

## The Modernization of European Insolvency Law: An Ongoing Process

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## The Modernization of European Insolvency Law: An Ongoing Process

### 1. BACKGROUND OF THE EUROPEAN UNION LEGAL SYSTEM

THE EUROPEAN UNION (“EU” or “Union”) today consists of 28 member states<sup>1</sup> (“Member States”) that have agreed to work together on issues of common interest in accordance with EU Treaties<sup>2</sup> (“Treaties”). These Treaties are negotiated at intergovernmental conferences and ratified by each Member State.<sup>3</sup> In contrast to the United States of America, each Member State in the EU maintains, for the most part, its sovereignty and its own legal system.<sup>4</sup> In fact, one of the EU’s principles of paramount importance is the preservation and veneration, within the Union, of

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1. *About the EU: EU Member Countries*, EUROPA.EU, <http://europa.eu/about-eu/countries/member-countries> (last updated Nov. 4, 2015).

2. *EU Law: EU Treaties*, EUROPA.EU, [http://europa.eu/eu-law/decision-making/treaties/index\\_en.htm](http://europa.eu/eu-law/decision-making/treaties/index_en.htm) (last updated Sept. 28, 2015) [hereinafter *EU Treaties*]. The first stone was cast in 1951, with the Treaty Establishing the European Coal and Steel Community. *Id.* This was followed by the signing of the Treaty of Rome in 1957, which gave birth to the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). *Id.* The Merger Treaty, also known as the “Brussels Treaty,” (1965) and the Single European Act (1986) were subsequently signed, followed by the execution of the Treaty on European Union, the “Maastricht Treaty,” in 1992. *Id.* The Maastricht Treaty formally established the European Union and prepared for integration of EU economics and fiscal policies (European Monetary Union). *Id.* The Treaties of Amsterdam (1997), Nice (2001), and Lisbon (2007) further implemented and expanded the roles and powers of the European Union, and annexed new Member States. *Id.*

3. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, art. 48, 2007 O.J. (C 306) 1, 39 [hereinafter Treaty of Lisbon].

4. KLAUS-DIETER BORCHARDT, THE ABC OF EUROPEAN UNION LAW, 39 (2010), [http://europa.eu/documentation/legislation/pdf/oa8107147\\_en.pdf](http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf).

each Member State's national identity.<sup>5</sup> Member States do not intend to be “dissolved” into the EU, but rather contribute their own particular characteristics and qualities.<sup>6</sup> It is precisely this variety of national cultures, characteristics, and identities that makes the EU a unique example of common international organizations or State federations.

Notwithstanding the above, to be a part of the EU, Member States do relinquish part of their sovereignty to the collective union, which is an autonomous entity with its own sovereign rights.<sup>7</sup> The EU has a legal order, independent of the relevant Member States, in connection with specific areas of competence and responsibility, and to which Member States and their nationals are subject.<sup>8</sup>

The Treaties and general principles of Union Law, including the Charter of Fundamental Rights,<sup>9</sup> represent the EU's primary legislation.<sup>10</sup> As binding agreements between Member States, the EU Treaties set out EU objectives and rules for EU institutions,<sup>11</sup> how decisions are made, and the relationship between the EU and its Member States.<sup>12</sup> The Treaties collectively are like the “constitution” of the European Union, and the EU takes every action based on them.<sup>13</sup>

EU institutions make secondary legislation through different legal instruments permitted under the Treaties.<sup>14</sup> These legal instruments are divided into binding legal instruments—Regulations, Directives, and Decisions—and non-binding legal instruments—Recommendations and Opinions.<sup>15</sup>

5. *Id.* at 24.

6. *Id.*

7. *Id.* at 32.

8. *Id.* However, such a legal order is still a work-in-progress, and its future is not clear. See Kathleen R. McNamara, *The Eurocrisis and the Uncertain Future of European Integration*, in *CRISIS IN THE EUROZONE: TRANSATLANTIC PERSPECTIVES* 22 (Council on Foreign Relations Press 2010), <http://www.cfr.org/world/eurocrisis-uncertain-future-european-integration/p22933> (noting that the status of the EU is uncertain following the Eurozone crisis).

9. *EU Treaties*, *supra* note 2.

10. *Fact Sheets on the European Union: Sources and Scope of European Law*, at 1 EUROPEAN PARLIAMENT (Oct. 1, 2015), [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.2.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf) [hereinafter *Sources and Scope*].

11. The institutional framework of the Union comprises various institutions, but the European Parliament, Council of the European Union, and European Commission are the main institutions involved in EU legislation. See *About the EU: EU Institutions and Other Bodies*, EUROPA.EU, <http://europa.eu/about-eu/institutions-bodies> (last updated Jan. 6, 2016). Each institution acts within its limits, powers, and responsibilities as set forth in the Treaties. See *id.*; *EU Treaties*, *supra* note 2.

12. *EU Treaties*, *supra* note 2.

13. BORCHARDT, *supra* note 4, at 29.

14. See *id.* at 81; *Sources and Scope*, *supra* note 10.

15. *Sources and Scope*, *supra* note 10.

*A. Regulations, Directives, and Decisions*

Regulations are of general application, binding in their entirety, and directly applicable in all Member States as soon as they enter into force, with no need to be transposed into national laws.<sup>16</sup> Their scope is to ensure the uniform application of Union law in all the Member States.<sup>17</sup> EU Regulations preempt national laws when they conflict.<sup>18</sup>

Directives bind only the Member States to whom they are addressed in connection with the specific result to be achieved.<sup>19</sup> Directives require national authorities to enact a transposing act or national implementing measure to align with the directive's objectives, provided that a Member State may use its discretion to take account of specific national circumstances.<sup>20</sup> Citizens are given rights and are bound by the legal act only when the Member State adopts the transposed directive.<sup>21</sup> Directives are not directly applicable.<sup>22</sup>

Decisions are binding in their entirety.<sup>23</sup> In instances where Decisions particularly address Member States or natural or legal persons, they only bind those Member States or persons with reference to the specific situations addressed.<sup>24</sup>

*B. Recommendations and Opinions*

With a Recommendation, the EU institutions express to Member States, and in some cases to individual citizens, a view that does not bind or impose any legal obligation on the addressee.<sup>25</sup> Recommendations call upon the addressee, but do not require it, to behave in a particular way.<sup>26</sup>

Opinions are issued by EU institutions to provide assessments of a given situation or development in the EU or in the individual Member States.<sup>27</sup> Opinions

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* However, the Court of Justice of the European Union has ruled that certain provisions of a directive may have direct effects if "(a) the directive has not been transposed into national law or has been transposed incorrectly; (b) the provisions of the directive are imperative and sufficiently clear and precise; and (c) the provisions of the directive confer rights on individuals." *Id.*

23. *Id.*

24. *Id.*

25. BORCHARDT, *supra* note 4, at 95.

26. *Id.*

27. *Id.*

may also be predecessors for legally binding acts or prerequisites for proceedings before the European Court of Justice.<sup>28</sup>

## 2. THE ORIGINS OF THE EUROPEAN INSOLVENCY LAW: REGULATION (EC) NO. 1346/2000

Until a few years ago, financially distressed companies in many EU Member States had few options other than liquidation in the absence of alternative informal solutions.<sup>29</sup> Insolvency proceedings were therefore primarily designed to liquidate the companies' assets and distribute to creditors the relevant proceeds according to the ranking of their claims.<sup>30</sup> In many Member States, insolvency laws remained primarily punitive, and were designed to punish a delinquent debtor rather than aid in its rehabilitation or reorganization.<sup>31</sup> “[a]n entrepreneur who failed to succeed in business was considered as a social threat.”<sup>32</sup>

The Council of the European Union laid down the first legislative act in connection with insolvency proceedings via Council Regulation No. 1346/2000 (“Regulation 1346”), which has been in force since May 31, 2002.<sup>33</sup> Regulation 1346 aimed to provide uniform rules for the settlement of cross-border insolvencies.<sup>34</sup> Article 1 of Regulation 1346 identifies its applicability to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.”<sup>35</sup>

Regulation 1346 did not provide new common rules to European insolvency proceedings, but rather focused on coordinating insolvency proceedings as they existed and continue to exist under national laws of the Member States.<sup>36</sup> In fact, as

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28. *Id.*

29. See, e.g., Paolo Manganelli, *The Evolution of the Italian and U.S. Bankruptcy Systems—A Comparative Analysis*, 5 J. BUS. & TECH. L. 237, 238 (2010) (discussing the lack of remedies available to troubled entrepreneurs under Italian bankruptcy law); see also Julian Franks et al., *A Comparison of US, UK, and German Insolvency Codes*, 25(3) Financial Management 86 (1996) (describing the wide-spread use of liquidation for German and UK firms).

30. Manganelli, *supra* note 29, at 239 (discussing liquidation proceedings and payment of proceeds to creditors); see also Franks, *supra* note 29, at 86 (describing the strong control rights given to creditors which favor liquidation).

31. See Manganelli, *supra* note 29, at 237 (as was the case in Italy until the late 20th century); see also Rafal Manko, *Cross-border insolvency law in the EU* (2013) (describing the punitive nature of member state insolvency laws).

32. Manganelli, *supra* note 29, at 238.

33. Council Regulation 1346/2000, 2000 O.J. (L 160) 1, 13.

34. *Id.* recital 2, at 1 (describing the objective of providing uniform rules).

35. *Id.* art. 1, at 4.

36. *Id.* recital 3, at 1. See also Miguel Torres & J.J. Forner, *Regulation N. 1346/2000 on Insolvency Proceedings—General Presentation*, TORRES, MARTIN & ZARAGOZA (Mar. 31, 2014), <http://english.tnzabogados.com/index.php?menu=8&all=1&doc=&cat=4>.

expressly stated in Recital 11 of Regulation 1346, the European legislature acknowledged that “it is not practical to introduce insolvency proceedings with universal scope in the entire Community.”<sup>37</sup> The main reason is that the laws on security interests between Member States are fairly different,<sup>38</sup> as are the preferential rights of creditors and relevant treatment in various insolvency proceedings.<sup>39</sup>

The primary goals of Regulation 1346 are thus to streamline cross-border insolvency proceedings, introduce rules for better coordination of debtor’s assets measures, and prevent forum shopping.<sup>40</sup> In this respect, the main principles and rules set out by Regulation 1346 include:

- (1) The courts of the Member State where the debtor’s Center of Main Interest (COMI)<sup>41</sup> is situated shall have jurisdiction to open insolvency proceedings producing, with no further formalities, the same effects as in any other Member State.<sup>42</sup> These insolvency proceedings are referred to as “main proceedings.”<sup>43</sup>
- (2) The courts of other Member States (other than the State where main proceedings opened) shall have jurisdiction only if the debtor possesses an establishment within the territory of that other Member State.<sup>44</sup> These proceedings, referred to as “secondary proceedings,” may only relate to the assets of the debtor situated in the territory of the Member State where the secondary proceedings are opened and may only consist of “winding-up proceedings” (liquidation).<sup>45</sup>

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37. Council Regulation 1346/2000, *supra* note 33, recital 11, at 2.

38. *Id.*

39. *Id.* See also BOB WESSELS, EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS 7 (3rd ed. 2009) [hereinafter WESSELS, AN INTRODUCTORY ANALYSIS]; Bob Wessels, *The Changing Landscape of Cross-Border Insolvency Law in Europe*, 12 JURIDICA INT’L 116, 118 (2007) [hereinafter Wessels, *Cross-Border Insolvency Law*] (explaining Recital 11).

40. *Id.*; see also WESSELS, AN INTRODUCTORY ANALYSIS, *supra* note 39, at 7; Wessels, *Cross-Border Insolvency Law*, *supra* note 39, at 118.

41. Recital 13 of Regulation 1346 states that the Center of Main Interests “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.” Regulation 1346 does not provide for a clear definition or interpretation of COMI, which should be assessed on a case-by-case basis. However, there is a presumption that the COMI is where the debtor company has its registered office. See Wessels, *Cross-Border Insolvency Law*, *supra* note 39, at 118.

42. See Council Regulation 1346/2000, *supra* note 33, art. 3, at 5; *id.* recital 22, at 3.

43. *Id.* art. 1(1), at 4; *Id.* art. 2(a), at 4; *Id.* recital 12, at 3.

44. *Id.* art. 3(2), at 5.

45. *Id.* art. 2(c), at 5; *Id.* art. 3(2)—(3), at 5; See Jennifer Marshall, *Comparing Europe’s Insolvency Rules*, 21 INT’L FIN. L. REV. 23, 24 (2002).

- (3) The applicable law—both procedural and substantive—is that of the Member State within the territory of which such proceedings are opened (*lex concursus*).<sup>46</sup> Certain exceptions, however, are provided, including third parties' rights *in rem*, set-off rights, and reservation of title.<sup>47</sup> These rights, under certain conditions, are not affected by the legal consequences of the commencement of main proceedings.<sup>48</sup> The exception also applies in the event another law has been chosen (instead of the *lex concursus*), such as a contract relating to immovable property<sup>49</sup> or an employment contract.<sup>50</sup>
- (4) Creditors of the insolvent debtor may lodge their claim in either main proceedings or secondary proceedings—provided that payments obtained in one procedure are taken into account in any other procedure where the claim has been lodged, with no duplication.<sup>51</sup>
- (5) Recognition of insolvency proceedings is granted among Member States.<sup>52</sup> Insolvency proceedings opened in the Member State where the debtor has his COMI will be automatically recognized in all other Member States.<sup>53</sup> Nevertheless, such recognition does not prohibit the undertaking of secondary proceedings in a state where the debtor owns an establishment.<sup>54</sup> Thus, an insolvency official may exercise all powers that he has under the law of the Member State, where main proceedings have been commenced, in any other Member State.<sup>55</sup>

However, Regulation 1346 only applies to coordination of cross-border insolvency cases within the European Union and among the jurisdictions of the

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46. See Council Regulation 1346/2000, *supra* note 33, art. 4(1), at 5, recital 23.

47. See *id.* arts. 5–7, at 6–7.

48. *Id.*

49. *Id.* art. 8, at 7 (stating that insolvency proceedings are governed by the law of the Member State where the immovable property is situated).

50. *Id.* art. 10, at 7 (stating that employment contracts are governed by the law of the applicable Member State).

51. *Id.* art. 32, at 10. This exercise of creditor's rights is also subject to "the right of creditors to oppose that or to withdraw the lodgment of their claims where the law applicable so provides." *Id.* art. 32(2).

52. *Id.* art. 16, at 7–8. The point of recognition is the time when judgment "becomes effective in the State of the opening of proceedings." *Id.*; see also *id.* recital 22, at 3.

53. *Id.* art. 16, at 7–8.

54. *Id.* art. 16(2), at 8.

55. *Id.* art. 18, at 8. "In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action . . ." *Id.* art. 18(3).

Member States.<sup>56</sup> Regulation 1346 does not address coordination of insolvency proceedings related to non-EU States, where the rules of general private international law or specific legislation of a particular country in this field shall apply.<sup>57</sup>

### 3. A NEW APPROACH TO EUROPEAN INSOLVENCY

Due to a number of factors, including the severe financial and social crisis of 2008, EU institutions acknowledged that the number of failing businesses was continuously increasing.<sup>58</sup> For example, from 2009 to 2011, an average of 200,000 firms underwent bankruptcy proceedings every year in the EU, a quarter of which had a cross-border element.<sup>59</sup> These dramatic statistics captured the attention of the European Commission, who started modernizing the EU's insolvency rules to facilitate the survival of businesses and grant honest entrepreneurs a second chance.<sup>60</sup> In looking at the experience of jurisdictions outside the EU, in particular United States Chapter 11 Bankruptcy, many Member States have come to understand that the preservation of a company's business operations potentially achieves better economic results than does liquidation.<sup>61</sup>

On December 12, 2012, the European Commission ("Commission") submitted to the European Parliament, the Council of the European Union, and the European Economic and Social Committee a communication regarding a new European approach to business failure and insolvency ("Communication").<sup>62</sup> With the Communication, the European Union spurred the creation of a system to "restore and reorganise business[es] so that they can survive . . . financial crises, operate more efficiently[,] and when necessary, make a fresh start."<sup>63</sup> This system applies not only to large multi-national companies, but also to 20 million small businesses

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56. *Id.* art. 3, at 5.

57. Michael Bütter, *English Fixed and Floating Charges in German Insolvency Proceedings: Unsolved Problems Under the New European Regulation on Insolvency Proceedings*, 2002 SING. J. LEGAL STUD. 271, 299 (2002) ("[F]or all other companies which are registered outside the European Union[,] the current private international insolvency laws of the Member States will still play an important role in the future . . .").

58. *Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee*, at 2, COM (2012) 742 final (Dec. 12, 2012) [hereinafter *Communication from European Commission*]. The European Union recognized that it needed to "promote economic recovery, boost investment[,] and safeguard employment" in the face of the "severe economic and social crisis." *Id.*

59. *Id.* "About 50% of all new businesses do not survive the first five years of their life. 1.7 million jobs are estimated to be lost due to insolvencies every year." *Id.*

60. *See id.* at 5.

61. *See* European Commission Press Release IP/14/254, *Insolvency: Commission Recommends New Approach to Rescue Businesses and Give Honest Entrepreneurs a Second Chance* (March 12, 2014).

62. *See generally id.*

63. *Id.* at 2.

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that are a part of Europe's economy.<sup>64</sup> The Commission also highlighted the "areas where differences between domestic insolvency laws have the greatest potential to hamper the establishment of an efficient insolvency legal framework in the internal market,"<sup>65</sup> and identified the key factors to foster a more favorable environment for cross-border investment.<sup>66</sup> Such key factors<sup>67</sup> can be summarized as follows:

- (1) ensuring an effective second chance for entrepreneurs, creating preferred, fast-track proceedings for "honest" bankruptcies;<sup>68</sup>
- (2) providing a reasonable "time to discharge,"<sup>69</sup> which should have a limit of three years for an honest entrepreneur;
- (3) setting forth homogeneous deadlines a debtor must meet to file for insolvency proceedings, taking into account that the length of such timeframe may adversely affect debtor's ability to solve financial difficulties or undermine the efficiency of proceedings for creditors;<sup>70</sup>
- (4) securing the right of creditors to commence insolvency proceedings against debtors;<sup>71</sup>
- (5) laying down specific rules for filing and verifying claims to reduce uncertainties, ensure equal treatment among creditors, and enhance transparency and efficiency of the process;<sup>72</sup> and
- (6) promoting restructuring plans as a solution to the crisis.<sup>73</sup>

Finally, the European Commission proposed the next steps in order to achieve the above-mentioned goals, including modernization of Regulation 1346 and the

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64. *Id.*

65. *Id.* at 3.

66. *Id.* at 6.

67. *Id.* at 5–8.

68. *Id.* at 5–6. According to the Commission, an "honest" debtor has failed with no obvious personal faults and has acted "above-board" in its conduct giving rise to the indebtedness, contrary to a "dishonest" debtor, whose failure is mainly due to or aided by fraudulent or irresponsible acts. *Id.* at 5.

69. *Id.* at 6.

70. *Id.*

71. *Id.* at 7.

72. *Id.*

73. *Id.* at 7–8.

identification of the most effective ways to solve the problems due to disparities between national insolvency laws.<sup>74</sup>

#### 4. THE RECAST REGULATION ON INSOLVENCY PROCEEDINGS: REGULATION (EC) NO. 2015/848

In March 2012, the Commission launched a public consultation, seeking views on the future of European insolvency law and, in particular, on possible revisions to Regulation 1346.<sup>75</sup> Notably, EU institutions acknowledged that “[t]he activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law,<sup>76</sup> and Regulation 1346 no longer represented an efficient and adequate tool to face the new challenges brought by a changed economic landscape.<sup>77</sup>

More than a decade since the enactment of Regulation 1346, commentators and operators reported a number of issues relating to its application.<sup>78</sup> The main issues relating to Regulation 1346 were, in particular:

- Non-application of Regulation 1346 to pre-insolvency proceedings, i.e., proceedings aimed at preventing and avoiding bankruptcy declarations of the debtor, represented by the so-called “hybrid proceedings” with debtor-in-possession.<sup>79</sup>
- Practical difficulties encountered in the application of the COMI principle (necessary to determine the main proceedings and jurisdiction) with frequent abuses and forum shopping.<sup>80</sup>
- Insolvency administrators’ lack of control of the main proceedings on the assets located in other Member States where secondary proceedings are opened, making sales of the whole business more difficult.<sup>81</sup>

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74. *Id.* at 8–9.

75. *Consultation on the Future of European Insolvency Law*, EUR. COMMISSION: CIV. JUST.—NEWSROOM (June 21, 2012), [http://ec.europa.eu/justice/newsroom/civil/opinion/120326\\_en.htm](http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm).

76. Regulation 2015/848, recital 4, 2015 O.J. (L 141) 19, 58.

77. *Id.* recital 1.

78. *See generally* BURKHARD HESS ET AL., EXTERNAL EVALUATION OF REGULATION NO. 1346/2000/EC ON INSOLVENCY PROC. (2011), [http://ec.europa.eu/justice/civil/files/evaluation\\_insolvency\\_en.pdf](http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf).

79. *Id.* at 37–38.

80. *See generally id.* at 323–24, 327–28, 334.

81. *Id.* at 273–74.

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- Absence of any disclosure and public obligations with respect to open and pending insolvency proceedings, with negative consequences for creditors filing their proofs of claims.<sup>82</sup>
- Absence of an EU, as well as a national, insolvency registry accessible by any interested party.<sup>83</sup>
- Absence of specific rules concerning group insolvency.<sup>84</sup>
- Absence of specific rules for coordination with insolvency proceedings opened outside the EU.<sup>85</sup>

In that context, the European Parliament has established a legal framework that provides better freedom, security, and justice for more efficient and effective cross-border insolvency proceedings.<sup>86</sup> On May 20, 2015, after extensive discussions among the European Commission, European Parliament, and the Council of the European Union, the European Parliament approved the revised European Regulation on insolvency proceedings, Regulation (EU) 2015/848 (“Regulation 848”), repealing former Regulation 1346.<sup>87</sup>

The main features of Regulation 848 include:<sup>88</sup>

- (i) *Broader scope; rules extended to “pre-insolvency” or “hybrid proceedings.”*

Regulation 848 does not contemplate only wind-up proceedings, but extends to pre-insolvency proceedings to promote the rescue of economically viable but distressed businesses.<sup>89</sup> Other types of proceedings include public proceedings; interim proceedings (a temporary stay to allow negotiations with creditors); and adjustment of debt, reorganization, or liquidation (including where the debtor

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82. *Id.* at 33.

83. *Id.* at 375–77.

84. *Id.* at 221, 223–24.

85. *Id.* at 46.

86. Regulation 2015/848, *supra* note 76, recitals 2–4, at 19.

87. *Id.* art. 91–92, at 59. Regulation 848 will apply only to insolvency proceedings opened after June 26, 2017 (with certain exceptions specified in Article 92). *Id.* art. 84, at 56. Until then, Regulation 1346 continues to apply. *See id.*

88. *See generally* PAUL HASTINGS LLP, STAY CURRENT: NEW EU REGULATION ON INSOLVENCY PROCEEDINGS (June 2015), <http://www.paulhastings.com/docs/default-source/PDFs/stay-current-new-eu-regulation-on-insolvency-proceedings.pdf>.

89. *Id.* at 2.

maintains possession, but under the control or supervision by a court or the appointed insolvency practitioner).<sup>90</sup>

(ii) *New rules on secondary proceedings.*

Secondary proceedings can be opened in a Member State other than the one where the debtor's COMI is located, provided the debtor has an "establishment" in that jurisdiction.<sup>91</sup> Establishment is defined as any place of operations where a debtor carries out or has carried out—in the 3-month period prior to the request to open main insolvency proceedings—a non-transitory economic activity with human means and assets.<sup>92</sup>

Regulation 848 limits the need to open secondary proceedings through the introduction of "synthetic" or "virtual" secondary proceedings, where a main proceedings practitioner provides that the distribution and priority rights of local creditors of other Member States will be treated as if secondary proceedings had been opened.<sup>93</sup> An insolvency practitioner may request that a competent court postpone or refuse to open secondary proceedings if such are not essential to protect local creditors' interests.<sup>94</sup> Such an undertaking must be submitted and approved by known local creditors, according to rules that apply to restructuring plan adoption under the law of the Member State where secondary insolvency proceedings could have been opened.<sup>95</sup> The undertaking will be subject to any other requirements relating to form and approval of the Member State where main insolvency proceedings were opened.<sup>96</sup> In addition, Regulation 848 provides for enhanced and expanded duties of communication and cooperation between insolvency practitioners in main proceedings and those in secondary proceedings.<sup>97</sup>

(iii) *The creation of an EU-wide system of web-based insolvency registers.*

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90. *Id.*

91. *Id.* at 3.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 4.

97. *Id.*

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The Regulation introduces a new instrument in order to improve access to information for creditors, any interested party, and courts,<sup>98</sup> and prevents the opening of parallel insolvency proceedings by creating a central European database<sup>99</sup> that is linked with a national electronically searchable database.<sup>100</sup> Notably, certain essential information must be published immediately after the opening of the relevant proceedings, including:

- a. date of the opening of insolvency proceedings;
- b. relevant court;
- c. type of insolvency proceedings;
- d. whether the proceedings are main or secondary proceedings;
- e. debtor's name, its registered office, and number;
- f. name and contact details of the insolvency practitioner appointed in the proceedings, if any; and
- g. time limit for lodging claims, if applicable, or a reference to the criteria for calculating that time limit.<sup>101</sup>

Said information must be furnished to any concerned Member State free of charge via the central European database.<sup>102</sup>

Furthermore, Article 86 of the Regulation demands Member States to provide a short description of their national legislation and procedures relating to insolvency (to be updated on a regular basis).<sup>103</sup>

Finally, the Regulation provides for an obligation of cooperation and exchange of information between Member States' courts and between the procedural coordinators, i.e., between both primary and secondary procedures and among procedures of different companies in the same

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98. Regulation 2015/848, *supra* note 76, recital 76, at 28.

99. *Id.* art. 25, at 38; *id.* recital 76, at 28. The provisions relating to the European central database will be applicable beginning on June 26, 2019. *Id.* art. 25, at 38; *id.* art. 92, at 59.

100. *Id.* art. 24, at 37; *id.* recital 76, at 28. The provisions relating to the national insolvency registers will be applicable beginning on June 26, 2018. *Id.* art. 92, at 59.

101. *Id.* art. 24, at 37.

102. *Id.* art. 27(1), at 38.

103. *Id.* art. 86, at 58. This specific Regulation 848 provision will be applicable beginning on June 26, 2016. *Id.* art. 92, at 59.

industrial group.<sup>104</sup> The Regulation expressly states that coordination between different Member States' courts may relate to coordinator appointment, the exchange of information, the management of assets involved in the proceedings and the hearings, and the approval of protocols.<sup>105</sup>

(iv) *Standardization of the procedure for filing and lodging claims.*

Regulation 848 introduces a standardized procedure to file and lodge claims within insolvency proceedings.<sup>106</sup> In particular, Regulation 848 aims to create a European standard claim form to file proof of claims in any Member State.<sup>107</sup> The European Commission will create this standard claim form, which must include specific information, including the foreign creditor's name, contact details, bank details, the amount of the claim, and possible interest claimed.<sup>108</sup> The form should also specify the interest rate, the period of calculation, and the capitalized amount of interest.<sup>109</sup>

Consequently, when a cross-border insolvency proceeding (whether main or secondary) is opened under Regulation 848, all creditors must provide the insolvency practitioners with the same essential information in order to get a clear view of the liabilities of the debtor.<sup>110</sup>

(v) *Group Insolvency Proceedings.*

Regulation 848 has introduced specific procedural rules on the coordination of the insolvency proceedings among a group of companies.<sup>111</sup> Regulation 1346 did not contain any provision on groups of companies, but issues on cross-border insolvency typically arise in the context of companies belonging to a same group and located in different countries across Europe.<sup>112</sup> Therefore, it is reasonable to believe that

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104. *Id.* art. 58, at 48.

105. *Id.* art. 57, at 48.

106. *Id.* art. 55, at 46–47.

107. *Id.* art. 55(1), at 46.

108. *Id.* art. 55(2), at 47.

109. *Id.* art. 55(2), at 47.

110. *Id.* arts. 53, 55, at 46–47.

111. *Id.* arts. 61–70, at 49–52.

112. See generally Council Regulation 1346/2000, *supra* note 33 (silent as to group proceedings). See also PAUL HASTINGS, *supra* note 88, at 1 (“The main features of . . . Regulation [848] are . . . the introduction of new

Regulation 848's new provisions on group insolvency proceedings constitute an important innovation and will likely become the backbone of cross-border insolvency proceedings.<sup>113</sup>

When two or more members of a group of companies are subject to insolvency proceedings in different Member States, Regulation 848 sets out certain communication obligations with the goal of enabling a "proper cooperation between the actors."<sup>114</sup> Such coordination and cooperation should occur at different levels: between insolvency practitioners,<sup>115</sup> between the courts involved, and between insolvency practitioners and courts.<sup>116</sup>

Insolvency practitioners have certain prerogatives, including the right to be heard in any insolvency proceedings opened for a group company, the right to request a stay of any measure related to the realization of assets in other group insolvency proceedings, and the right to apply for the opening of "group coordination proceedings."<sup>117</sup>

While Regulation 848 does not introduce a common jurisdiction for the insolvency of a group of companies, it lays down a complex mechanism for the coordination of the various proceedings intended to facilitate communication and efficiency between processes in different Member States.<sup>118</sup> However, it offers no exceptions to the general principle that each insolvent company be treated independently pursuant to the substantive law of its COMI.<sup>119</sup>

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procedures with the aim of facilitating cross-border coordination and cooperation between multiple insolvency proceedings in different Member States relating to members of the same group of companies.").

113. See PAUL HASTINGS, *supra* note 88, at 6 ("Regulation [848] introduces procedural rules on the coordination of the insolvency proceedings of members of a group of companies . . . . This concept forms the largest part of the provisions of group insolvency proceedings since it will likely become the backbone of cross-border insolvency proceedings.").

114. Regulation 2015/848, *supra* note 76, recital 52, at 25.

115. *Id.* art. 56, at 47–48. (122.1: *Id.* art. 57, at 48).

116. *Id.* art. 58, at 48.

117. PAUL HASTINGS, *supra* note 88, at 6.

118. See Regulation 2015/848, *supra* note 76, ch. V, at 47–54.

119. *Id.* recital 66, at 26.

The procedural rules for the group coordination proceedings provide that:

- an insolvency practitioner of a group company member may submit group coordination proceedings to a competent court having jurisdiction over the insolvency proceedings of a group member;<sup>120</sup>
- the request shall contain the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to whom should be appointed as group coordinator, and an outline of the estimated costs of the coordination;<sup>121</sup>
- the court receiving a request to open group coordination proceedings shall immediately give notice to other insolvency practitioners appointed in relation to the group members about the request and the proposed coordinator;<sup>122</sup> and
- each insolvency practitioner can either accept the proposal, or object to (1) its inclusion within group coordination proceedings—in which case his/her appointed insolvency proceeding does not take part in group coordination proceedings, save by subsequent opt-in right under Article 69 of Regulation 848;<sup>123</sup> or (2) the appointment of the person proposed as group coordinator—in which case the court may refrain from appointing the proposed person and invite the objecting insolvency practitioner to submit an alternative proposal.<sup>124</sup>

If the court has decided that opening group coordination proceedings is appropriate to facilitate the effective administration of the concerned group cross-border insolvency proceedings, it will appoint the group coordinator and decide on the outline of the coordination.<sup>125</sup>

(vi) *Preventing forum shopping.*

The Regulation has introduced new presumptions for the identification of the COMI, but without providing a clear and specific definition of

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120. *Id.* art. 61(1), at 49.

121. *Id.* art. 61(3), at 50.

122. *Id.*

123. *Id.* art. 64(1)(a), at 50.

124. *Id.* art. 64(1)(b), at 50.

125. *Id.* art. 68(1), at 51.

same.<sup>126</sup> Such presumptions need to be distinguished based on the status of the relevant debtor:

- a. when the relevant debtor is a company or a legal person—the place of the registered office is presumed to be its COMI in the absence of proof to the contrary,<sup>127</sup> and the presumption will only apply if the registered office has not been moved to another Member State within the three-month period preceding the filing of the petition for the relevant insolvency proceedings;<sup>128</sup> and
- b. when the relevant debtor is an individual exercising an independent business or profession—the principal place of business is also presumed to be its COMI in the absence of proof to the contrary,<sup>129</sup> and the presumption will only apply if the individual’s principal place of business has not been moved to another Member State within the three-month period preceding the petition for the relevant insolvency proceedings.<sup>130</sup>

The new presumption, particularly the changes to the principal place of business made in the three months preceding the insolvency proceedings opening, is meant to prevent abusive forum shopping or COMI relocation, in which assets or judicial proceedings are transferred from one Member State to another in order to obtain a more favorable legal position to the detriment of creditors.<sup>131</sup> Presumptions as to COMI are refutable and the relevant court will carefully assess whether a debtor’s COMI is genuinely located in a Member State and specify the grounds on which the jurisdiction of the court is based.<sup>132</sup> Where the circumstances give rise to doubts regarding the court’s jurisdiction, the court should ask the debtor to supply additional evidence to support his assertions and give creditors an opportunity to present their views.<sup>133</sup>

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126. *Id.* art. 3, at 31–32; *see generally id.* art. 2, at 29–31 (which defines key terms of art in the Regulation but is silent on “centre of main interests”).

127. *Id.* art. 3, at 31.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* recitals 29–30, at 22.

132. *Id.* recital 30, at 22; *id.* art. 4, at 32.

133. *Id.* recital 32, at 22.

## 5. THE MARCH 12, 2014 RECOMMENDATION

On March 12, 2014, the Commission issued “Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency,” (the “Recommendation”) with the aim to provide a coherent framework for national insolvency rules.<sup>134</sup> This tasked Member States to facilitate the restructuring of businesses at an early stage, avoiding lengthy and costly procedures for the liquidation of the debtor company.<sup>135</sup> The Recommendation also provided for alternative out-of-court restructuring procedures; granted automatic stays to debtors who want to adopt a restructuring plan; and reduced the negative effects of bankruptcy by providing discharge rules.<sup>136</sup> In the Commission’s view, such changes should ultimately promote entrepreneurship, investment, and employment, and reduce obstacles impeding the smooth functioning of the internal market.<sup>137</sup>

In particular, the Recommendation asks Member States to modernize their national insolvency laws, taking into account certain critical and indispensable principles and minimum standards:

(i) *Preventive Restructuring and Debtor-in-Possession.*

The Commission observed that in many cases, the restructuring process starts too late, when the chance for the entrepreneur to efficiently reorganize its business tends to decrease considerably.<sup>138</sup> The reasons for such delayed filings have been partly because certain Member States only offer inefficient restructuring tools, which are mainly used in the context of formal insolvency proceedings.<sup>139</sup> Also, in many Member States, the

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134. *Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency*, COM (2014) 1500 final (Mar. 12, 2014) [hereinafter *Recommendation of 12.3.2014*], [http://ec.europa.eu/justice/civil/files/c\\_2014\\_1500\\_en.pdf](http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf); European Commission Press Release IP/14/254, *Insolvency: Commission Recommends New Approach to Rescue Businesses and Give Honest Entrepreneurs a Second Chance*, at 2 (Mar. 12, 2014), [http://europa.eu/rapid/press-release\\_IP-14-254\\_en.htm](http://europa.eu/rapid/press-release_IP-14-254_en.htm).

135. European Commission Press Release IP/14/254, *supra* note 134, at 2.

136. *Id.*

137. *Recommendation of 12.3.2014*, *supra* note 134, at 5.

138. *See Recommendation of 12.3.2014*, *supra* note 134, at 2–3 (indicating that business restructuring in European countries is either available only at a late stage, or not effective enough in those countries where restructuring is possible at an earlier stage, and therefore it is necessary to encourage efficiency in national insolvency rules in order to lower the cost of restructuring); *see also Commission Staff Working Document: Impact Assessment Accompanying the Document Commission Recommendation on a New Approach to Business Failure and Insolvency*, SWD (2014) 61 final, at 2 (Mar. 12, 2014) [hereinafter *Impact Assessment*], [http://ec.europa.eu/justice/civil/files/swd\\_2014\\_61\\_en.pdf](http://ec.europa.eu/justice/civil/files/swd_2014_61_en.pdf) (“[m]any European restructuring frameworks are still inflexible, costly, and value destructive”).

139. *See Recommendation of 12.3.2014*, *supra* note 134, at 2 (noting that in some Member States businesses are able to restructure only at a late stage and in formal insolvency proceedings, while in other Member States, restructuring is possible at an earlier stage, but hampered by formalities).

opening of formal insolvency proceedings automatically triggers the replacement of the debtor with an insolvency official for the management of the company during the restructuring process.<sup>140</sup> The Commission also considered such old-fashioned restructuring mechanisms as the primary cause for the high costs typically associated with the reorganization process and relevant inefficiency.<sup>141</sup> Therefore, a key point is to have restructuring frameworks that enable debtors to address the crisis at an early stage in order to prevent insolvency and preserve the continuation of the business.

In this regard, the Recommendation encourages Member States to adopt consistent legal frameworks that allow debtors to restructure their business as soon the likelihood of insolvency is apparent.<sup>142</sup> In addition, debtors should remain in possession of their business and maintain control over the day-to-day operations, so-called “debtor-in-possession.”<sup>143</sup>

The Commission further recommends that the restructuring procedure not be lengthy and costly and, to that extent, Member States should consider introducing lighter and more flexible out-of-court proceedings.<sup>144</sup> The role and involvement of the court, in fact, should be limited and aimed mainly at safeguarding the rights of creditors and other interested parties affected by the debtor’s proposed restructuring plan.<sup>145</sup>

(ii) *Automatic Stay.*

The Commission recognizes the stay of individual enforcement actions and suspension of insolvency proceedings as a key-factor to enable the preparation and negotiation of a restructuring plan by the debtor.<sup>146</sup> The Recommendation suggests that debtors have the right to obtain from a competent court a temporary stay of third parties’ individual enforcement actions, including unsecured and secured creditors, which

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140. Sergei A. Davydenko & Julian R. Franks, *Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the U.K.*, 63 J. FIN. 565, 602–06 (2008) (observing that the insolvency official replaces or heavily influences the business’s management in insolvency proceedings in U.K., France, or Germany).

141. *See Impact Assessment*, *supra* note 138, at 2.

142. *Recommendation of 12.3.2014*, *supra* note 134, at 6.

143. *Id.*

144. *Id.*

145. *Id.* at 6–7.

146. *Id.* at 4.

may otherwise jeopardize the whole restructuring process and the prospects of a restructuring plan.<sup>147</sup> In particular, the Commission proposes that the stay be granted in all circumstances where creditors, who represent a significant amount of the claims likely to be affected by the debtors' proposed restructuring plan, support the negotiations on the adoption of such restructuring plan.<sup>148</sup>

In order to be effective, the Commission recommends that the stay be extended and applicable to the obligation of the debtor to file for insolvency under the given circumstances.<sup>149</sup> Insolvency petitions filed by creditors should also be suspended for the duration of the stay.<sup>150</sup> Performance of pending contracts, however, should not be affected by the stay.<sup>151</sup>

The Recommendation tries to find a fair balance between the interests of debtors versus creditors in pursuing their rights. The duration of the stay should be determined on the basis of the complexity of the proposed restructuring plan, and should not exceed four months, subject to possible renewals.<sup>152</sup> In any case, a stay should not exceed 12 months in total duration, provided that when the stay is no longer necessary to facilitate the adoption of a restructuring plan, the stay should be lifted.<sup>153</sup>

(iii) *Negotiation and Preparation of the Restructuring Plan.*

Granting of the stay is a remedy primarily intended to give the debtor a breathing spell to prepare and negotiate the reorganization of its business.<sup>154</sup> Adoption of a restructuring plan is considered by the Commission as a key factor that increases the prospects of successful restructuring, and ultimately rescues viable businesses.<sup>155</sup> To further

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147. *Id.* at 7.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 7.

152. *Id.*

153. *Id.*

154. *Impact Assessment*, *supra* note 138, at 10, n. 25 (citing JOSE M. GARRIDO, WORLD BANK, OUT-OF-COURT DEBT RESTRUCTURING 48 (2012), <http://documents.worldbank.org/curated/en/2012/01/15615171/out-of-court-debt-restructuring> (explaining that a stay on creditor actions can provide the debtor with a limited period for negotiation with the creditor; otherwise, when a creditor uses enforcement action against a debtor, it usually means the end of negotiations)).

155. *Recommendation of 12.3.2014*, *supra* note 134, at 8.

facilitate the restructuring and ensure a fair balance of the various stakeholders' interests, the Recommendation suggests the non-mandatory appointment of a mediator in the event the court believes it could pave the way for successful negotiations of the restructuring plan.<sup>156</sup> The appointment of a supervisor should also be contemplated, whenever the court deems it necessary, to supervise the negotiation process and safeguard the interests of all parties interested in the implementation of the restructuring plan.<sup>157</sup>

The Commission encourages Member States to set specific rules concerning the minimum requirements of restructuring plans.<sup>158</sup> First, it is essential to have a clear and complete identification of the creditors affected by the plan.<sup>159</sup> Second, the plan should clearly indicate the treatment of each category or class of debts and the position taken by affected creditors on the restructuring plan.<sup>160</sup> The Commission recommends that creditors with different interests be treated in separate classes and, at a minimum, secured and unsecured creditors should be separate classes.<sup>161</sup> Furthermore, the restructuring plan should specify terms and conditions of new financing, if any, as well as the plan's potential to prevent insolvency of the debtor and ensure the viability of the business.<sup>162</sup>

(iv) *Adoption of the Restructuring Plan by the Majority of Creditors.*

The Recommendation specifies that restructuring plans should be adopted if approved by the creditors holding the majority of the claims in each class according to the specific rules set down by national laws.<sup>163</sup> In case of more than two classes of creditors, the courts of the Member States should confirm restructuring plans supported by a majority of those creditor classes, weighing their respective claims.<sup>164</sup> This would allow the courts to cram-down dissenting creditors, provided that all interested creditors have been effectively allowed to participate in the

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156. *Id.* at 6.

157. *Id.* at 7.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 8.

162. *Id.* at 8–9.

163. *Id.* at 8.

164. *Id.*

voting process and have received no less than what they would reasonably be expected to receive in the absence of restructuring (in a liquidation scenario).<sup>165</sup>

Thus, the Commission recommends that creditors be allowed to vote irrespective of their location.<sup>166</sup> To that extent, national law requiring a formal voting process should also provide for the possibility of voting by long distance communication “such as registered letter or secure electronic technologies.”<sup>167</sup>

(v) *Court confirmation of the restructuring plan.*

To ensure legal certainty and safeguard creditor interest, especially in the presence of dissenting creditors and possible cram-down mechanisms, or where new financing is considered, the restructuring plan should be confirmed by a court as binding upon each affected creditor.<sup>168</sup> While Member States should ensure that courts can confirm plans with expediency and written procedure, certain fundamental conditions, to be clearly established by national laws, should be met, including:

- a. conditions which ensure the protection of legitimate interests of all creditors involved;<sup>169</sup>
- b. effective notification of the restructuring plan to all creditors likely to be affected by it;<sup>170</sup>
- c. dissenting creditors whose claims and rights are impaired under the plan should receive a treatment that is not worse than what they would receive in the absence of the restructuring (i.e., under a liquidation scenario);<sup>171</sup> and

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165. *Id.* Article 20 of the Recommendation also provides the possibility to confirm restructuring plans “adopted by certain creditors or certain types or classes of creditors,” provided other non-participating creditors are not adversely affected. *Id.*

166. *Id.*

167. *Id.*

168. *Recommendation of 12.3.2014, supra* note 134, at 8.

169. *Id.*

170. *Id.*

171. *Id.*

d. the new financing provided under the restructuring plan is instrumental to implementation of the plan and does not unfairly prejudice the interests of dissenting creditors.<sup>172</sup>

The Recommendation suggests that courts should reject restructuring plans which clearly do not have any prospect of preventing the debtor insolvency and ensuring business viability.<sup>173</sup>

Last, the Commission recommends that all creditors affected by the restructuring plan should be notified of the plan's content, and given the right to oppose adoption and appeal against its confirmation by the court.<sup>174</sup> However, in the interest of the creditors supporting the plan, the appeal against the confirmation should not suspend the implementation of the restructuring plan.<sup>175</sup>

(vi) *Protection of New Financing*

Based on recent experience, especially with United States Chapter 11 bankruptcy proceedings, the Commission has acknowledged the chance of a debtor accessing new financing as a key element for successful restructurings.<sup>176</sup> To that aim, it is essential to grant adequate protections to new financing providers and remove the possible obstacles and risks connected to such new financings.<sup>177</sup> The Recommendation exhorts Member States to enact specific protections for new financing, including new loans, selling of certain assets by the debtor, and debt-equity swaps, pursuant to restructuring plans confirmed by a court.<sup>178</sup> In particular, new financing should be sheltered from any risk of being declared void, voidable, or unenforceable as an act detrimental to general creditors and financing providers, and should be exempt from civil and criminal liability relating to the restructuring process.<sup>179</sup> However, no exemptions

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172. *Id.*

173. *Id.* at 8–9.

174. *Id.* at 9.

175. *Id.*

176. *Id.*; D.J. BAKER ET AL., AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012-2014 FINAL REPORT AND RECOMMENDATIONS 74–75 (2014), <https://abiworld.app.box.com/s/vvircv5xv83aav14dp4h>.

177. *Recommendation of 12.3.2014*, *supra* note 134, at 9.

178. *Id.*

179. *Id.*

should be given where fraud is subsequently established in relation to the new financing.<sup>180</sup>

(vii) *Discharge*

The Recommendation expressly states that “the negative effects of bankruptcy on entrepreneurs should be limited in order to give them a second chance.”<sup>181</sup> Debtors who have undergone insolvency proceedings should be fully discharged of their debts no later than three years after the opening of the proceedings in cases of asset liquidation or on the date which repayment began in cases where the restructuring plan provides for creditor repayment.<sup>182</sup>

On expiry of the discharge period, debtors should be discharged of their debts without the need to re-apply to a court.<sup>183</sup> In any event, the Commission recommends that Member States set forth specific rules for the purpose of discouraging debtors who have acted dishonestly, in bad faith, or who do not adhere to a repayment plan or any other legal obligation in the creditors’ interests.<sup>184</sup>

## 6. STATUS OF IMPLEMENTATION OF THE RECOMMENDATION

On September 30, 2015, the Directorate-General Justice and Consumers of the European Commission (the “Directorate-General”) published a document reporting the evaluation of the implementation of the Recommendation in the Member States.<sup>185</sup> Despite the lack of feedback from four Member States,<sup>186</sup> the Directorate-General concluded that amongst the Member States who responded,

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180. *Id.*

181. *Id.*

182. *Id.* However, the Commission maintains “[a] full discharge after a short period of time would not be appropriate in all circumstances.” *Id.*

183. *Id.* “Member States may exclude specific categories of debt, such as those rising out of tortious liability, from the rule of full discharge.” *Id.* at 10.

184. *Id.* Moreover, Member States should “safeguard the livelihood of the entrepreneur and his family by allowing the entrepreneur to keep certain assets.” *Id.*

185. See generally Directorate-General Justice & Consumers of the European Commission, *Evaluation of the Implementation of the Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency* (Sept. 30, 2015) [hereinafter Directorate-General], [http://ec.europa.eu/justice/civil/files/evaluation\\_recommendation\\_final.pdf](http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf).

186. *Id.* at 1 n.3 (Cyprus, Denmark, Ireland, and Malta).

several already largely comply with the Recommendation.<sup>187</sup> Those who do not comply have not launched any reforms as of September 30, 2015.<sup>188</sup>

The Directorate-General also observed that the Recommendation had not completely reached its main target—facilitating the rescue of businesses in financial difficulty and giving a second chance to honest debtors—because a significant number of Member States had only partially implemented its provisions.<sup>189</sup> The Directorate-General further pointed out that such differences in the implementation of the Recommendation ultimately resulted in continuing legal uncertainty and additional costs for investors in assessing their risks.<sup>190</sup> Thus, certain barriers to efficient restructuring of viable companies in the EU, including cross-border enterprise groups, still remain.<sup>191</sup>

## 7. CONCLUSION

Both Regulation 848 and the Recommendation, which signal the new approach of EU Institutions toward business failures and insolvency proceedings, certainly represent a significant step forward in the development of the EU insolvency legislation. Such reforms effectuate wider harmonization of insolvency proceedings across the various Member States for the benefit of all stakeholders and possible investors irrespective of their location.<sup>192</sup> It is interesting to note that most of the principles and standards of the Recommendation are based on Chapter 11 bankruptcy proceedings in the United States,<sup>193</sup> which are probably by far the strongest and most well developed business reorganization schemes in the world.<sup>194</sup> Although the initiatives of the EU in this direction are largely laudable, there is still a long way to go before the prospective objectives are successfully attained, especially considering the specific characteristics of the European Union, where each Member State maintains its sovereignty and a certain degree of discretion in its implementation of national laws.<sup>195</sup>

The main objective of the European Institutions, on one hand, is to foster the creation of a homogenous legal framework for business restructurings across the various Member States.<sup>196</sup> On the other hand, the underlying target seems to be even

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187. *Id.* at 5.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Recommendation of 12.3.2014*, *supra* note 134, at 2–3.

193. Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 4, 40 (2005).

194. D.J. BAKER, *supra* note 176, at 8.

195. Directorate-General, *supra* note 185, at 2.

196. *Recommendation of 12.3.2014*, *supra* note 134, at 5.

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broader and more ambitious; it strives to promote a common and uniform legal, economic, and financial environment between the European Union and the United States.<sup>197</sup> If this is true, however, it is unclear why neither Regulation 848 nor the Recommendation have contemplated specific rules for coordination and cooperation between EU insolvency proceedings and non-EU insolvency proceedings, in particular, Chapter 11 bankruptcy proceedings in the United States.

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197. Jonathan Hill, Member of the European Comm'n, The Transatlantic Relationship in Financial Services: A Force for Positive Change 4 (Feb. 25, 2015), [http://europa.eu/rapid/press-release\\_SPEECH-15-4505\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4505_en.htm).