained that Article 38 refers to a different situation than the one in the *Eurofood* case.\(^\text{200}\) The Court has subsequently decided that a ‘decision to open insolvency proceedings’ can be up to

\(^{192}\) Article 16 (1) and Recital (22) EIR; ECJ EU 2 May 2006, C-341/04 (*Re Eurofood IFSC Ltd*), par. 49.

\(^{193}\) See e.g. Belohlavek 2008, par. 5.10, (“In conjunction with the unclear issues regarding the defining of a debtor’s COMI, the absurdity of the Regulation therefore lies in the fact that in practice it often does not matter where the COMI is located, but who finds such a center and substantiates its existence first”); LoPucki, *Universalism Unravels* 2005, p. 148-150, who has suggested that the vagueness of the COMI concept in combination with the pressure put on courts to claim large cases will generate a more destructive competition than is presently ‘corrupting’ USA bankruptcy courts; see also, Tung 2001, p. 82-83; LoPucki, *Global and out of control?* 2005; Pottow 2007, p. 812; Von Wilcken 2011, p. 73.

\(^{194}\) Virgós-Schmit Report, par. 220.

\(^{195}\) Virgós 2004, par. 70.

\(^{196}\) This rule can also somewhat be derived from Recital (22) EIR.

\(^{197}\) Virgós 2004, par. 70.


\(^{199}\) Moss 2008, p. 35.

\(^{200}\) ECJ EU 2 May 2006, C-341/04 (*Re Eurofood IFSC Ltd*), par. 57.
the national laws of the relevant Member State.\textsuperscript{201} Additionally, such may be determined, should there be:

\textit{“a decision handed down following an application, based on the debtor’s insolvency, seeking the opening of proceedings referred to in Annex (A) to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation.”}\textsuperscript{202}

This decision of the court has been criticized,\textsuperscript{203} mainly due to the improper effects caused by this extended interpretation of the ‘opening of proceedings’. It would however go beyond the scope of this dissertation to discuss the correctness of the \textit{Eurofood} ruling. In any case, it is clear that the ECJ’s ruling creates the extended possibility of national law to determine when proceedings are deemed to be opened. It does not, however, change the moment at which the facts of the case are crystallized for the determination of the COMI.

\textbf{§1.4.3 Shift of incorporation & Real seat}

Due to the difference in the choice of law models applicable under insolvency law and company law, a distinction should be made between the reincorporation of a company and a shift of its real seat.\textsuperscript{204} Take for example the famous \textit{Centros} case,\textsuperscript{205} where a company was incorporated under UK law in order to take advantage of the low minimum capital requirements while conducting its business in Denmark (its real seat). This is a typical example of a ‘letterbox’ company, as meant by the ECJ in \textit{Eurofood}.\textsuperscript{206} In such a case, the COMI of the company is almost certainly located in Denmark rather than its place of incorporation, the UK. Therefore, in case of insolvency, the main proceedings could only be opened in Denmark, rebutting the incorporation presumption. This would subsequently mean that Danish law would be applicable to the insolvency proceedings.\textsuperscript{207}

However, through the ECJ’s rulings in \textit{Centros} and \textit{Inspire Art},\textsuperscript{208} one can determine that (de facto) the company law of the place of incorporation (the UK) will be applicable through its recognition by other Member States.\textsuperscript{209} By way of the aforementioned established rule of law, the ECJ has generated a choice of company law, possibly stimulating ‘letterbox’ companies.\textsuperscript{210} However, this example shows that, under the COMI model, the place of incorporation does not necessarily contribute much in cross-border insolvencies by dislocating it from the choice of law model applied under company law. In practice, there are few cases to be noted where a debtor moved its registered office in order to forum shop, unless the law

\begin{footnotes}
\textsuperscript{201}ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 54.
\textsuperscript{202}ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 54.
\textsuperscript{203}Moss 2008.
\textsuperscript{204}See also paragraph [1.2.3].
\textsuperscript{205}ECJ EC 9 March 1999, C-212/97 (Centros); ECJ EU 5 November 2002, C-208/00 (Überseering).
\textsuperscript{206}ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 35.
\textsuperscript{207}Article 4(1) EIR.
\textsuperscript{208}ECJ EU 30 September 2003, C-167/01 (Inspire Art).
\textsuperscript{209}Eidenmüller 2005, p. 425; McCormack 2009, p. 191.
\textsuperscript{210}Hoek 2014, p. 62.
\end{footnotes}
of the relevant Member State effectively requires it to be so.\textsuperscript{211} More often, the debtor keeps its registered office in the Member State of incorporation and takes steps to transfer its central administration.\textsuperscript{212} A well-established company is also not likely to reincorporate due to the degree of exertion and costs required. It has, however, been argued that the main obstacles to reincorporation have been resolved to some degree.\textsuperscript{213} Primarily, due to the Merger Directive\textsuperscript{214} and the Directive on the Taxation of Mergers.\textsuperscript{215}

\textsuperscript{211} E.g. the reincorporations of Deutsche Nickel through DNick Holding in, High Court of Justice (Chancery Division) 23 January 2013, DNick Holding plc [2013] EWHC 68 (Ch); DNick Holding Report 2005; Ringe 2008, p. 586-587; and the reincorporation of Schefenacker see, Quenby 2007; Goetker 2007; Ringe 2008, p. 585-586. However, these German companies were required to reincorporate under German law, prior to its legislative amendment, named: Das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (Statute for the Modernisation of Limited Liability Company Law and the Combat of Misuse); Arnold 2013, p. 250-251.

\textsuperscript{212} Such as e.g. in, High Court of Justice (Chancery Division) 26 November 2009, Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch); High Court of Justice (Chancery Division) 6 December 2010, Re European Directors (DH6) BV [2010] EWHC 3472 (Ch); Chancery Division (Companies Court) 20 May 2009, Re Nortel Networks SA [2009] EWHC 1482 (Ch).

\textsuperscript{213} Enriques, Regulatory Competition 2006, p. 431.

\textsuperscript{214} Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005, L 310/1); in conjunction with, ECJ EU 13 December 2005, C-411/03 (SEVIC Systems) where the ECJ ruled that the failure of the German law on mergers to allow for cross-border mergers violated Articles 43 and 48 of the EC Treaty; in addition, see, CJEU EU 12 July 2012, C-378/10 (Vale) where the CJEU has made clear that Member States that provide for national conversions may not prohibit cross-border conversions.

\textsuperscript{215} Article 4(1) of Directive (EEC) 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990, L 225/1); in conjunction with ECJ EU 11 March 2004, C-9/02 (de Lasteyrie du Saillant), where the ECJ ruled that when a natural person moves to another Member State, the taxation of unrealized gains is not permissible under the freedom of establishment; Tröger 2005, p. 17, where it has been argued that the Lasteyrie du Saillant case should apply to companies as well.
Chapter 2 - Examining the paradigm of forum shopping

§2.1 England

§2.1.1 Common practice
It seems to be common practice in financial markets to use English law as the norm when it comes to finding a consensus on applicable law and forum in international relations. Regardless of whether it is the choice of law applicable to financial contracts in general, cross-border financing, syndicated loans or derivatives. The choice for English law is primarily caused by the established market practice, creating legal certainty and over time becoming the standard in financial sectors. This has led to internal training within the actors in the market, creating somewhat of a snowball effect and ultimately giving English law its current status.

Within the area of insolvency law, the choice to apply English law is also dominant. Primarily due to the aforementioned reasoning and additionally due to its flexible insolvency laws. There are famous examples of the use of a company voluntary arrangement (Schefenacker and Deutsche Nickel), a scheme of arrangement (Equitable Life, Drax, Wind Hellas, La Seda de Barcelona, Rodenstock and more recently DTEK) or a pre-packaged administration (Collins & Aikman, Wind Hellas and European Directories)

218 McCormack 2009, p. 180, where the author describes the UK as the restructuring capital of Europe.
219 Tilley 2005, p. 102 (“European restructuring (...), with the exception of the U.K. among the major economies, is still inflexible, bureaucratic, and value destructive. For this reason international practitioners favour the U.K. as a jurisdiction should a choice be available.”)
220 On the successful restructuring of Schefenacker after forum shopping see, Quenby 2007; Goetker 2007.
221 High Court of Justice (Chancery Division) 23 January 2013, DNick Holding plc [2013] EWHC 68 (Ch); also in this regard, see, DNick Holding Report 2005.
222 High Court of Justice (Chancery Division) 8 February 2002, Re Equitable Life Assurance Society [2002] EWHC 140 (Ch).
223 High Court of Justice (Chancery Division) 17 November 2003, Re Drax Holdings Ltd [2003] EWHC 2743 (Ch).
224 High Court of Justice (Chancery Division) 6 December 2010, Re European Directors (DH6) BV [2010] EWHC 3472 (Ch).
in order to either liquidate the company or rescue it out of insolvency. Some of these cases show clear forum shopping through a COMI shift (active forum shopping), where others merely convinced the court of their COMI to be in England in arguably ambiguous cases (passive forum shopping).

There are unfortunately no particular metrics available in order to determine the specific amount of foreign companies relocating to the English jurisdiction in order to use its insolvency laws, as this type of data is not recorded. Only an indication can be made. Nonetheless, the popularity of the English jurisdiction can clearly be seen in practice, as also outlined above. One could not overlook the presence of forum shopping as strongly displayed by news headlines in the UK. The particular situation of the English jurisdiction has even been observed by the European Commission, which acknowledged that the flexible regime offered by English law attracts companies from other European jurisdictions.

The stream of court cases which has shifted to the English jurisdiction due to the effects of the EIR has two sides. There are certain direct benefits, such as the economic profits to national insolvency practitioners. Also, there are some indirect advantages, for example that businesses may restart in England and provide jobs; or that professionals who migrate to England may continue working in England, thereby paying taxes and contributing to the UK economy. However, there are also negative effects, such as the encumbering of the courts and the official receiver with the task of more exhaustive and costly investigations due to the international character of these cases. Additionally, there could be an unfair result for creditors who anticipated to rely upon their national laws, yet now find themselves in undesirable circumstances.

§ 2.1.2 Schemes of arrangement
A procedure frequently subject to forum shopping, is the UK scheme of arrangement. The scheme of arrangement is a procedure which allows for an arrangement or compromise between a company and its creditors. It can bind dissenting minorities in order to overcome the impossibility or impracticality of obtaining the consent of every creditor in situations where there is a possible

231 Rescuing either the company as a whole (the legal entity) or only its business.
232 See paragraph [1.3.4] on active and passive forum shopping.
233 See, Briggs 2010, under note 5, where the author (who is a Deputy Registrar in Bankruptcy at the High Court) states that (“amongst the 20-25 debtor petitions filed each day, at least one relates to a debtor with substantial foreign connections”); Walters 2010, p. 183, referencing to recent surveys of official receivers which suggested that up to 200 bankruptcy orders were made on the petition of foreign nationals in 2 years, ending the 31st of March 2010. The majority of these petitioners were German. In less than half of the cases there was information to suggest that no real relocation to the UK was present.
237 Coburn 2012, p. 10.
238 Coburn 2012, p. 10.
239 Although, indeed, such creditor may have the possibility of opening secondary proceedings, this would not necessarily improve their situation, see also paragraph [1.2.4].
rescue which would be more beneficial than a liquidation. Although, it is not an insolvency procedure as such, in practice it is often used as a restructuring or insolvency tool. It can be used by a company both during a solvent and an insolvent state. In recent years, schemes have become a very popular restructuring tool for companies around the world. One of the main reasons for foreign companies to make use of a scheme is because of its cramdown mechanism. Even when a cramdown is possible in the home state, there is still an incentive to make use of the scheme of arrangement procedure due to the established experience, understanding and certainty which it offers.

Because the scheme of arrangement is not characterised as an insolvency procedure, the EIR does not apply to it, unless it is used in an administration procedure. The scheme of arrangement procedure is not enlisted in Annex (A) of the EIR, as it is also often used for other causes, such as the transfer of control over a company. The advantage of falling outside the scope of the EIR is quite considerable to forum shopping. This is mainly due to the absence of the COMI requirement and the lower thresholds for recognition by the English court. In order to apply for a scheme of arrangement, the English court must first have jurisdiction. The court will normally be satisfied in exercising its discretion only when the company is ‘liable to be wound up’. With regard to domestic companies, this requirement is met simply by a registration under the Companies Act. With regard to foreign companies, according to the English court in Re Drax Holdings, a company is ‘liable to be wound up’ when it has a ‘sufficient connection’ with England. Even though the bar was initially set reasonably high in Re Drax

240 Pilkington 2013, par. 2.2.2.3; O’Dea 2012, par. 1.01-1.02.
241 O’Dea 2012, par. 1.08.
242 For example in High Court of Justice (Chancery Division) 29 March 2011, Re Metrovacesa SA [2011] EWHC 1014 (Ch); High Court of Justice (Chancery Division) 26 May 2010, La Seda de Barcelona SA [2010] EWHC 1364 (Ch) [Spain]; High Court of Justice (Chancery Division) 27 January 2014, Re Tele Columbus GmbH [2014] EWHC 249 (Ch); High Court of Justice (Chancery Division) 6 May 2011, Re Rodenstock GmbH [2011] EWHC 1104 (Ch) [Germany]; High Court of Justice (Chancery Division) 21 April 2010, Re Gallery Capital S.A v Gallery Media Group Ltd [2010] WL 4777509 [Russia]; High Court of Justice (Chancery Division) 28 April 2015, Re Dtek Finance BV [2015] EWHC 1164 (Ch); High Court of Justice (Chancery Division) 3 December 2013, Re Magyar Telecom BV [2013] EWHC 3800 (Ch) [The Netherlands]; High Court of Justice (Chancery Division) 3 December 2012, Re Global Investment House KSC [2012] EWHC 3792 (Ch) [Kuwait]; High Court of Justice (Chancery Division) 24 July 2013, Re Icopal AS and others [2013] EWHC 3469 (Ch) [Delaware, USA]; High Court of Justice (Chancery Division) 25 June 2013, Re Vietnam Shipbuilding Industry Group [2013] EWHC 2476 (Ch) [Vietnam]; see also Anthony 2014.
243 A ‘cramdown’ within an insolvency procedure is (simply put) a legal mechanism by which creditors, with the approval of the court, are able to bind a dissenting minority to a reorganization plan against their will. Rutstein 2011; for a comparative analysis between Member States, see, Balmond 2010.
244 Rutstein 2011. The established practices of the scheme of arrangement create the premise upon which parties are better able to ensures its recognition within a particular jurisdiction. E.g. on the recognition possibilities of the scheme of arrangement in the Netherlands, see, Verhagen 2012.
245 Milman 2011, p. 2; Payne 2013, p. 571 et seq.; see further paragraph [3.1.5].
246 Milman 2011, p. 1-2; Payne 2013, p. 564.
247 Companies act 2006 s895(2); O’Dea 2012, par. 2.01; Pilkington 2013, par. 4.2.
248 Pilkington 2013, par. 4.2.1.
249 High Court of Justice (Chancery Division) 17 November 2003, Re Drax Holdings Ltd [2003] EWHC 2743 (Ch), par. 29-30; Pilkington 2013, par. 4.5.2-4.5.4.
Holding to establish a ‘sufficient connection’, this threshold has been considerably lowered in the *Re Rodenstock* and *Primacom Holdings* cases.\(^{250}\) Currently the requirement for a company to be able to apply for a scheme of arrangement is merely that its key financial documents are governed by English law, making the procedure very accessible for foreign companies.\(^{251}\) The court has even gone so far as to accept situations in which the law governing financial documents were changed just before the application to the court, in order to meet the requirements for recognition.\(^{252}\) Therefore, forum shopping to apply a UK scheme of arrangement is rather simple and low-cost. Considering that the EIR does not apply, there is also no additional need to establish the company’s COMI within the UK. The ease at which one could forum shop to the UK scheme of arrangement has led some parties to propose its inclusion to the EIR in order to restrict abuse.\(^{253}\) Interestingly, the scheme of arrangement’s inclusion to the EIR is two-sided. While the EIR 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.\(^{254}\) Rather seemly, this shows the duplicity of the COMI model.

\(^{250}\) High Court of Justice (Chancery Division) 6 May 2011, *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); High Court of Justice (Chancery Division) 20 January 2012, *Primacom Holdings GmbH v Credit Agricole* [2012] EWHC 164 (Ch) par. 63-64; Pilkington 2013, par. 4.5.6; O’Dea 2012, par. 2.01-2.18; see also High Court of Justice (Chancery Division) 29 March 2011, *Re Metrovacesa SA* [2011] EWHC 1014 (Ch); High Court Of Justice (Chancery Division) 27 January 2014, *Re Tele Columbus GmbH* [2014] EWHC 249 (Ch).

\(^{251}\) Pilkington 2013, par. 4.5.6-4.5.9; moreover, this does not have to be the exclusive jurisdiction, see, High Court of Justice (Chancery Division) 25 June 2013, *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch).

\(^{252}\) High Court of Justice (Chancery Division) 3 December 2013, *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), par. 15; High Court Of Justice (Chancery Division) 19 November 2014, *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch), par. 250-251; *High Court of Justice (Chancery Division)* 28 April 2015, *Re Dtek Finance BV* [2015] EWHC 1164 (Ch), par. 11-17.

\(^{253}\) See paragraph [2.5.2]; see also Pilkington 2013, par. 4.5.12, anticipating upon the problems of forum shopping related to the ease at which one could apply for a scheme of arrangement.

\(^{254}\) See, Windsor 2010 on the potential recognition issues of a scheme within the EU.
§2.2 Germany

It has been noticed by scholars and the European Commission that there is a drive of COMI migrations from Germany towards the English jurisdiction.\(^{255}\) One could argue that this drive is caused by the large differences in corporate and insolvency law. In this regard, Germany introduced the MoMig\(^{256}\) and the ESUG,\(^{257}\) hoping to address the raised ‘issue’ forum shopping.\(^{258}\) However, the effects of the measures seem to be narrow. An investigation of the Insolvency Service\(^{259}\) in 2011 resulted in 61 companies incorporated in England being wound up for filing false and misleading information, and not co-operating with the investigation. The 61 companies were linked to two German citizens who ran a business offering English companies to German clients when “bankruptcy or commercial difficulties threaten”.\(^{260}\) These distressed foreign companies transferred their domicile to England, only to subsequently go bust and take advantage of the more pleasant insolvency laws in England. The technique used by these companies was a pre-pack administration, allowing them to dispose of their creditors and restart their business free of debt.\(^{261}\) This investigation gives an insight in the regulatory arbitrage within the EU through forum shopping for an optimal insolvency legislation. After discovering these forum shopping practices, the Insolvency Service Technical Manual has been adjusted in order to prevent abuse of the English insolvency laws.\(^{262}\) Effectively, by way of a so-called ‘suspension period’ on the legitimacy of the COMI in England.\(^{263}\)

\(^{255}\) EU Commission Report to the European Parliament, the Council and the European Economic and Social Committee on the application of the EU Insolvency Regulation (EC) No. 1346/2000, COM(2012)743 final [hereafter ‘Commission Report 2012’], p.9-18, which observes that German debtors are particularly trying to (“take advantage of the discharge opportunities of English law”); Walters 2010, p. 183 (“a ‘quiet invasion’ of German nationals”); McCormack, Reconstructing European 2010, p. 143 (“flight of the corporate wild geese from Germany”); also see e.g. the forum shopping of Re Rodenstock GmbH [2011] EWHC 1104 (Ch); [2012] B.C.C. 459; Primacom Holdings GmbH v Credit Agricole [2012] EWHC 164 (Ch); [2013] B.C.C. 201 (Ch D); the restructuring of Deutsche Nickel through DNick Holding in High Court of Justice (Chancery Division) 23 January 2013, DNick Holding plc [2013] EWHC 68 (Ch); and DNick Holding Report 2005; on the successful restructuring of Schefenacker after forum shopping see, Quenby 2007; and, Goetker 2007; on the unsuccessful case of Hans Brochier see High Court of Justice (Chancery Division) 15 August 2006, Hans Brochier Holdings Ltd v. Exner [2006] EWHC 2594 (Ch); High Court of Justice (Chancery Division) 8 December 2006, Hans Brochier Holdings Ltd v. Exner, [2006] EWHC 2594 (Ch); Amtsgericht Nuremberg 15 August 2006, (8004 IN 1326-1331/06), ZIP 2/2007 (Hans Brochier).

\(^{256}\) MoMig is the acronym for: Das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (Statute for the Modernisation of Limited Liability Company Law and the Combat of Misuse).

\(^{257}\) ESUG is the acronym for Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (The German Law on Further Facilitating the Restructuring of Companies), which seeks to suppress German companies’ impulse towards the use of the English CVA.

\(^{258}\) Lürken 2007; Moore 2009, p. 26; Seelinger 2012.

\(^{259}\) The Insolvency Service is the government agency that provides services to those affected by financial distress or failure. It administers company liquidations and personal bankruptcies. It deals with misconduct through the investigation of companies and enforcement, as they have the operational responsibility for the network of official receivers who act as trustees of first and last resort in bankruptcy cases.

\(^{260}\) Insolvency Service Publication 2011; cf. some older statistics in Armour 2005, p. 386.

\(^{261}\) Watkins 2011.

\(^{262}\) UK Insolvency Service Technical Manual, Ch. 41 Pt. 5, par. 41.61.

\(^{263}\) See further, paragraph [2.4.3].
§2.3 The Netherlands

This section will discuss the reorganization possibilities for companies in the Netherlands in comparison to the English scheme of arrangement procedure. The relevance of this comparison to forum shopping will soon become clear.

The Dutch insolvency law has two formal insolvency procedures for companies, namely: Bankruptcy; 264 and the suspension of payments. 265 Additionally, there is a debt reorganization possibility called ‘het Akkoord’ which is essentially an agreement proposed by the debtor, requiring the creditors’ consent and a court approval in order to become binding. 266 This reorganization possibility (the Akkoord) can be compared to the English scheme of arrangement. An Akkoord can be reached either pre- or post-insolvency.

The pre-insolvency Akkoord (‘buitengerechtelijk akkoord’) is an agreement which is purely based on contract law. 267 It is a method for the informal reorganization of a company, before insolvency. There are also two post-insolvency possibilities for an Akkoord, namely: When the company is in suspension of payment (‘surseanceakkoord’); 268 or in bankruptcy (‘faillissementsakkoord’). 269 Both Akkoords are available during the formal insolvency procedures and will involve the appointed insolvency practitioner acting as a trustee in the procedure, similar to the appointment of a UK liquidator or administrator which could apply a scheme of arrangement. 270 There are hardly any significant differences between the two post-insolvency Akkoords, in any case none which are important to deal with for the purpose of this dissertation. 271

While these Akkoords are all meant to be used as a tool to reorganize and potentially save a viable company, there are some significant deficiencies holding them back. Firstly, with regard to the post-insolvency Akkoords, the preferential or secured creditors will not be party to the agreement, as they will not be able to vote. 272 Seeing that they will not be able to vote, they will also not be bound by the Akkoord. 273 The pre-insolvency Akkoord, however, does have the possibility to involve and bind preferential or secured creditors, making it a more effective instrument for a company restructuring. However, this pre-insolvency Akkoord does not have a cramdown possibility, 274 whereas the post-insolvency Akkoord does

264 Title 1 of the Faillissementswet (hereafter ‘Fw’).
265 Title 2 Fw.
266 Title 1, 6th section (the ‘faillissementsakkoord’) and Title 2, 2nd section Fw (the ‘surseance akkoord’); Wessels 2013, par. 6001.
267 Mennens 2015, par. 2.1.
268 Title 2, 2nd section Fw.
269 Title 1, 6th section Fw.
270 Companies Act 2006, s 896 (2)(c).
271 Wessels 2013, par. 6002.
272 Article 143 Fw; Wessels 2013, par. 6025.
273 Article 157 Fw; Soedira 2011, p. 20-21; Wessels 2013, par. 6025; Mennens 2015 par. 2.2-2.4. More specifically, Article 232 Fw which elaborates on the receivables that are not affected by a ‘surseance akkoord’.
274 Wessels 2013, par. 6203; Mennens 2015, par. 2.4.
(a so-called 'dwangakkoord').\textsuperscript{275} For the pre-insolvency Akkoord to be effective, it will (in general) have to obtain the consent of all the creditors it wants to bind.\textsuperscript{276} It is only in highly exceptional circumstances that the Dutch court will apply a cramdown in a pre-insolvency Akkoord.\textsuperscript{277} Indeed, the Dutch Insolvency laws seem to provide for two possibilities (pre- and post-insolvency), each holding one half of the puzzle.\textsuperscript{278}

The fact that preferential and secured creditors are able to exercise their rights, regardless of an Akkoord reached during insolvency, is generally considered a weak point and is criticized by authors.\textsuperscript{279} These deficiencies, amongst other reasons, have led to the instruments becoming rather unsuccessful.\textsuperscript{280} Hence, there has been a need for a law reform in the Netherlands for some time, as the current insolvency regime does not provide for a solid and effective restructuring procedure to achieve corporate rescue.\textsuperscript{281} Due to this shortcoming, Dutch corporate entities have been forum shopping for the English scheme of arrangement in order to perform the necessary restructurings.\textsuperscript{282}

Following this need, the Dutch legislator brought a draft text of the Wet Continuïteit Ondernemingen II\textsuperscript{283} (amongst other drafts) into consultation in August of 2014. This preliminary draft proposes to modernise the current rescue possibilities with an official pre-insolvency rescue procedure called the 'dwangakkoord buiten faillissement'. Unsurprisingly, the UK scheme of arrangement and the US Chapter 11 rescue procedures have been used as an inspiration.\textsuperscript{284} Although many changes have been proposed, for the purpose of this dissertation, it should suffice to mention the following principle features.

First, one should note that it is not required for a company to be declared bankrupt or even to be in a state of insolvency for it to propose the new 'dwangakkoord buiten

\textsuperscript{275} Article 268a Fw; Wessels 2013, par. 6014; Mennens 2015, par. 2.2.
\textsuperscript{276} Soedira 2011, p. 37-38; Wessels 2013, par. 6013.
\textsuperscript{277} HR 12 August 2005, ECLI:NL:HR:2005:AT7799, NJ 2006/230, with annotation from P. van Schilfgaarde (Payroll), par. 3.4.5 where the court states that such measures will only be taken in highly exceptional circumstances; Soedira 2011, par. 8.4 et seq.; Wessels 2013, par. 6209; Mennens 2015, par. 2.1 and 2.4.
\textsuperscript{278} See also Soedira 2011, p. 37-38.
\textsuperscript{279} Soedira 2011, p. 20-21 and 106-107; Wessels, Surseance van betaling 2011, par. 7-15; Mennens 2015, par. 2.2.
\textsuperscript{280} Soedira 2011, p. 20-21; Wessels 2013, par. 6003; Mennens 2015, par. 2.2-2.3.
\textsuperscript{281} Soedira 2011, p. 20-21 and 106-107; Wessels 2013, par. 6218-21, Mennens 2015, par. 4.1.
\textsuperscript{282} See e.g. High Court of Justice (Chancery Division) 26 September 2005, DAP Holding [2005] EWHC 2092 (Ch); High Court of Justice (Chancery Division) 6 September 2012, Re NEF Telecom Co BV [2012] EWHC 2944 (Ch); High Court of Justice (Chancery Division) 3 December 2013, Re Magyar Telecom BV [2013] EWHC 3800 (Ch); High Court of Justice (Chancery Division) 5 September 2014, Re New World Resources NV [2014] EWHC 3143 (Ch); High Court of Justice (Chancery Division) 28 April 2015, Re Dtek Finance BV [2015] EWHC 1164 (Ch).
\textsuperscript{283} Voorstel van Wet Continuïteit Ondernemingen II [hereafter 'WCO II']; and, Memorie van Toelichting bij het conceptvoorstel Wet Continuïteit Ondernemingen II [hereafter 'MvT WCO II'], both available at http://www.internetconsultatie.nl/wco2.
\textsuperscript{284} MvT WCO II, par. 3.1, specifically taking account of the international (and thus also Dutch) exodus towards the UK scheme of arrangement and the USA Chapter 11 procedures, making them more conventional.
Essentially, the new rescue procedure consists of three stages. Firstly, there will have to be a restructuring plan (Akkoord); secondly, there will be a division of classes which will vote on the proposed Akkoord; and finally, when a requisite majority is reached, the Akkoord may be approved by the court, making it binding on all parties.

The required majority for the new Akkoord will be reached when every class has accepted the Akkoord with a simple majority of the parties present and voting, representing at least two third of the total claim amount represented in the class. Once this majority has been reached, the Akkoord will have been accepted and awaiting a court approval which would bind all participating parties. If the Akkoord has not reached the requisite majority, there is still a possibility for the court to approve the Akkoord through the use of a cramdown. The court has the ability to cramdown a dissenting class when it is of the opinion that they could not have reasonably come to vote against the Akkoord. There is no minimum voting threshold for this cramdown, however, it is required that the creditors will receive more than they would in case of a liquidation or the enforcement of their security rights.

It is clear that the Dutch legislator will have successfully created a Dutch alternative to the UK scheme of arrangement by way of this new rescue procedure. Whether the new legislation will also advance in practice remains to be seen, however, scholars are optimistic.

§2.4 Problems of forum shopping

As established in paragraph [1.3.3], forum shopping under the EIR is not considered objectionable in itself. It only becomes objectionable in cases of abuse. This abusive forum shopping can cause different problems which essentially relate to the choice of law.

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285 Article 368(1) WCO II; Mennens 2015, par. 4.2.5.4.
286 Article 368(1) WCO II.
287 Article 371 WCO II.
288 Article 373(1) WCO II; it is still unclear whether a company will have to be in financial difficulties or not. It has been argued that this is a necessary minimum requirement in order to prevent abuse of the procedure, see, Vriesendorp 2014, par. 2.3.
289 Article 372(3)(a) WCO II.
290 Article 372(3)(b) WCO II; Vriesendorp 2014, par. 2.3.3.3.
291 Vriesendorp 2014, par. 2.3.3.3.
292 Article 373(2) WCO II; Vriesendorp 2014, par. 81.
293 Article 373(2) WCO II.
294 Naturally, it will not be easy to catch up with the confidence and predictability established by (e.g.) the UK scheme of arrangement.
295 Soedira 2011, p. 106-107; Vriesendorp 2014, par. 2.5; Mennens 2015, par. 5.
296 Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 72, where forum shopping is described as being (“in no way unlawful”).
§2.4.1 Main problems

Firstly, a problem is formed in the area of applicable law. Due to the separation of criteria allocating the applicable insolvency law (the COMI) and company law (incorporation), a disparity could be formed.\(^{297}\) In particular cases it is, for example, possible for French company law to apply in an English insolvency. The conflict-of-law problems resulting from this contrast could produce an increase of insolvency costs. In addition, national courts will be obliged to delve themselves into foreign law, and apply it correctly. Indeed, placing the national courts in difficult and precarious positions while often concerning large cross-border insolven\(^{298}\)cies with high stakes.\(^{298}\) Moreover, this creates a situation in which shareholders and managers could ‘cherry-pick’ the applicable laws in order to achieve a combination that best fits their needs, but not necessarily those of creditors.\(^{299}\)

It has, however, been contended that such scenarios will generally not arise, arguing that companies will often fully migrate.\(^{300}\)

With regard to the national courts, one could argue that forum shopping generates mutual competition. \textit{Id est}, extensive freedom in choice of forum would create a structure in which national courts would stand in direct competition with one another.\(^{301}\) In such a structure there would be many incentives for national courts to accept petitions for main insolvency proceedings, for example, the increase in: Prestige for national courts; court filing fees; and business for professionals in the jurisdiction.\(^{302}\) Subsequently, courts would have a tendency to concede to these incentives, creating undesirable situations. So-called ‘case placers’\(^{303}\) would be able to abuse this inclination to their advantage. Even if courts attempt to resist and refuse cases, they could simply be displaced elsewhere.\(^{304}\) At any rate, these incentives would lead or possibly already have led to unjust decisions.\(^{305}\) The potential prejudice of national courts has been observed frequently within this dissertation.\(^{306}\)

Another problem of forum shopping is the unpredictability caused. When there is a possibility of a change of applicable law, it remains uncertain whether the debtor

\(^{297}\) See also paragraph [1.4.3].

\(^{298}\) Walters, 2010, p. 183; Rasmussen 1997, p. 33 ("It is fanciful to expect a court to apply the bankruptcy law of a foreign country with anything approaching an acceptable degree of accuracy."); Westbrook 1991, p. 481 ("[T]he difficulty is that a single judge in the midst of litigation is all too likely to err about questions of foreign insolvency law, including reciprocity. The Felixstowe opinion illustrates the difficulty of understanding other insolvency regimes, even those from relatively similar legal systems").


\(^{300}\) Ringe 2008, p. 603, with reference to the cases of Deutsche Nikkel, Schefenacker and Hans Brochier.

\(^{301}\) LoPucki, \textit{Universalism Unravels} 2005.

\(^{302}\) McCormack 2009, p. 280

\(^{303}\) Essentially, ‘case placers’ are favoured insiders such as corporate executives, professional advisers and post-petition lenders using the legal system (forum shopping) to leverage benefits for themselves, partially at the expense of the companies they supposedly serve, see, LoPucki, \textit{Universalism Unravels} 2005.

\(^{304}\) LoPucki, \textit{Universalism Unravels} 2005, p. 166.

\(^{305}\) LoPucki, \textit{Global and out of control?} 2005; Pottow 2007, p. 812; Von Wilcken 2011, p. 73.

\(^{306}\) See paragraphs [1.3.4 and 1.4.2].
will forum shop or not, thereby frustrating legal certainty. In addition, there are registration and publication problems in some jurisdictions, leading to even more uncertainty. This unpredictability has consequences for creditors in the market, mainly relating to their ability to cope with the possible costs associated to the change in forum. These parties can be divided into sophisticated and unsophisticated parties. When approaching the problem of unpredictability, it should first be noted that costs related to insolvency are considered a by-product of debt finance. When the applicable insolvency laws are uncertain and dependant on the debtor’s conduct, a moral hazard is created, as the debtor is able to opportunistically change its jurisdiction, possibly causing a shift in the ranking of security rights and claims. Accordingly, sophisticated parties (such as financial lenders) would need to factor the additional expected costs of insolvency due to this unpredictability into their interest rates. It has been argued that financial lenders will always have to factor in the risk of an ex post change of jurisdiction, as companies are free to relocate within the EU. Therefore, the possibility of forum shopping should not cause any additional risk. Moreover, it has been argued that the present-day financial lenders include anti-migration covenants in their lending agreements in order to secure themselves from these migrations. 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

308 Also referred to as ‘adjusting’ or ‘non-adjusting’ parties, see, Bebchuk 1996. ‘Non-adjusting’ or ‘unsophisticated’ implies that 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 do.
310 For empirical research on this effect, see, Davydenko 2008, section 3; see also, Guzman 2000; McCormack 2011, p. 55-57; ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 27.
313 ECJ EC 9 March 1999, C-212/97 (Centros); ECJ EU 5 November 2002, C-208/00 (Überseering); ECJ EU 30 September 2003, C-167/01 (Inspire Art); see also paragraph [1.3.3].
316 For example, under UK law there is in principle no duty owed by the directors to the creditors during the course of business, see, Loose 2011, par. 6.27-6.28; Privy Council (New Zealand) 21 May 1990, 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); Keay 2009, par. 6.182; Loose 2011, par. 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.
insolvency venues allowing them to avoid personal liability.\textsuperscript{317} Therefore, the aforementioned covenants will have much less effect in cases of forum shopping for insolvency proceedings, as the debtor’s concern towards the fulfilment of its financial arrangements could very well suffer against its opportunist behaviour due to economic or financial distress.\textsuperscript{318} Indeed, these covenants would be much more effective in cases of solvency.\textsuperscript{319}

Generally, forum shopping is considered to be for sophisticated parties.\textsuperscript{320} Those who have the necessary resources and expertise to explore the jurisdictional options in order to maximise welfare. Sophisticated creditors will consequently adjust the terms of their lending agreement to reflect the risks which they face. However, the interests of sophisticated parties (such as banks and financial institutions) differ from those of unsophisticated parties (such as ordinary creditors and employees).\textsuperscript{321} It is very common for sophisticated creditors to have certain legal priorities due to their securities on the debtor’s assets, putting them in a different creditor class than ordinary creditors. The extent and ranking of these priorities also differ between Member States.\textsuperscript{322} Logically, if forum shopping is possible, sophisticated creditors might press debtor companies to choose the forum most favourable to them, despite its negative effects to the interests of unsophisticated parties.\textsuperscript{323} In addition, sophisticated creditors have information advantages and more bargaining power as they are usually the debtor’s senior creditor.\textsuperscript{324} Accordingly, the change of forum becomes more influential to sophisticated creditors while it remains uninfluential to unsophisticated parties.\textsuperscript{325} Unsophisticated parties will, however, (by definition) not adjust to this risk as sophisticated creditors do. It should therefore come as no surprise that the unsophisticated parties generally\textsuperscript{326} suffer the consequences of forum shopping; which can be viewed as abusive in severe cases.\textsuperscript{327} This disparity is perhaps the most significant problem caused by forum shopping.\textsuperscript{328} One could argue that the rational opportunistic behaviour of these influential sophisticated creditors will

\textsuperscript{317} Eidenmüller 2006, p. 244 et seq.
\textsuperscript{318} Eidenmüller 2011, p. 146; Schillig 2014, p. 19.
\textsuperscript{319} As also noted in Enriques, Regulatory Competition 2006, p. 433, (“Such clauses may be sufficiently deterrent in many cases, at least as long as bankruptcy is not immediately impending”); see also Eidenmüller 2011, p. 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{320} Enriques, Regulatory Competition 2006, p. 433-434; McCormack 2009, p. 184 on the collaborations between sophisticated creditors and managers.
\textsuperscript{321} See more elaborately, Mucciarelli 2013, p. 183 and 184.
\textsuperscript{322} Westbrook 1998, p. 30; Pottow 2006, p. 1903; Omar 2011, p. 32-33.
\textsuperscript{324} McCormack 2009, p. 184.
\textsuperscript{325} Guzman 2000, p. 2180-2181.
\textsuperscript{326} However, it should be noted that sophisticated parties could suffer from forum shopping just as well, see paragraph [2.4.2].
\textsuperscript{327} LoPucki, Courting Failure 2005, p. 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”); Guzman 2000, more specifically under note 134; Enriques, Regulatory Competition 2006, p. 430-434; Pottow 2007, p. 816. Reporting the ‘furious’ responses of junior creditors to the Wind Hellas restructuring see, Herman 2010; Moya 2010; Watts 2010.
\textsuperscript{328} Guzman 2000, p. 2184; Virgós 2004, p. 13.
ultimately cause inefficiencies in EU cross-border insolvency, as they serve a personal interest rather than that of the collective. In practice, however, there are also situations in which the senior creditors will simply buy out small (unsophisticated) creditors in order to exempt themselves from potential disturbance of their insolvency/restructuring plans. In the UK, this has developed in the practical remedy of a so-called synthetic secondary. This entails the promise to local creditors of a Member State containing an ‘establishment’ to treat their claims in the main proceedings as if there were secondary proceedings, in order to avoid the actual opening of such proceedings.

§2.4.2 Magnitude of the problems
The extent of abusive forum shopping within the EU is difficult to quantify, as it is not established what should be qualified as ‘abusive’. Only specific indications have been made. It has, however, been reported in the Commission’s Impact Assessment 2012 that:

“The problem of forum-shopping is likely to decrease to some extent even in the absence of EU action because regulatory competition and a focus on enabling ‘second chances’ will inevitably drive some convergence in national legislation.” (emphasis added)

It is the classical understanding of regulatory competition that one can influence one’s national politics directly through ‘voice’ and indirectly through ‘exit’. ‘Voice’ refers to the possibility of exercising one’s rights to vote, criticise, protest etc. ‘Exit’ refers to the possibility of moving elsewhere; somewhere potentially better. It is here where law shopping occurs, and by extension, forum shopping. Indeed, one could imagine that Member States will seek to minimise large differences between their insolvency laws in order to avoid such actions. The Commission’s restraint, however, is with due cause. Is regulatory competition

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330 See e.g. the case of High Court of Justice (Chancery Division) 15 July 2005, Collins & Aikman [2005] EWHC 1754 (Ch) where the creditors were promised at meetings held across Europe that local priority rules would be respected as far as possible within the main insolvency proceedings, as long as no secondary proceedings were opened; see also Von Wilcken, 2011, p. 73.
331 Goode 2011, par. 15-67; e.g. applied in, High Court of Justice (Chancery Division) 15 July 2005, Collins & Aikman [2005] EWHC 1754 (Ch); High Court of Justice (Chancery Division) 30 March 2006, Re MG Rover Belux SA/NV (In Administration) [2006] EWHC 1296 (Ch). However, secondary proceedings do not necessarily have to be disadvantageous, see, Chancery Division (Companies Court) 20 May 2009, Re Nortel Networks SA [2009] EWHC 1482 (Ch), where English administrators were given leave to open secondary proceedings in France due to the anticipated advantages of doing so.
332 Impact Assessment 2012, p. 27, providing specific numbers from several Member States on cases of possible abusive forum shopping.
333 Impact Assessment 2012, p. 36.
335 E.g. Ireland which has reduced the time for discharge from bankruptcy from 12 years to three years in order to counteract forum shopping to the UK, see Personal Insolvency Act 2012, s 157 amending the Bankruptcy Act 1988, s 85.
336 See emphasis added to the quotation above.
so predictable that one could let the resolution of problems caused by forum shopping be settled by it? This question will be discussed further in paragraph [4.1.4]. In any case, the Commission continues in its Impact Assessment 2012 by stating that it is unlikely that the aforementioned convergence will happen any time soon. Therefore, incentives for forum shopping will remain an issue.338

A more fundamental argument undermining the gravity of abusive forum shopping is the involvement of senior creditors. As discussed earlier339 sophisticated parties have the possibility to influence the debtor company. It has been asserted that the debtor company’s senior creditors often either support or insinuate forum shopping.340 In any event, it could be argued that strong safeguards are in place for creditors.341 Knowing this, one could partially invalidate the problem of unpredictability and legal uncertainty to creditors caused by forum shopping. Moreover, it shows the potential positive side of forum shopping. If creditors and debtors are seeing its advantages, then who is being protected by the EIR’s resistance against forum shopping? It seems that the answer lies in the distinction made between legitimate and abusive forum shopping.342 If forum shopping is at the expense of a particular (group of) creditor(s), it cannot be considered to satisfy the common welfare. These could be sophisticated or unsophisticated creditors. Although unsophisticated creditors are particularly sensitive to abuse, it should be noted that abusive forum shopping could also very well occur amongst sophisticated parties, for example by way of a UK scheme of arrangement cramdown of a dissenting lender within a syndicate.343 Indeed, it is abusive forum shopping which frustrates the common welfare, making it understandably objectionable by the EIR.344 The issue of abuse, however, will only be empirically significant if there is a substantial difference in treatment (legal or factual) of creditors.345 That is to say, that the damage caused to certain creditors should be considered sufficiently significant in order to outweigh the benefits of the others. An attempt will be made to establish an appropriate balance in Chapter 5 of this dissertation.

§2.4.3 National measures
In order to prevent abusive forum shopping, certain Member States have set up national laws establishing a so-called ‘suspension period’.346 A suspension period may be described as a cool-off period in which a COMI relocation will not be accepted by the host state and remain with the state of origin.347 Effectively, these

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338 Impact Assessment 2012, p. 36.
339 See paragraph [2.4.1].
341 Ringe 2008, p. 605; cf. the statement of Mr Registrar Baister in High Court of Justice (Chancery Division) 29 October 2004, Re TXU Europe German Finance BV [2005] B.C.C. 90, par. 19.
342 See further paragraph [5.8.3].
343 It has however been argued that the mere ‘threat’ of a scheme may often result in unanimity/super-majority within syndicated loans, see Pilkington 2013, par. 2.3.3.2.
344 On the EIR’s objective to act in the interest of the common welfare, see paragraph [5.8.4.4].
346 Impact Assessment 2012, p. 35.
347 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/l22-2003.t1.html#.a10; Italy
Member States are attempting to establish a fixed period on the COMI requirement of a ‘regular basis’. However, it has been argued by the Commission that these types of measures are ineffective in resolving the issues of abusive forum shopping, reasoning that such a measure: Could be circumvented by skilled professionals and would only replace the uncertainty of determining the COMI with that of the COMI shift. Admittedly, these arguments seem strong at first sight. Yet, when compared with the current state of affairs, they become much less persuasive.

A suspension period is made in order to prevent unreal or fictional COMI relocations, thereby giving third parties the time to fully acknowledge the new COMI of the debtor. Although a skilled professional could possibly circumvent the full suspension period, it is not rational to argue that a measure is ineffective simply by stating that it will not be effective. This argument has no further particular base. More important is the second argument, which is similarly doubtful. The necessity of a particular period to determine the continuity of the debtor’s conduct for the establishment of a ‘regular basis’ is already a requirement of the COMI concept. For example, a national court could very well rule that a company does not have its COMI in that Member State because it has merely established itself in that location for several days. The argument that the relevant company has therefore not conducted the administration of his interests on a ‘regular basis’ would suffice. A suspension period only gives substance to the matter, providing for a more specific period for the determination of a ‘regular basis’. In the absence of specific legislation, the determination of such a period would simply be left to the discretion of the court. Therefore, the time at which the COMI has been shifted should always be established by the national court when determining the ‘regular basis’, regardless of whether there is a suspension period or not.

Dependent on the wording of the relevant national legislation, it might also be argued that the national law contradicts itself. More specifically, if one would first have to establish a COMI within its jurisdiction in order to initiate a particular period. Hence, the court would first have to establish that, indeed, the debtor’s COMI is within the jurisdiction of the host state, only to later refuse the acknowledgement of this COMI due to the suspension period. This act, however, would be contrary to the EIR. Once a COMI has been established in a particular Member State, that state does not have the discretion to refuse acknowledgement, as such discretion would undermine the very purpose of the EIR. The reasoning behind the suspension period and its elaboration by the court should therefore indicate its aim and consequently its legality with much precaution.

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; The United Kingdom with a (less vigorous) period of twelve months, see, UK Insolvency Service Technical Manual Ch.41 Pt 5, para.41.61; and France (very cautiously) with a six month period, see, Circulaire 2003, par. I 2.1.

348 Impact Assessment 2012, p. 35.
349 See paragraph [1.2.2].
350 See the acknowledgement of a possible conflict with the EIR in the French, Circulaire 2003, par. I 2.1; see in more detail Wessels, Realisation of the EU 2003, p.4.
this contradiction should be avoided by establishing the suspension period for the
time between the determination of a pro-forma COMI and the establishment of
the eligible COMI.\footnote{Which is the place where the debtor conducts the administration of his interest, but not yet on
a regular basis.}

Even if a particular suspension period would be legal and effective, one might
argue that such a period infringes the freedom of establishment.\footnote{Which is
the place where the debtor conducts the administration of his interest on a regular
basis.} The legislation would render an obstacle, making the exercise of the freedom of establishment less
attractive. Not to mention its direct discrimination of foreign individuals/companies from nationals. More specifically, it might be argued that such national laws infringe the EIR. The requirement of a ‘regular basis’ is one
which has been established through EU legislation on the basis of Article 81 TFEU, falling under the area of freedom, security and justice (Title V of the TFEU). Within
this area, the Union has been granted shared competence by virtue of Article 4(2)(j)
TFEU. Meaning that, once the Union has exercised its powers in this area, Member
States may not.\footnote{Article 2(2) TFEU.} This pre-emption will only occur to the extent that the EU has
exercised its competence, thereby providing room for Member States to take action
in cases of minimum harmonisation.\footnote{Craig & de Búrca 2011, p. 84.} However, one should not consider the EIR’s
COMI model as harmonisation which aims to empower Member States in creating
more specific or restrictive legislation. It enacts provisions on jurisdiction, recognition and applicable law in order to create uniformity within the Union by
way of a binding and directly applicable Regulation.\footnote{Recital (8) EIR.} Regardless of whether the
EIR should be considered as total harmonisation or minimum harmonisation, one
could validly contend that the EIR has regulated the requirement of a ‘regular
basis’ as one which is to be determined by the national courts on a case-by-case
basis.\footnote{See paragraph [1.2.2] where the requirement of ‘regular basis’ has been analysed as one which
should be assessed by the national court on the basis of the particular facts and circumstances of
the case, and that no fixed time limit that may be established; Virgós 2004, par. 69; see also High
\footnote{ECJ EC 30 November 1995, C-55/94 (Gebhard).} \footnote{Article 2(2) TFEU.}}
National laws which aim to further implement this section of the EIR
might therefore be considered as infringing EU law.\footnote{ECJ EC 10 October 1973, C-34/73 (Fratelli), par. 10 (“a Regulation means that its entry into
force and its application in favour of or against those subject to it are independent of any measure of
reception into national law [...] Strict compliance with this obligation is an indispensable
condition of simultaneous and uniform application of Community Regulations throughout the
Community.”).} Nonetheless, such an infringement may be justified for the purpose of preventing abusive forum
shopping. This will be discussed further in paragraphs [5.8.2 and 5.8.3].

\section*{§2.4.4 Normative model & Forum shopping}

The EIR currently adheres to the normative model of mitigated universality.\footnote{See paragraph [1.2.4].} Within the preparatory acts of the legislative procedure of the EIR, the Economic
and Social Committee and the Committee on Legal Affairs and the Internal Market have expressed\(^\text{360}\) that the EIR should take a more unitary approach.\(^\text{361}\) The EU institutions advised to enshrine the principle of universality, as it naturally coheres with the EU’s internal market. One of the main reasons for the adoption of legislation on a European level was to address the problem of recognition of insolvency proceedings. The refusal to recognise by Member States led to multiple proceedings, high insolvency costs and thus very inefficient insolvency proceedings.\(^\text{362}\) The adoption of an automatic recognition mechanism therefore seemed to solve this problem.\(^\text{363}\) Still, the EU legislature has discarded these recommendations by mitigating the EIR with the possibility of opening secondary procedures. It seemed that, at the time, this compromise was inevitable after many years of discussion.\(^\text{364}\) The EIR itself justifies its modest approach to be because of the “widely differing substantive laws” within the EU, resulting in a need to “protect the diversity of interests”.\(^\text{365}\)

As Professor LoPucki very well describes: “universalism is an all-or-nothing system”,\(^\text{366}\) and it affects forum shopping in a similarly way. Universalism empowers a single court with the competence to rule over all of the debtor’s assets and liabilities, giving the forum great effects. In that regard, the EIR’s compromise with territorialism softens the effects by providing for a safeguard to local creditors. There is much discussion in literature on the effects of universalism and territorialism on forum shopping. Some claim that universalism will lead to forum shopping and subsequently great harm.\(^\text{367}\) Others argue that territorialism leads to just as much forum shopping, if not more.\(^\text{368}\) It has also been argued that the ‘real forum shopping’ lies in the application of disparate approaches (universalism and territorialism).\(^\text{369}\) However, for the purpose of this dissertation, one should differentiate between the right to choose or influence the applicable forum and the consequences of that choice. The effects allocated to insolvency proceedings in an international context will result from the normative model chosen. It is conceivable

\(^{360}\) Opinion of the Economic and Social Committee no. C75/01 of 2000, par. 3.4; Report Committee on Legal Affairs, p. 10, section III, where it recommends a more unitary approach.

\(^{361}\) See also Debate of the EP, where Kurt Lechner explains his proposition of a more universal approach.

\(^{362}\) Report Committee on Legal Affairs, p. 12; see also Westbrook 1991, p. 465 (“a universalist rule would so increase values available for all local claimants in all general defaults as to offset by far the losses that particular local claimants might suffer in some cases. That assertion is persuasive because the preservation of going concern values and the maximising of liquidation values by integrated sales will likely increase returns to creditors greatly”).

\(^{363}\) See also paragraph [1.2.4].

\(^{364}\) A previously proposed full universal approach from the 1960s pushed the envelope, resulting in its foundering in 1984, see, Report Committee on Legal Affairs, p. 10 and 12, where the Committee explains the reasons behind the compromise.

\(^{365}\) See, Opinion of the Economic and Social Committee no. C75/01 of 2000, par. 3.2.2 describing the proposed EIR as (“extremely modest and unambitious”).

\(^{366}\) Recital (11) and (12) EIR; Virgós-Schmit Report, par. 12-13.


\(^{368}\) LoPucki, *Global and out of control?* 2005, p. 79-80.

\(^{369}\) Pottow 2007, p. 797-802, where it is contended that a change of forum under territorialism, by moving the company’s assets, is just as easy, if not easier than a shift of the COMI under universalism.

\(^{370}\) Pottow 2007, p. 802-807.
to have a choice of forum under a universal approach, as well as under a territorial approach. Thus, the distinction to be made is between the choice itself and the effects given to that choice, through the rights and powers allocated to the forum. Consequently, any arguments made with regard to choice of forum should be separated from arguments for and against a universal or territorial international insolvency regime. The aim of this dissertation is not to discuss the normative model, but the choice of forum. Therefore, the general remarks made in this dissertation should suffice.

§2.5 Reform propositions

Since the enactment of the EIR various propositions have been made to amend it. Some are suggestions, with a view on the EIR’s mandatory proposition of reforms. Others, more as complaints on the functioning of the EIR. From all of these propositions, a selection can be made which strikes at the core of the EIR’s flaws. In the light of the subject of forum shopping, only particular propositions will be discussed. For the most part, the issues and its propositions will be supported on the basis of the External Evaluation Report of 2012 commissioned by the European Commission Directorate-General for Justice and Consumers (‘External Evaluation Report’). The External Evaluation Report contains a very extensive legal and empirical research of: Case law of the CJEU and the national courts; statistical data; and experiences of various stakeholders involved in the EIR’s daily application (e.g. insolvency practitioners, lawyers, judges and other relevant practitioners, bankers, accountants and consumer protection associations). The study is mainly based on interviews, case law and legal literature instead of statistical data. However, it has been stressed that data from relevant stakeholders is the most efficient way of obtaining reliable information. The Commission’s Impact Assessment, in which it analyses the problems of the EIR and proposes solutions, is also heavily based on the results of the External Evaluation Report.

§2.5.1 Group insolvencies

Within the EIR, the possibility to arrange a single insolvency procedure for a group of companies is unfortunately not regulated. As also decided by the ECJ in Eurofood, under the EIR every legal entity has to be dealt with separately. Therefore, in order to arrange a single procedure for all of the companies in a group, the COMI of all the relevant companies should be in one jurisdiction. This conclusion has already been reached by the English court in various cases. For

371 Article 46 EIR.
374 Impact Assessment 2012.
375 Virgós-Schmit Report, par. 76; Moss 2007.
376 ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 30-37.
377 Moss 2009, par. 8.88.
378 High Court of Justice (Chancery Division) 16 May 2003, 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
efficiency reasons, it is almost always value maximizing to arrange the insolvency of a group of companies within a single procedure. However, due to the workings of the COMI model, a group of companies is difficult to align. For instance, in every case, the COMI presumption of all the companies in a group, other than those in the jurisdiction of the main proceedings, will have to be rebutted. Essentially, forcing companies to create legal scenarios which often do not reflect the economic realities. It is here where most passive forum shopping occurs. Additionally, insolvency practitioners could encounter hindrance from parties pleading for a different COMI, or seeking to initiate secondary proceedings. Unsurprisingly, this deficiency has been indicated throughout the EU as leading to unnecessarily difficult and inefficient proceedings.

In order to address this issue, it has been proposed to amend the EIR in such a way as to provide for the ability to initiate a single insolvency proceeding for a multinational group of companies. For the most part, this option could be available once the COMI concept has been adapted to deal with corporate group structures. If proper reforms would be made in this regard, it would most likely result in a significant decrease of passive forum shopping, as it would become superfluous in these cases.

§2.5.2 Broadening the scope

The scope of the EIR encompasses collective insolvency proceedings which have more specifically been listed in Annex (A) of the EIR. However, many hybrid and pre-insolvency proceedings available within the EU are not listed in Annex (A),

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in England; see also High Court of Justice (Chancery Division) 30 March 2006, Re MG Rover Belux SA/NV (In Administration) [2006] EWHC 1296 (Ch); High Court of Justice (Chancery Division) 15 July 2005, Collins & Aikman [2005] EWHC 1754 (Ch).

379 Moss 2007, p. 1008-1009 on the possibility of either a group insolvency proceeding or various main proceedings spread across different systems (“It is difficult to see how any sensible rescue, reconstruction, or beneficial sale can take place in such a situation”); Bufford 2014, p. 11.

380 See also paragraph [1.3.4].

381 Omar 2007; see e.g. High Court of Justice (Chancery Division) 16 May 2003, Re Daisytek-ISA Ltd [2003] B.C.C. 562, the judgement of which was not received well in France and Germany, where the two jurisdictions declared the English administration proceeding void and contrary to the ‘spirit’ of the EIR.

382 Impact Assessment 2012, p. 34, where this issue has been pointed out. See further paragraph [2.4.1].

383 See Annex I of the External Evaluation Report, 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; Hirte 2008, p. 213; Mevorach 2009, p. 63.

384 See Annex I of the External Evaluation Report, where (in different sections) 42% of the Member States’ respondents proposed that the EIR be amended to clarify its application to multinational groups of companies. For proposals, see, INSOL Europe Proposal, p. 91; Moss 2006, p. 4-5.

385 Moss 2006, p. 4-5.

386 Reforms to address group insolvencies have been made in the EIR Recast, see paragraph [3.1.4].

387 Article 1(1) and 2(a) EIR.

388 That is to say, national procedures which provide for a possibility to restructure a company before the company is formally insolvent, or at least, without the requirement of insolvency (‘pre-insolvency proceedings’); and proceedings which leave the existing management in place (‘hybrid proceedings’).
and do not fall within the scope of the Regulation.\textsuperscript{389} One particular exclusion from the EIR is critical, namely the UK scheme of arrangement, the omission of which from Annex (A) has been good to forum shoppers.\textsuperscript{390} This difference in recognition between various proceedings within the EU could lead to problems. More specifically, the Commission mentions three main problems in its Impact Assessment 2012,\textsuperscript{391} namely that: Foreign creditors can continue with individual enforcement actions; foreign creditors will be less willing to fully engage in restructuring negotiations; and that opportunities for the continuation of businesses through pre-insolvency and hybrid proceedings are reduced. It has subsequently been proposed to extend the scope of the EIR by including hybrid and pre-insolvency proceedings, \textit{inter alia} the UK scheme of arrangement.\textsuperscript{392}

\textbf{§2.5.3 Clarification of the COMI}

As also mentioned in paragraph [1.4.1], the EIR’s COMI concept has been heavily criticised. Mostly due to its vague explanation, making it susceptible to multiple interpretations.\textsuperscript{393} Admittedly, the COMI concept has developed through the course of time, creating more understanding of the concept and its appropriate application.\textsuperscript{394} Nevertheless, the concept retains a stigma due to its erratic past, rendering its explanation a long awaited upgrade to the EIR.\textsuperscript{395} Propositions have been made to clarify the COMI concept by way of a more specific definition and clarification of its intended use or interpretation.\textsuperscript{396}

It is interesting to mention that the description of the COMI concept in the initial proposal of the EIR was more detailed than is currently the case.\textsuperscript{397} Moreover, the Committee on Legal Affairs and the Internal Market have proposed to create more legal certainty with regard to the COMI concept during the preparatory acts of the

\textsuperscript{389} See Annex I of the External Evaluation Report, Q3, where 58\% of the Member States’ respondents have indicated that they have national hybrid or pre-insolvency proceedings, not listed under Annex (A) of the EIR. Subsequently under Q4, 71\% of these respondents have acknowledged that the exclusion of those proceedings raise problems.

\textsuperscript{390} See paragraph [2.1.2].

\textsuperscript{391} Impact Assessment 2012, p. 12.

\textsuperscript{392} See Annex I of the External Evaluation Report, where (in different sections) 23\% of the Member States’ respondents proposed that the EIR be amended to extend its scope, including hybrid and pre-insolvency procedures (the UK scheme of arrangement is specifically mentioned several times); Impact Assessment 2012, p. 31, where the Commission generally proposes to extend the scope of the EIR to hybrid and pre-insolvency procedures as a solution to the limited scope of the EIR. The EIR Recast has now made reforms in this regard, see paragraph [3.1.5].

\textsuperscript{393} Moss 2006, p. 1-2.

\textsuperscript{394} See paragraphs [1.2.2 and 1.2.3].

\textsuperscript{395} See, 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.

\textsuperscript{396} See, Annex I of the External Evaluation Report, where (in different sections) 38\% of the Member States’ respondents proposed (generally) that the EIR be amended to elaborate on the definition of a COMI and its use as a concept; Moss 2006, p. 3.

\textsuperscript{397} Recital (13) of Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999 (\textit{OJ} 1999, C 221/6).
legislative procedure of the EIR. Efforts which unfortunately did not reap the benefit.

§2.5.4 Forum shopping

The problems arising from abusive forum shopping have already been discussed extensively in paragraph [2.4.1]. Its presence and magnitude have furthermore been confirmed in the External Evaluation Report. One could conclude with much certainty that there is a general acknowledgement within the EU on the presence of abusive (or at least problematic) forum shopping under the EIR. In order to deal with these issues, a variety of propositions have been made. To name a few, it has been proposed to: Initiate an EU suspension period; create a more specific COMI concept; or create substantive rules on priority within the EU. Most of the aforementioned proposals on the EIR have been processed into its Recast, which will be dealt with in the following Chapter.

399 See, Debate of the EP, where Commissioner Vitorino, on behalf of the Commission, explicitly rejects the proposition to clarify the COMI concept. However, an attempt has been made in the EIR Recast to clarify the COMI concept, see paragraph [2.5.3].
400 See, Annex I of the External Evaluation Report, Q9, where 50% of the Member States’ respondents stated that there have been abusive COMI relocations in order to obtain a more favourable insolvency regime and even more have raised the issue of forum shopping in general.
401 See, Annex I of the External Evaluation Report, where (in different sections) 27% of the Member States’ respondents proposed to take measures in order to address the problems of forum shopping.
402 See, Annex I of the External Evaluation Report, where three of the Member States’ respondents proposed an EU suspension period (Germany at Q2) (Slovenia at Q2) (Estonia at Q7).
403 See, Annex I of the External Evaluation Report, where two of the Member States’ respondents proposed a specification of the COMI concept (Malta at Q7) (Italy at Q7); see also Moss 2006, p. 3.
Chapter 3 - Recast of the European Insolvency Regulation

§3.1 Notable reforms

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 that the reforms will have on forum shopping.

§3.1.1 The COMI & Forum shopping

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 has been codified following the Interedil judgement of the CJEU.\(^{405}\) 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 COMI relocations.\(^{406}\) 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.\(^{407}\) 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.\(^{408}\) The EIR Recast also specifically mentions the national courts’ duty to apply the COMI test \textit{ex officio}\(^{409}\) and deny jurisdiction if it finds that the COMI is not within its territory.\(^{410}\) Perhaps superfluously, as this is already good practice.\(^{411}\) More importantly, the EIR Recast has adjusted its view on forum shopping by changing the objective to avoid incentives of forum shopping in general to those which detriment the general body of creditors.\(^{412}\) 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.\(^{413}\) Hence, it can be said that there is a more accurate representation under the EIR Recast of the legitimate concerns regarding fraudulent or abusive forum shopping, while acknowledging...

\(^{406}\) Article 3(1) second subparagraph and Recital (31) EIR Recast; also dealt with more elaborately in paragraph [3.1.2].
\(^{407}\) Recital (28) EIR Recast. As is also currently regulated under the English jurisdiction, see, Insolvency Service Technical Manual, Ch 43.0, part 2, par. 43.0.8 \textit{et seq.}
\(^{408}\) Recital (32) EIR Recast.
\(^{409}\) Recital (27) and Article 4 EIR Recast.
\(^{410}\) Recital (33) EIR Recast.
\(^{411}\) See paragraphs [1.2.2 and 1.2.3]; Moss 2013, p. 56.
\(^{412}\) Recital (5) EIR Recast.
\(^{413}\) Recital (29) EIR Recast.
the reality of forum shopping in general. However, what is to be considered abusive or fraudulent still remains unknown.

§3.1.2 Suspension period
As has been discussed earlier, there seem to be no issues on a European level with regard to companies relocating within the Union. 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 of assets or business, 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 objective of the EIR Recast 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. 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. Hence, the measure

414 See paragraph [1.3.3].
415 See, Commission Report 2012, p.10, which accompanied the initial EIR reform proposal.
416 Von Wilcken 2011, p. 71; see also the requirement of a ‘regular basis’ explained in paragraph [1.2.2].
417 See paragraph [2.4.1].
418 Article 3(1) second subparagraph and Recital (31) EIR Recast; which is against the advice stipulated in Impact Assessment 2012, p. 35.
419 Recital (29) and (31) EIR Recast, stating the (“objective of preventing fraudulent or abusive forum shopping”).
420 Report of the Committee on Legal Affairs, p. 21, amendment 27.
421 See paragraph [2.4.3].
would regulate all acts of forum shopping by way of COMI shifting, instead of dealing with abusive forum shopping head-on.\textsuperscript{422} 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.\textsuperscript{423} Such a suspension period would thus make forum shopping in itself much less appealing 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.\textsuperscript{424}

\textbf{§3.1.3 Judicial review}

Although very few of the Member States’ respondents in the External Evaluation Report have proposed such an amendment,\textsuperscript{425} the EIR Recast now provides for the possibility to challenge the decision opening main insolvency proceedings.\textsuperscript{426} 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.\textsuperscript{427} 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.

This amendment was proposed by the Commission in its 2012 Impact Assessment,\textsuperscript{428} essentially arguing that judicial review would decrease COMI shifting, consequently improving the protection of the creditor’s right to property. Indeed, by installing this check companies will be impaired to abusively shift the COMI, either by actively moving assets or passively arguing for a different jurisdiction.\textsuperscript{429} However, the advantage of this amendment should be moderated. As was also suggested by the ECJ in Eurofood,\textsuperscript{430} 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 judicial remedy for foreign creditors.

\textsuperscript{422} See also Moss 2013, p. 56.
\textsuperscript{423} 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. See further paragraph [2.1.2].
\textsuperscript{424} For a proposition, see the hypothesis in Chapter 5.
\textsuperscript{425} Annex I of the External Evaluation Report, Q1 and Q2 (Czech Republic), and Q7 (Poland).
\textsuperscript{426} Article 5 EIR Recast.
\textsuperscript{427} Article 26 EIR.
\textsuperscript{428} Impact Assessment 2012, p. 38.
\textsuperscript{429} Szydlo 2010, p. 268.
\textsuperscript{430} ECJ EU 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par. 43.
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 common welfare. Perhaps by scrutinizing the relocation ex ante, one could immediately determine its legitimacy, making the need for an ex post review of its correctness otiose.\textsuperscript{431}

\textbf{§3.1.4 Group insolvencies}

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.\textsuperscript{432} 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.\textsuperscript{433} Nonetheless, the EIR Recast has managed to accommodate for 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.\textsuperscript{434} The EIR Recast has defined such a group of companies as “a parent undertaking and all its subsidiary undertakings”.\textsuperscript{435} Procedural rules are subsequently laid down to ease the coordination between insolvency practitioners and national courts, with each other and between themselves.\textsuperscript{436} 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.\textsuperscript{437} In addition, an independent insolvency practitioner should be appointed as coordinator, assisting and monitoring the group coordination proceedings.\textsuperscript{438} 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.\textsuperscript{439} 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.\textsuperscript{440} Ostensibly, these reforms would lead to a significant reduction of

\textsuperscript{431} See further, Chapter 5.
\textsuperscript{432} Recital (54) EIR Recast.
\textsuperscript{433} Moss 2013, p. 57.
\textsuperscript{434} Recital (6) EIR Recast.
\textsuperscript{435} Article 2(13) EIR Recast.
\textsuperscript{436} See Chapter V EIR Recast.
\textsuperscript{437} Article 66 EIR Recast.
\textsuperscript{438} Article 61(3), 71 and 72 EIR Recast.
\textsuperscript{439} Mevorach 2009, par. 6.2.1.2.
\textsuperscript{440} See e.g. Article 64(1) and 65(1) EIR Recast, stating the freedom of parties to exclude themselves from the group proceedings.
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 and using their synergy to create more efficiency in cross-border insolvency proceedings, the EIR Recast seems to embraced forum shopping for the benefit of the collective.

This is a rationale which is to be encouraged and will form the basis of the hypothesis in Chapter 5. 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 none the less a reality within forum shopping 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. It is therefore proposed in Chapter 5 to incorporate the possibility to alter the applicable law as well, provided that there will be additional safeguards.

§3.1.5 Scope of the Regulation & Scheme of arrangement

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. 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 problems. Consequently, parties will be more willing to engage in these procedures; which are usually aimed at corporate rescue.

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

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441 Article 66 EIR Recast.
442 Recital (52) EIR Recast.
443 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”).
444 See paragraph [5.9].
445 This is currently the case when COMI shifting by way of active or passive forum shopping, see paragraphs [1.2.2, 1.4.1 and 2.4.1].
446 See paragraph [5.9].
447 Article 1(1) EIR Recast.
448 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.
uncertainties in particular situations,\textsuperscript{450} which remained unresolved.\textsuperscript{451} 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.\textsuperscript{452} 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).\textsuperscript{453} 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.\textsuperscript{454} This brings us to the interesting debate of whether or not the scheme of arrangement falls within the scope of the EIR Recast. The determination of this inclusion is important and will have considerable consequences, as already discussed in paragraph [2.1.2]. If the scheme of arrangement procedure does not fall within the scope of the EIR, does it fall under that of the Recognition Regulation?\textsuperscript{455} Or will it remain in limbo?

In theory, the transition between the EIR and the Recognition Regulation should be seamless.\textsuperscript{456} However, it has been described as one of the most controversial issues in cross-border insolvencies.\textsuperscript{457} Currently, the scheme of arrangement is not listed in Annex (A) of the EIR Recast. Therefore, strictly speaking, one should conclude from 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.\textsuperscript{458}

\textsuperscript{450} See, CJEU EU 8 November 2012, C-461/11 (Radziejewski) 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 CJEU EU 22 November 2012, C-116/11 (Bank Handlowy and Adamiak) 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 Commission Report 2012, p. 6 and 7.

\textsuperscript{451} External Evaluation Report, p. 36 et seq.; see also Eidenmüller 2013, p. 9.

\textsuperscript{452} 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”).


\textsuperscript{454} Eidenmüller 2013, p. 11.


\textsuperscript{456} Virgós 2004, par. 77-78; see also ECJ EC 22 February 1979, C-133/78 (Gourdain v Nadler) 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).

\textsuperscript{457} Commission Report 2012, p.10.

\textsuperscript{458} 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
seems likely that this will become the scheme of arrangement’s legal status (remain in limbo), as this fear was also one of the main reasons to include such procedures in the EIR Recast.

other grounds (such as the Rome I Regulation or private international law) is a different matter and is possible irrespectively. See in that regard, Verhagen 2012 describing the different ways in which a scheme might be recognised within the Netherlands.
Chapter 4 - Approach to cross-border insolvency

§4.1 Incorporation model

§4.1.1 Choice of law proposition

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 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,\(^{459}\) 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 [3.1.4] 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, this dissertation will aim to build on conventional doctrine by attempting to further develop the incorporation model.

§4.1.2 Clarification

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,\(^{460}\) 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.

§4.1.3 Effects

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


\(^{460}\) See critique on the COMI concept in paragraph [1.4.1].
company law. 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 within the EU. 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. 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 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. 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, there are still many safeguards in place with regard to a company’s reincorporation in order to protect creditors against abuse during solvency.

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

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461 Which is also based on the place of incorporation, see paragraph [1.4.3].
462 Ringe 2008, p. 614-15; for an explanation of this problem, see paragraph [2.4.1].
463 Ringe 2008, p. 608 et seq.
465 See paragraph [2.4.1].
468 See paragraph [2.4.1].
469 Rather than the uncertainty of a COMI, which would have to be manipulated.
470 Also followed in, ECJ EC 9 March 1999, C-212/97 (Centros).
471 Ringe 2008, p. 617 who also welcomes this idea.
474 Ringe 2008, p. 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 also paragraph [5.2].
forum shopping.\footnote{McCormack, \textit{Reconstructing European} 2010, p. 137; on the correlation between manipulability and predictability, see paragraph [1.4.1].} 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 common welfare in cases of insolvency.\footnote{See further, paragraph [5.2].} 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{Ringe 2008, p. 618; McCormack, \textit{Reconstructing European} 2010, p. 134-135.} However, despite the fact that group insolvencies are not strictly within the objective of the EIR,\footnote{See further, paragraph [5.9].} it seems that this argument does not uphold anymore under the EIR Recast. As discussed in paragraph [3.1.4], 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{See also paragraph [3.1.4].} A hypothesis for such a mechanism has been proposed in Chapter 5 of this dissertation.\footnote{Eidenmüller 2005, p. 426 et seq.; Ringe 2008, p. 603.}

\textbf{\section*{4.1.4 Regulatory competition}}

The freedom to choose the applicable insolvency law, as provided by the incorporation model, could lead to uncertainties of regulatory competition.\footnote{Kolvenbach 1990; Schmitthoff 1973, p. 3-9.} Regulatory competition between Member States has, traditionally, been considered an inappropriate paradigm for the European Community (now Union).\footnote{Andenas 2009, p. 34-35.} The majority of the Member States of the EU have chosen to apply the ‘real seat’ doctrine in this regard.\footnote{Drury, \textit{Delaware Syndrome} 2005, p. 710-711.} Member States have chosen this path to ensure application of the law most closely connected with the operations of the company.\footnote{Drury 1974.} Regulatory competition has also been an issue in the USA for many years, where concerns were raised of a possible ‘race to the bottom’.\footnote{Cary 1974.} 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’.\footnote{Cary 1974, p. 663-666.} These concerns were related to regulatory competition in company law and have been reiterated to some extent in the context of the EU.\footnote{See e.g. Barnard 2000; Holst 2002; Drury, \textit{A European Look} 2005.}
where it was desired to avoid such a ‘race to the bottom’ in the European company law harmonisation project.\textsuperscript{488}

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.\textsuperscript{489} Consequently, it should be treated differently.\textsuperscript{490} Through pluralistic minimum harmonisation, the EU has managed to maintain regulatory competition and national diversity.\textsuperscript{491} 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.\textsuperscript{492} Thus, the European fear of potential ‘Delaware effects’ would be unfounded.\textsuperscript{493} It has subsequently been argued that Member States are losing more than they are gaining by avoiding regulatory competition.\textsuperscript{494} Indeed, one could also contend that regulatory competition will have beneficial developments, or result in a ‘race to the top’.\textsuperscript{495}

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.\textsuperscript{496} In any case, there is still no direct\textsuperscript{497} regulatory competition within the EU in the area of insolvency law, as there is no direct choice of insolvency law.\textsuperscript{498} 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.\textsuperscript{499} Hence, such possibilities should be taken into consideration when attempting to improve upon the current model.\textsuperscript{500}

\textsuperscript{488} Edwards 1999, p. 3.
\textsuperscript{489} Deakin 2006, p. 440.
\textsuperscript{490} Armour, 2005, p. 393-396, on the absence of various necessary preconditions, unlike in the USA; Wouters 2000, p. 283-284.
\textsuperscript{492} Deakin 2006.
\textsuperscript{493} Drury, Delaware Syndrome 2005, p. 728-738.
\textsuperscript{494} See e.g. Holst 2002, p. 340; Rasmussen 2001, p. 291 (“Competition can be a good thing.”); Rasmussen, Timing Matters 2000 applauding jurisdictional competition in certain contexts, such as "prepackaged" bankruptcies.
\textsuperscript{496} See e.g. Enriques, Regulatory Competition 2006, p. 440 on (“whether ‘relabelling’ corporate law rules as insolvency law rules can be a viable strategy for Member States”).
\textsuperscript{497} Although, it has been argued that regulatory competition is present indirectly due to possibilities of forum shopping, see, Eidenmüller 2005, p. 427.
\textsuperscript{498} Enriques, Regulatory Competition 2006, p. 448.
\textsuperscript{499} See e.g. Enriques, Regulatory Competition 2006, p. 423-425; and Armour, European Company Law 2011, p. 143 on the regulatory competition of minimum capital requirements.
\textsuperscript{500} See paragraph [5.12] on the anticipated effects of regulatory competition after application of the proposition under the hypothesis.
Chapter 5 - Hypothesis

§5.1 Introduction

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.\textsuperscript{501} It is believed that social welfare will increase when regulations are put in place, facilitating these coordinations.\textsuperscript{502} The scope of this approach has been extended to that of the EU under the EIR. Within the era of internationalization and the EU’s fundamental freedoms, companies establish themselves throughout the EU, bringing with it new problems of coordination, now at the European level. It has been attempted by the EIR to solve these problems, aiming for of coordination, efficiency and effectiveness.\textsuperscript{503} Yet, after careful review, it seems that the EIR operates on a system which is far from ideal for the provision of more efficiency in cross-border insolvencies.\textsuperscript{504} The integrated COMI model was meant to prevent forum shopping by allocating jurisdiction towards the place of the debtor’s ‘true’ location.\textsuperscript{505} However, from the foregoing discussions it has become clear that the COMI model has not reached this goal.\textsuperscript{506} Adversely, it allows for forum shopping, while simultaneously producing negative effects due to its unpredictability. Yet, the EIR Recast continues to apply the COMI model, although adjusting its objective towards abusive forum shopping. Indeed, an aim to prevent forum shopping 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.\textsuperscript{507} As a form of arbitrage, forum shopping is used to increase, at the very least, personal welfare. However, when put to good use, forum shopping could be able to benefit the common welfare.\textsuperscript{508} Rather than avoiding forum shopping, its evaluation and possible coordination might therefore prove fruitful.\textsuperscript{509}

This hypothesis attempts to show that forum shopping is able to create more efficiencies in the internal market once it has been accepted and regulated.\textsuperscript{510} Accepted by way of the incorporation model. Regulated by way of an overarching European procedure, distinguishing legitimate forum shopping from abusive ones.

\textsuperscript{501} Schwartz 2005, p. 1200-1201. The costs associated with the coordination of collection efforts can be quite high, primarily in cross-border insolvencies.
\textsuperscript{502} Schwartz 2005, p. 1201.
\textsuperscript{503} Recital (2) and (3) EIR.
\textsuperscript{504} See paragraphs [1.4.1 and 4.1.3].
\textsuperscript{505} That is to say, the place where the company is truly located, as also perceived by third parties, rather than its place of incorporation. See also paragraph [1.4.1].
\textsuperscript{506} See paragraph [1.4.1].
\textsuperscript{507} 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 2013, p. 197; and paragraph [1.3.1].
\textsuperscript{508} It could produce efficiencies, see paragraph [4.1.3]; or help accomplish restructurings and corporate rescues, see paragraphs [2.1 – 2.3].
\textsuperscript{509} Recital (4) EIR.
\textsuperscript{510} See also Mucciarelli 2013, p. 192, on a rather similar line of argumentation for the proposition of a choice of law model.
Let it be clear from the outset that it is not the intention of this hypothesis to present a ready-made proposal amendable to the EIR Recast. 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 hypothesis 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.511

The focus of this Chapter 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.512 It follows that the 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’513 autonomously, while we await an informative study from the Commission.514 In this respect, the hypothesis proposed under the present Chapter is rather logically in line with the developments in EU insolvency law.515 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.516 Furthermore, it provides for a chance to significantly improve the current structure of cross-border insolvency law and the culture of forum shopping.

The hypothesis begins by describing the legislative framework necessary to accomplish its endeavour. This 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 scrutinization 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, the hypothesis will conclude with a critical assessment and a review of its pragmatism.

§5.2 Solvency & Insolvency

As also expressed above, the present hypothesis 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, the hypothesis will propose certain additional measures to support the incorporation model where it

511 Eidenmüller 2011, p. 155.
512 See paragraph [3.1.1]
513 Recital (29), (31) and (46) EIR Recast.
514 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.
515 That is to say, European laws related to insolvency.
516 The proposition to recognize a European doctrine of ‘abuse of law’ has been proposed in Eidenmüller 2013, p. 14; notwithstanding its importance in other areas of law as well, see, De La Feria 2011, p. XV-XVIII.
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. 517 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. 518 Subsequently, the debtor will tend to seek the consent of the creditor, resulting in situations which are likely to prove legitimate. Moreover, Professor Eidenmüller has stressed the additional protection provided by the implemented provisions of the Tenth Merger Directive. 519 In certain Member States these provisions translate to a right of veto, in others a right to be paid off or given security. 520 In any case, protection is in place. Ordinary creditors (often unsophisticated) and employees, however, do not have the bargaining power required to ensure such protection. 521 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. 522 Moreover, unsophisticated creditors can ‘free-ride’ on the actions taken by other creditors against reincorporation. 523 In addition, the reincorporation of the debtor company within the EU is always possible de jure. 524 It is therefore not reasonable to expect additional protection in cases of ‘law shopping’.

The situation changes once a debtor company has reached the stage of insolvency, or possibly even near-insolvency. The aforementioned covenants will have much less effect for sophisticated creditors, if at all. 525 Additional protection provided by

517 On this distinction, see paragraph [1.3.4]; see also Schillig 2014, p. 22 who makes a similar distinction.
518 Eidenmüller 2011, p. 146; Armour, Abuse of European Insolvency Law 2011, p. 164; see also paragraph [2.4.1].
519 Eidenmüller 2013, p. 16 where Eidenmüller describes that under the existing European legal framework, a change in a company’s registered office (which is not an SE) is only possible by way of the Tenth Merger Directive, which provides for important safeguards; Articles 6(2) (c) and 7(1) of Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005, L 310/1); Article 13(2) of Directive (EEC) 78/855 of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (OJ L295/36). Currently, no other general European legal instrument is in place, dealing with a shift of registered office, see, paragraph [1.3.3]. However, reincorporation is also possible in other (non-standardized) ways, see, paragraph [5.3].
520 Edwards 1999, p. 109-110; see also Armour, Abuse of European Insolvency Law 2011 p. 161. However, it has also been argued that these safeguards are usually trivial, see 2006, L. Enriques, EC Company Law 2006, p. 36.
521 Eidenmüller 2011, p. 146; Armour, Abuse of European Insolvency Law 2011, p. 165.
522 Schillig 2014, p. 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”)).
523 Schwartz 1981, p. 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, Regulatory Competition 2006, p. 430; Armour, Abuse of European Insolvency Law 2011, p. 165.
524 See paragraph [1.3.3].
525 See paragraph [2.4.1].
the EU Directives\textsuperscript{526} will become unimportant as well. Professor Eidenmüller himself has 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{527} Hence, such provisions would fail to contain any meaningful prohibition, requirement, or enabling rule.\textsuperscript{528} The situation is worse for unsophisticated creditors and other stakeholders, who will be sensitive to the abuse of law.\textsuperscript{529} In this regard, it is important to note the frequent corroboration with or even initiation by strong/sophisticated creditors in cases of forum shopping,\textsuperscript{530} 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 \([1.3.4]\), this dissertation requires an additional element of direct causality in order to establish situations of forum shopping, rather than law shopping. This hypothesis presumes that such a direct causal link\textsuperscript{531} 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’.

\textbf{§5.3 Reincorporation & Exit solvency test}

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 hypothesis proposes the establishment of a solvency test upon the exit of a company from its place of incorporation; an ‘exit solvency test’.\textsuperscript{532} The solvency of the debtor company should be established by the ‘home’ state,\textsuperscript{533} according to its national conceptions, before accepting reincorporation.\textsuperscript{534} 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.\textsuperscript{535} Where the company is insolvent and wishes to reincorporate to a different jurisdiction, the pre-emptive reincorporation-test must be applied.

\textsuperscript{526} Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (\textit{OJ} 2005, L 310/1) Articles 6(2)(c) and 7(1); Directive (EEC) 78/855 of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (\textit{OJ} L295/36) Article 13(2).

\textsuperscript{527} Eidenmüller 2011, p. 145 under note 37. On the possibilities of reincorporation, see paragraph \([5.3]\).

\textsuperscript{528} Enriques, \textit{EC Company Law} 2006, p. 44 \textit{et seq}.

\textsuperscript{529} Schillig 2014, p. 21-22.

\textsuperscript{530} See paragraph \([2.4.2]\).

\textsuperscript{531} Which is described as the intention to initiate insolvency proceedings in the foreseeable future, see paragraph \([1.3.4]\).

\textsuperscript{532} A similar test has been reasoned in Schillig 2014, p. 22; see also Rickford 2008, par. 4.4-4.8.

\textsuperscript{533} That is to say, the jurisdiction in which the company is originally incorporated.

\textsuperscript{534} 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, under recommendation 5 of the Annex (“The home Member State should verify the legality of the transfer procedure in accordance with its legislation”).

\textsuperscript{535} Articles 49 and 54 TFEU.
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 the effects towards its stakeholders.

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 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

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536 That is to say, the jurisdiction to which the debtor company wishes to reincorporate.
537 Mainly, one could reincorporate by way of a merger under the Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005, L 310/1); or, in case of a Societas Europea, by changing its registered office under Regulation (EC) 2157/2001 on the Statute for a European company (SE) (OJ 2001, L 294/1), Articles 7-8. 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 2008, p. 585-588.
538 For example the possibilities under UK law of a cash flow test, see, Goode 2011, par. 4.15-4.21; and a balance sheet test, see, Goode 2011, par. 4.22-4.39.
539 See e.g. Bicker 2006; Reumers 2007; Mevorach 2009; Finch 2009, p. 581 et seq.; Rajak 2009; or The Paper of UNCITRAL Working Group V (Insolvency Law) on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.92), par. 2, where it is described as (“two or more legal entities (group members) that are linked together by some form of control (whether direct or indirect) or ownership”).
European consent.\textsuperscript{540} 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.

\section*{§5.4 EU norm}

In order to implement an effective enforcement of the aforementioned propositions, 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 (\textit{id est}, contrary to the principle of abuse of law),\textsuperscript{541} the consequences (in the context of forum shopping) would merely entail that one could not rely on the EIR or the freedom of establishment.\textsuperscript{542} 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 (e.g. the freedom of establishment) and also have sub-optimal effects, as there would be no harmonisation throughout the EU. The most effective way of achieving enforcement would therefore be by EU legislation, more specifically, a regulation.\textsuperscript{543} 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 hypothesis, this newly reformed regulation will be named the Insolvency Reincorporation Regulation (hereafter ‘IRR’).

Considering that the EIR Recast is a subordinate piece of legislation, it should be interpreted in accordance with the superior EU law governing it, \textit{inter alia}, the general principles of EU law.\textsuperscript{544} 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.\textsuperscript{545} 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,\textsuperscript{546} thought has been put on the addition of a threshold. In this respect, abusive forum shopping could be compared to other EU legislations (e.g. on state aid\textsuperscript{547} or mergers\textsuperscript{548}) which aim to protect

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\textsuperscript{540} See also paragraph [3.1.4] on the singular approach taken by the EU legislature.
\textsuperscript{541} Community law cannot be relied on for abusive or fraudulent ends, see, ECJ EU 12 May 1998, C-367/96 (Kefalas), par. 20; ECJ EU 23 March 2000 C-373/97 (Diamantis), par. 33; ECJ EU 3 March 2005, C-32/03 (Fini H), par. 32; ECJ EU 21 February 2006, C-255/02 (Halifax), par. 68.
\textsuperscript{542} Saydé 2014, p. 98-101; see also Farmer 2011, p. 3-4 describing the ‘classical’ consequences of abuse of law as denying or forfeiting of a right.
\textsuperscript{543} A Directive would create problems of avoidable rules, similar to the problem described in paragraph [5.2] on cases of insolvency.
\textsuperscript{544} Moss 2009, par. 2.19.
\textsuperscript{545} Article 5(4) TEU; ECJ EC 17 December 1970, C-11/70 (Internationale Handelsgesellschaft); Tridimas 2006, p. 136; Omar 2004, p. 92.
\textsuperscript{546} Article 5(3) TEU.
\textsuperscript{548} Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004, L 24/1).
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. A threshold 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.\footnote{Article 5(3) TEU; Recital (5) EIR.} 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.\footnote{See Article 81(2) TFEU, more specifically under sub (f).} 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.\footnote{ECJ EC 15 July 1982, C-245/81 (Edeka Zentrale), para 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 ECJ EC 28 October 1982, C-52/81 (Faust v Commission), par. 27; ECJ EU 10 February 2004, Joined cases T-64/01 and T-65/01 (Afrikanische Frucht-Compagnie v Council), par. 83; ECJ EU 10 March 2005, C-342/03 (Spain v Council), par. 49.} More specifically, granted by Article 81 TFEU for the purpose of developing judicial cooperation in civil matters.\footnote{See also the Preface of the EIR Recast.} In addition, the competence of the EU legislature to regulate the subject of abuse of law can be found in legislation,\footnote{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, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 74.} case law\footnote{See also the Preface of the EIR Recast.} and literature.\footnote{See e.g. ECJ EC 7 February 1979, C-115/78 (J. Knoors v. Secretary of State for Economic Affairs), par. 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”).} 

\section*{§5.5 Procedure of reincorporation}

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 benefit the common welfare. 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.\footnote{See e.g. Dourado 2011, p. 481.} 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,\footnote{Which requires the consent of the creditors, as will be discussed later on.} followed by
by a judgement of the national court of the debtor company’s plan to reincorporate.\footnote{558 To be discussed in paragraph [5.8.2].} 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\footnote{559 That is to say, a numerical or other measurable factor defining the system or sets the conditions of its operation. See also paragraph [5.12].} 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 hypothesis 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 harmonisation, ultimately increasing knowledge and experience by benefitting from national diversity.\footnote{560 Deakin 1999; Bernard 2002; Deakin 2006, p. 444-445.}

\section*{§5.6 Insolvency Reincorporation Regulation}

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.\footnote{561 See paragraph [1.3.1].} It should, however, not be the objective of EU insolvency law to concern itself with matters such as employee protection or other social interests.\footnote{562 Jackson 1982; Jackson 1986.} 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).\footnote{563 Jackson 1982; Baird 1984; Jackson 1986; Jackson 1989.} Without such regulation, creditors would potentially take unilateral actions, to the detriment of the collective. Hence, EU insolvency law should essentially prevent a prisoners dilemma between stakeholder by promoting a mandatory and collective corporate insolvency regime within the EU.\footnote{564 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, p. 858-863; Jackson 1986, p. 7-19; Jackson 1989; which was later critically reviewed in, Carlson 1992. Still, however, the notion of viewing insolvency law as a way to overcome
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.\footnote{Von Wilcken 2011, p. 74; De Weijs 2014, p. 501-502.} 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.\footnote{See INSOL Europe Proposal, par. 3.5 where it is proposed to initiate a suspension period of one year, except when all creditors have conceded to the relocation.} 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.\footnote{In such cases, each creditor would be better off enforcing its claim, to the detriment of the collective, see, Jackson 1982, p. 861; Schillig 2014, p. 8.} 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.\footnote{Fennell 2011, p. 42-43; De Weijs 2014, p. 512-513; Schillig 2014, p. 20.} 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.\footnote{Fennell 2011, p. 42-43; see also paragraph [3.1.5].} Other creditors would subsequently be pushed into either accepting or losing out.\footnote{Schillig 2014, p. 8-9 where a clear explanation is given of this problem.} Such a ‘tragedy of the anticommons’ could be avoided by requiring a majority of votes and imposing a cramdown, instead of requiring unanimity.\footnote{Pilkington 2013, par. 2.3.3.1; Schillig 2014, p. 3 and 9. The hold-out problem has also been taken into account under the proposed Dutch ‘dwangakkoord buiten faillissement’, see, Wessels 2013, par. 6202; see also paragraph [3.1.5].} The binding of parties against their will can be justified on account of the necessity to decide in favour of the common interest.\footnote{See e.g. MvT WCO II, p. 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 2013, par. 6016; Vriesendorp 2014, par. 2.3.2.4.} Moreover, the cramdown mechanism is an accepted phenomenon within the EU.\footnote{See, Veder 2013, 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. See also paragraph [2.3] on the specifics of the system proposed in the Netherlands and paragraph [2.1] on that of the UK scheme of arrangement.}
Additionally, a moratorium is required in order to stay creditor’s enforcements in the interim. 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. 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). 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. 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 for the acceptance of a plan should be left to the discretion of the Member State. In addition, it is advised to include a minimum amount of representation in value of claims. 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. The latter of which are often considered ‘out of the money’ creditors as opposed to ‘in the money’ creditors.

574 Wessels 2012, p. 412; Schillig 2014, p. 3 and 6.
575 Van der Aa 2007, p. 35.
576 This could be avoided, for example, by prioritizing such post-insolvency claims.
578 Although the majority requirement prescribed in the Insolvency Recommendation 2014, part III, C (18) is advisable.
579 In order to acquire an accurate representation and avoid problems of artificial votes.
580 This distinction is made e.g. under the UK scheme of arrangement, see, Pilkington 2013, par. 8.2.3 and 8.8; O’Dea 2012, par. 3.28 and 8.89; under the proposed Dutch ‘dwangakkoord buiten faillissement’, see, Article 373(2) WCO II; MvT WCO II, p. 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, Chapter 11, Section 1129(b)(2)(B)(i); see also, EHYA 2007, p. 5 on propositions from the association which represents participants in the European high yield bond markets.
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{581} 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{582} Moreover, the exclusion of ‘out of the money’ creditors would prevent hold-out problems.\textsuperscript{583} 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 hypothesis 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 set in paragraphs [5.8.3 and 5.8.4].

\textbf{§5.7 Maximization & Efficiency}

As construed in paragraphs [5.1 and 5.6], one should stimulate coordination between creditors in insolvency proceedings. Forum shopping is a way of achieving such coordination. As scholars have argued, that there is no ‘one size fits all’ insolvency procedure within the EU.\textsuperscript{584} 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 \textit{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

\textsuperscript{581} Provided that their claims have been treated appropriately from a procedural perspective and classified correctly.
\textsuperscript{582} E.g. under the UK scheme of arrangement, the votes of ‘out of the money’ creditors are not taken into account, see, Pilkington 2013, par. 8.2.3 and 8.8; O’Dea 2012, par. 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; MvT WCO II, p. 16 and 28.
\textsuperscript{583} Garcimartin 2011, par. 11; Hertz 2011, p. 328.
\textsuperscript{584} Franken 2004, p. 671; Schwartz 2005, p. 1243-1248 on the efficiency of permitting parties to contract \textit{ex ante} on their preferred procedure, and concluding that there should be a choice of bankruptcy procedure; see also Kastrinou 2013, p. 24.
dared to be made.\textsuperscript{585} Hence, it is presumed that if forum shopping is not ‘efficient’ or ‘value maximising’, it will not be attempted.\textsuperscript{586} By extension, the objective of insolvency law would thus be achieved.\textsuperscript{587} Still, one could also argue persuasively that, considering the ‘derivatives revolution’,\textsuperscript{588} the market could also create situations where creditors are widespread and not interested in maximisation,\textsuperscript{589} sometimes even the opposite.\textsuperscript{590} 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,\textsuperscript{591} as has been explained in the previous section. Notwithstanding the aforementioned, the valuation of the efficiency will be necessary for the purpose of establishing whether or not a reincorporation (forum shopping) is abusive.\textsuperscript{592} 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.

\section*{§5.8 Abuse of Law}

\subsection*{§5.8.1 Genuine or Legitimate}

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{593} Primarily by virtue of the formalistic and definitive establishment of the applicable jurisdiction through reincorporation,\textsuperscript{594} rendering such a distinction 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 conducts, 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 dissertation.\textsuperscript{595} Therefore, the hypothesis will focus on establishing a distinction between ‘legitimate’ and ‘abusive’ forum shopping.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{585} Jackson 1986, p. 21 \textit{et seq}.
\item\textsuperscript{586} Baird 2010, p. 654.
\item\textsuperscript{587} See paragraph [1.3.1].
\item\textsuperscript{588} Hu 2008, p. 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”).
\item\textsuperscript{589} Hu 2008, p. 687.
\item\textsuperscript{590} Hu 2008, p. 693-694; Schillig 2014, p. 10-12.
\item\textsuperscript{591} Schillig 2014, p. 13.
\item\textsuperscript{592} See paragraphs [5.8.4.2 and 5.8.5].
\item\textsuperscript{593} Impact Assessment 2012, p. 21.
\item\textsuperscript{594} See paragraph [5.3].
\item\textsuperscript{595} For a more detailed explanation of this distinction, see, Eidenmüller, \textit{Incorporation} 2009, p. 9; and, Eidenmüller 2011, p. 142 where the Hans Brochier case is used as an example.
\end{enumerate}
\end{footnotesize}
§5.8.2 Approval by the Court (national parameter)

An approval by the national court after creditors have reached an agreement is quite common within the EU.\(^{596}\) 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\(^{597}\) of the procedure; the statutory and procedural requirements;\(^{598}\) adequate provision of information to creditors;\(^{599}\) a fair representation of the classes, acting bona fide; and possible oppression of minorities.\(^{600}\) 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\(^{601}\) 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.\(^{602}\) 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 \([5.4]\), and will become increasingly apparent below.

§5.8.3 Principle of Abuse of EU law

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.\(^{603}\) It is therefore important to leave some discretion to the national court

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596 Veder 2013, where the comparative study concludes that all six EU jurisdictions require court approval for a proposed agreement within insolvency to have effect.

597 Court of Appeal (Civil Division) 18 December 1890, Re Alabama, New Orleans, Texas and Pacific Junction Railway Co Ltd [1891] 1 Ch 213; High Court of Justice (Chancery Division) 5 July 1922, Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723; High Court of Justice (Chancery Division) 16 March 1966, Re National Bank Ltd [1966] 1 W.L.R. 819; High Court of Justice (Chancery Division) 26 April 2004, Re Telewest Communications plc [2004] EWHC 924 (Ch); High Court of Justice (Chancery Division) 26 September 2008, Re TDG Plc [2008] EWHC 2334 (Ch); Pilkington 2013, par. 8.4; O’Dea 2012, par. 4.45. See also, High Court of Justice (Chancery Division) 21 July 2005, Re British Aviation Insurance Co Ltd [2005] EWHC 1621 (Ch), a low turn up of creditors is not unfair; Supreme Court of Victoria 14 August 1962, Re Chevron (Sydney) Ltd [1963] VR 249, voting by creditors to their benefit in some other capacity than as creditor to the relevant company might be seen as unfair.

598 Court of Appeal (Civil Division) 18 December 1890, Re Alabama, New Orleans, Texas and Pacific Junction Railway Co Ltd [1891] 1 Ch 213; High Court of Justice (Chancery Division) 5 July 1922, Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723; O’Dea 2012, par. 4.45. Such as a suspension period, see paragraph [2.4.3 and 3.1.2].

599 ECJ EU 9 March 1999, C-212/97 (Centros), par. 24 where reference is made to the established body of case law of the ECJ (now CJEU).

600 This requirement can be found in various cases, e.g. ECJ EC 10 Januari 1985, C-229/83 (Leclerc), par. 27; ECJ EU 17 July 1997, C-28/95 (Leur-Bloem), par. 41; ECJ EU 16 July 1998, C-264/96
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.

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 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

(Imperial Chemical Industries), par. 26; ECJ EU 9 March 1999, C-212/97 (Centros), par. 25; ECJ EU 14 December 2000, C-110/99 (Emsland-Stärke), par. 39.

604 ECJ EU 21 February 2006, C-255/02 (Halifax), par. 70.

605 ECJ EU 14 December 2000, C-110/99 (Emsland-Stärke), par. 52-53.

606 See e.g. the line of arguments in ECJ EU 13 July 2006, Joined cases C-295/04 to C-298/04 (Manfredi), par. 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.

607 For an extensive study on the abuse of EU law, see, Saydé 2014.

608 ECJ EU 14 December 2000, C-110/99 (Emsland-Stärke), par. 52; ECJ EU 21 February 2006, C-255/02 (Halifax), par. 74.

609 ECJ EU 14 December 2000, C-110/99 (Emsland-Stärke), par. 53; ECJ EU 21 February 2006, C-255/02 (Halifax), par. 75.

610 Article 267 TFEU; see also paragraph [5.4].

611 Weber 2011, p. 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.
need for a subjective requirement has been criticized by some authors,\footnote{Sørensen 2006, p. 457; Lang 2008, p. 608-609; Opinion of Advocate General Geelhoed, delivered on 27 February 2003, ECJ EU 23 September 2003, C-109/01 (Akrich), par. 174 (“in regard to subjective criteria, considerable reluctance to attach weight to such criteria is discernible in the case-law. In principle (...) the worker's intentions are irrelevant”).} it has been viewed valuable by others.\footnote{Weber 2011, p. 397-399.} For the present purpose, one would have to take into consideration the intent of the company concerned to abuse the law. The word ‘artificially’ as used here by the CJEU should be differentiated from the word ‘sham’ as referred to in paragraph [5.8.1]. When referring to ‘artificial’ 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 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.\footnote{Saydé 2014, p. 87.} By applying these two requirement to the EIR Recast, one could extract the conducts which should be considered abusive.

§5.8.4 Objectives of the EIR Recast

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.\footnote{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.} 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.\footnote{See also paragraph [1.3.1] on the more general aims of insolvency law.} Consequently, the objectives pursued are also slightly different. In addition, EU law has precedence over national law,\footnote{ECJ EC 15 July 1964, C-6/64 (Costa v E.N.E.L).} 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 insolvent companies access to their 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.

After contemplating on 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.\footnote{Recitals (3), (5) and (8) EIR Recast; see also paragraph [3.1.1].} 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;\(^{619}\) and to provide for legal certainty in cross-border insolvency.\(^{620}\)

### §5.8.4.1 Effectiveness

First is the principle of effectiveness, which has been recognised as a general principle of EU law by the CJEU.\(^{621}\) The principle requires the effective protection and enforcement of EU law within the Union.\(^{622}\) 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 dissertation, 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.

### §5.8.4.2 Efficiency

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.\(^{623}\) 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.\(^{624}\) 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, is could be considered abusive.

### §5.8.4.3 Coordination & Legal certainty

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

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\(^{619}\) Recital (4) EIR Recast; ECJ EU 2 May 2006, C-341/04 (*Re Eurofood IFSC Ltd*), par. 48; Moss 2009, par. 6.12.

\(^{620}\) ECJ EU 17 January 2006, C-1/04 (*Staubitz-Schreiber*), par. 26; Virgós 2004, par. 5; Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (*Staubitz-Schreiber*), para 57 and 75.


\(^{622}\) Tridimas 2006, p. 418 et seq.

\(^{623}\) Virgós-Schmit Report, par. 147.

\(^{624}\) 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.
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 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.

§5.8.4.4 Abusive forum shopping
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. 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 than 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. Reference can be made in this regard to paragraph [1.2.1] where 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, leading to unjustified inequalities. A value towards the welfare of the collective 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 (‘the collective’).

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625 See paragraphs [1.1.2 and 1.2.4].
626 See paragraph [1.4.1] on the manipulability of the COMI model.
Taken together, the objectives by which forum shopping should be examined are that of efficiency, legal certainty and welfare of the collective. 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. Accordingly, a plan to forum shop should at least: Retain efficiency; retain legal certainty; and preserve the welfare of the collective. 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.

§5.8.5 Valuation

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 consequent 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 models 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 indispensable for rationally arguing towards the most ‘appropriate’ procedure to follow, often segmenting generally between liquidation

627 See paragraph [5.8.5] on the valuation involved.
628 Finch 2008, p. 775.
629 See also paragraphs [2.1.1] on the frequent forum shopping to the UK in order to use its scheme of arrangement.
630 See, O’Dea 2009, p. 587-589 comparing the My Travel and Re Bluebrook cases on the valuation of economic interest; see also Turner 2013, p. 52 on the same comparison and the uncertainty of the UK courts’ approach to valuation.
or corporate rescue. Moreover, the EIR Recast demands the implementation of ‘abusive forum shopping’\textsuperscript{631} and the assessment of ‘effective administration of the insolvency proceedings’ with a ‘positive impact for the creditors’ within group coordination proceedings.\textsuperscript{632} To this end, the development of legal systems by instilling expertise on finance should be welcomed, if not inevitable.

\textbf{§5.8.6 Employees}

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.\textsuperscript{633} 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.\textsuperscript{634} Perhaps such efforts could someday provide better results, which could be used to create more objective and harmonised valuation of workers.\textsuperscript{635} However it seems that, for the time being, such valuations will depend on the expertise of national courts.

\textbf{§5.9 Group insolvencies & Forum shopping}

It has been discussed in paragraph [3.1.4] 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 [3.1.4].

The IRR as proposed under this hypothesis provides for the additional possibility to forum shop all legal entities of a group of companies to a single jurisdiction in order 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.\textsuperscript{636} 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

\textsuperscript{631} See paragraph [5.1].
\textsuperscript{632} Recital (57) EIR Recast.
\textsuperscript{634} Lazear 1995, p. 99 \emph{et seq}.
\textsuperscript{635} For more on this subject, see, Lazear 2014.
\textsuperscript{636} Mevorach 2009, p. 36; Finch 2009, p. 583-584.
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 in this regard.

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 hypothesis 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.

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.

§5.10 Added Value

The original incorporation model has the deficiency of allowing forum shopping on a rather extensive scale, with little protection in place against abuse and insufficient reckoning of the possibility of group insolvencies. The proposed changes under the present hypothesis will allow for the legitimate appreciation of the efficiency which forum shopping can provide. Inherently, the hypothesis 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

637 Finch 2009, p. 581 et seq.; see also Collins 1990, p. 733.
638 See paragraph [4.1.3].
639 See also Crawford 2010, p. 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”).
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 dissertation, 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 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. 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.”

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640 Franken 2005, p. 242; Kastrinou 2013, p. 22; see also Djankov 2008, p. 1146 showing empirically that mimicking other countries’ laws and systems does not work.

641 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.

642 Recital (10) EIR Recast; Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency (OJ 2014, L 74/65), calling Member States to adopt rescue orientated insolvency proceedings.

643 See, Jackson 1986, p. 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").

644 Schwartz 2005, p. 1200-1201 stating ("Social welfare is maximized when economically distressed firms are liquidated but financially distressed firms are continued.").

645 See paragraph [3.1.3] on the amendment of the EIR Recast to enable judicial review of the opening of main insolvency proceedings.

646 Arnold 2013, p. 259.
The ability to plan legitimate forum shopping \textit{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.  

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. Furthermore, the proposed model retains the advantages of an incorporation model, as discussed in paragraph [4.1.3].

The model proposed under this hypothesis also has advantages in its future perspective. By providing for a level playing field, making subdivisions and concretizing the area of law, it will become more feasible to harmonise insolvency law within the EU.

\footnote{647 See paragraph [2.4.1].} \footnote{648 See paragraph [3.1.2].} \footnote{649 Latella 2013, p. 19 \textit{et seq}.} \footnote{650 E.g. by way of the national parameters (see paragraph [5.12]) or the exit solvency test (see paragraph [5.3]).}
§5.11 Scheme

The procedure proposed should be visualised in the following way:

§5.12 Regulatory competition of national parameters

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.\textsuperscript{651} For this to occur, there are two

\textsuperscript{651} Armour 2005, p. 375.
preconditions. Firstly, there will have to be regulatory arbitrage. Secondly, Member States must have something to gain by this attraction and performance of firms. Due to the different systems of insolvency law, there seems to be regulatory arbitrage within the EU, as has already been concluded in paragraph [1.3.1]. Also, within the area of insolvency law Member States have already adjusted their national laws to compete with other jurisdictions’ legislation. The benefits of attracting firms to a particular jurisdiction have been discussed in paragraphs [1.3.1, 2.1.1 and 2.4.1], 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 relativized 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 dissertation.

<table>
<thead>
<tr>
<th>‘Good’ insolvency laws: Stringent parameters</th>
<th>‘Bad’ insolvency laws : Loose parameters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effect:</td>
<td>Difficulty to forum shop</td>
</tr>
<tr>
<td>Positive:</td>
<td>More protectionism</td>
</tr>
<tr>
<td></td>
<td>More legal certainty</td>
</tr>
<tr>
<td></td>
<td>Lower interest rates &amp; More capital</td>
</tr>
<tr>
<td>Negative:</td>
<td>Less possibilities during insolvency</td>
</tr>
<tr>
<td></td>
<td>Creditor has less influence</td>
</tr>
</tbody>
</table>

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653 See in this respect paragraphs [2.2 and 2.3] on the adjustments of the Netherlands and Germany due to the popularity of insolvency proceedings in England.
654 See also McCormack 2009, p. 280.
655 See paragraph [1.3.1].
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 much 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 lose 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 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

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656 That is to say, insolvency laws which are not used frequently and which are not considered effective in obtaining their objectives.

657 That is to say, insolvency laws which are used frequently and which are considered effective in obtaining their objectives.

658 Provided that this change in forum will not be abusive.
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 specialized, 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.

§5.13 Example

Under this section an example will be made in order to illustrate the effects of the proposition on the basis of this hypothesis. 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 is jurisdiction A.

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.

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659 See paragraph [2.4.2] on regulatory competition through ‘voice’ and ‘exit’.
660 Considering that managers will usually also have to take the interest of creditors into account, see paragraph [2.4.1].
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 antagonize 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.

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

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661 Either active or passive forum shopping.
663 See paragraph [2.4.1].
§5.14 Weaknesses & Pragmatism

This hypothesis has been reviewed by practitioners\textsuperscript{664} for its weaknesses and pragmatism, which has resulted in the following criticisms.

The primary remark made was that the procedure proposed under this hypothesis 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{665} 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{666} 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 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.

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

\textsuperscript{664} Specialized in cross-border insolvency law.
\textsuperscript{665} Provided that the plan remains unchanged.
\textsuperscript{666} Considering that exemptions could essentially be seen as an additional national parameter determining the legal alignment of a state.
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.\textsuperscript{667}

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 [5.6], 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.

\textsuperscript{667} For example the possibility of synthetic secondary procedures, adopted under Article 36 EIR Recast.
Conclusion
This dissertation has concluded from its onset 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, it 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 will remain to do so, 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. 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 dissertation has identified these issues and proposed a theoretical model which might improve upon the current system within a hypothesis. While attempting to identify when one should consider forum shopping ‘abusive’, the hypothesis 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 hypothesis 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 drawbacks should not reason the hypothesis to be 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 their political hardships.
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XXXIII
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