THE UK OPTS IN TO EUROPE: WORKING WITH JOHNNY FOREIGNER

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Introduction

1. This paper supports the talk which the authors will deliver on Wednesday 12 June 2013 at the Guildhall Chambers @ the Watershed Insolvency Seminar 2013. At a broad level, the focus of the talk will be on cross-border insolvency. More specifically, we are aiming to provide an update on the ongoing process of reform of Council Regulation (EC) No 1346/2000 on insolvency proceedings (which we shall refer to as the Regulation in this paper). In addition, we also aim to provide some analysis and practical examples in relation to those parts of the Regulation which deal with the interplay between different sets of national proceedings opened in respect of the same person or entity.

The Reform of the Regulation: the UK opts in (again)

2. The Regulation came into force in the Member States of the European Union (except Denmark) on 31 May 2002. As is well known by all who work within the field of insolvency, the Regulation is a key instrument which contains rules that assist in determining questions of jurisdiction in relation to insolvent entities, which resolves conflicts of laws between insolvency systems, and which mandates co-operation and communication between officeholders appointed in different proceedings in respect of the same entity.

3. Pursuant to Article 46 of the Regulation, the European Commission was required to submit a report on the Regulation to the European Parliament and various other bodies by no later than 1 June 2012, which is the 10-year anniversary of the coming into force of the Regulation. That article also provides for the report to be accompanied by a proposal for the adaption of the Regulation.

4. In compliance with Article 46, the following steps were undertaken by the Commission in relation to the Regulation in advance of 1 June 2012:

    4.1 A web-based consultation which was live between March and June 2012. Responses were invited from small and large businesses, self-employed individuals, insolvency practitioners, judicial authorities, public authorities, creditors, academics and the general public. The consultation attracted 134 replies from a range of bodies and Member States. (The UK accounted for 21% of the replies).

    4.2 A number of impact assessments and comparative legal studies were commissioned and obtained in 2012.

5. On 12 December 2012, the European Commission presented its report to the European Parliament and the Council and the European Economic and Social Committee. In broad outline, the report concluded that:

    5.1 At a high level of generality, the Regulation functions in a sound and satisfactory manner. It has, overall, improved the coordination of insolvency cases in respect of businesses which operated in several Member States. There was, however, scope for improvement. To that end, the Commission has proposed a revised version of the Regulation.

    5.2 The emphasis of the new European rules on cross-border insolvency will be to ensure that viable businesses have a second chance and to safeguard employment, and to switch the focus of the rules from liquidation to rescue and recovery. The aim is to create a business-friendly environment and to support the restructuring of businesses which are in difficulty.

    5.3 The Commission's Vice-President, Viviane Reding, who is also the EU's Justice Commissioner described the aim of the amended regulation as follows:

> "Our current insolvency rules need updating to make it easier for viable businesses in financial difficulties to keep afloat rather than liquidating. 1.7 million jobs are lost to insolvencies every year - We want to give honest companies and the people they employ a second chance."

6. She also made the following important statements in a speech dated 16 May 2013:

> "Businesses are essential to creating prosperity and jobs. But setting one up – and keeping it going – is tough, especially in today's economic climate. This is why I tabled last December a modernisation of insolvency rules in the EU, as part of our "Justice for Growth" agenda.
>
> Take a look at the figures: half of all businesses do not survive the first 5 years of their existence. An average of 200,000 firms go bust in the EU each year, resulting in direct job losses of 1.7 million every year. A quarter of these bankruptcies have a cross-border element.
>
> And faced with these figures, I asked myself the question - are the European rules that manage cross-border business insolvencies since 2000, capable of responding to the challenge that businesses now face?"

7. Before concluding as follows:

> "The revision has a positive economic impact, especially on the security of investment, the functioning of the single market and entrepreneurship in general. The new rules will help viable businesses to survive and promote a culture of the "second chance". The revised rules will increase efficiency, fairness and transparency of cross-border insolvency proceedings.
>
> Finally, and this is a point I'd like to emphasize, the revised rules will further strengthen mutual trust. Mutual trust between Member States' judicial authorities, between individual liquidators, and between liquidators and courts."

8. The proposed amended insolvency Regulation aims to introduce changes in the following areas:

   8.1 The scope of application of the Regulation. The Commission envisages that the Regulation will be extended to include hybrid and pre-insolvency proceedings.

   8.2 The concept of COMI will be clarified by the introduction of revised language as well as clearer rules which will apply to insolvency proceedings concerning individuals.

   8.3 There will be new rules which will address the publicity connected to insolvency proceedings. For example, the decisions opening and closing insolvency proceedings will need to be published in a public electronic pan-European register which will be searchable online.

   8.4 Standardised forms for giving notice of proceedings and for the lodging of claims by creditors will be introduced.

9. On 15 January 2013, the European Parliament referred the proposed revised Regulation to its Legal Affairs Committee for the purposes of obtaining a report on the Regulation. Mr Klaus-Heiner Lehne was appointed as the *rapporteur* on 18 December 2012. Both the Civil Liberties, Justice and Home Affairs committee and the Economic and Monetary Affairs committee have declined the possibility of giving an opinion on the proposed regulation. The proposed amended

Regulation was due to be considered at a meeting of the Legal Affairs committed held on 20 February 2013, but had to be postponed to a later date. It was eventually considered at a meeting which took place on 24 April 2013. The UK Insolvency Services expects the Legal Affairs Committee to report during the course of the summer. The indicative date given by the European Parliament for the 1st / single reading of the proposed revision to the Regulation is 10 December 2013.

10. As a result of Title V of Part 3 of the Treaty on the Functioning of the European Union, it was necessary for the UK government to decide whether to opt in to the proposed amended Regulation within 3 months of the revised Regulations' publication; i.e. by 10 April 2013. In order to reach a determination as to whether the UK should opt in, the Insolvency Service issued a call for evidence on 7 February 2013, with a very short closing date for submissions of evidence of 25 February 2013. The Insolvency Service has not yet published a response to the call for evidence.

11. The proposed revised Regulation was debated on 4 March 2013 by the House of Commons European Committee (C), under the chairmanship of Miss Anne McIntosh. Miss Joe Swinson, the Insolvency Minister addressed that Committee and made the following remarks:

> "… The proposed regulation will modernise the existing regulation on insolvency proceedings, following the European Commission's recent evaluation. As hon. Members will know, Europe has changed considerably since the regulation came into force in 2002, when the EU consisted of only 15 member states….
>
> "… Modernisation of the regulation on insolvency proceedings is required to ensure that it reflects current needs. The EU now has 27 member states, which will increase to 28 later this year. It has a population of 500 million people and 21 million companies. The Commission reports that 1.7 million jobs are lost from 200,000 firms going bust in the EU each year. The benefits of having an insolvency regime that helps to save viable but distressed businesses are therefore significant…"
>
> "… The Government have consulted widely with stakeholders, and they have expressed to us the view that fundamental change is not needed because the regulation has worked reasonably well in facilitating the efficient handling of cross-border insolvencies in the EU, and radical change could undermine the existing insolvency framework…."
>
> "… Responses from stakeholders have been universally supportive of the proposals and of the UK opting in. In particular, it was suggested that if the regulation did not apply to the UK, that could make the UK a less attractive place to do business. Businesses with cross-border interests might relocate to other member states so that any insolvency proceedings would be universally recognised across the EU…"
>
> "… The UK insolvency regime is well regarded internationally. It is ranked in the top 10 by the World Bank for the speed of procedures and the amounts returned to creditors—above that of Germany, France and Italy, as well as the US. We should be proud of that and be willing to share best practice with our colleagues in other EU states…."
>
> "…but the scheme of arrangement is not included, and we know that UK stakeholders would not be in favour of that…"

12. Furthermore, on 15 April 2013, Joe Swinson, the Insolvency Minister, confirmed in a written ministerial statement that the UK would opt-in to the Regulation. The Minister made the following statements:

> "… The decision to opt-in was unanimously supported by stakeholders who responded to a call for evidence during February 2013. I intend to publish the responses received later today…
>
> "… I believe the proposed amendments to the Insolvency Regulation will benefit UK businesses affected by insolvency in the EU. The proposals support business rescue by expanding the scope of the Regulation to restructuring and pre-insolvency proceedings. Bankruptcy tourism will be tackled through new rules on determining jurisdiction and increased transparency for creditors. In addition, the proposals include new rules on publication of insolvency information via free online registers across the EU, in line with our Digital by Default strategy…"

13. As a result of having opted-in, the UK is now in a position to contribute to and be involved in the ongoing negotiations on the detailed text of the proposed revisions to the Regulation. The authors are aware that the Insolvency Service has a team of individuals who are currently working on the proposal. Indeed, both of the authors have been part of a group of stakeholders (made up of academics, insolvency practitioners and lawyers) who have been working with the Insolvency Service to analyse and comment on the proposed revisions to the Regulation.

14. The text of the proposal to revise the Regulation is substantial; it is easily over 20 pages in length, and envisages modifications to most articles in the Regulation. By way of comparison, the Regulation itself only runs to 18 pages! It is not possible, in this paper, to provide a detailed analysis of <u>all</u> of the proposed changes. Instead, the key changes will be highlighted in the paragraphs which follow.

<u>Forum shopping (bankruptcy tourism)</u>

15. The revisions to the Regulation contain a number of amendments designed to make it harder for entities and individuals to shift their jurisdictional base (known in the Regulation as the Centre of Main Interests or COMI) to a more favourable jurisdiction:

    15.1 A new recital 12(a) will be inserted into the Regulation. Its aim is to impose an obligation on a Court which is required to decide whether to open proceedings to examine *ex officio* whether a debtor's COMI is located within its jurisdiction. The recital provides in terms that, where the circumstances give rise to doubts, the Court should (i) require the debtor to submit additional evidence, and (ii) give the debtor's creditors an opportunity to present their views in relation to jurisdiction.

    15.2 In effect, it is already the practice of the Courts of England and Wales, following the Chief Bankruptcy Registrar's decision in *Eichler* (No 2) (a bankruptcy tourism case) to require, in certain circumstances, the debtor to file additional evidence and / or to give notice to the debtor's creditors. So far as England and Wales is concerned, it follows that this proposed change will not have a substantial impact.

    15.3 The new recital translates into a new Article 3(b) which provides that a court seized of a request to open insolvency proceedings "<u>shall</u>" examine whether it has jurisdiction. In this context, the word "court" is not limited to a court in a traditional sense, but can include an insolvency practitioner. Indeed, Article 3(b)(2) specifically provides for insolvency practitioners to themselves review questions of jurisdiction on being appointed. Moreover, new Article 3(b)(3) gives any interested creditor who has his habitual residence or domicile in another Member State the right to challenge a decision opening main proceedings.

Jurisdiction (COMI / actions closely linked to insolvency proceedings)

16. The proposed revised Regulation will also contain new and improved rules on matters of jurisdiction. That is, both in relation to which Member State has jurisdiction to open proceedings, but also, once proceedings have been opened, which Courts have jurisdiction to hear actions which derive directly from the insolvency proceedings (e.g. avoidance actions). That is the effect of proposed new recital 13(b).

17. It was almost inevitable that the revisions to the Regulation would contain some rules in relation to COMI. As it turns out, the present draft of the amended Regulation contains proposed provisions which do not go much further than codifying the case law established by the CJEU. In particular, the decisions in *Eurofood IFSC [2006] ECR I-3813* and *Interedil Srl,(in liquidation) v Fallimento Interedil Srl, Banca Intesa Gestione Crediti Spa, Case C-396/09* (see new recital 13(a)).

18. The proposed new Article 3(1) of the Regulation retains the same rules as regards corporate COMI as are already contained in the Regulation. So far as an individual's COMI is concerned, they effectively introduce the rules which are contained in the Report on the Convention on Insolvency Proceedings (the predecessor to the Regulation) by Miguel Virgos and Etienne Schmit. That is to say that, for an individual exercising an independent business or professional activity, his or her COMI will be their principal place of business, and for any other individual, their COMI will be their habitual residence.

19. In addition, there is a proposed new Article 3(a) which now provides explicitly for the Courts of the Member States within the territory of which proceedings have been opened to also have jurisdiction "for any action which derives directly from the insolvency proceedings and is closely linked with them". Article 3(a)(2) makes specific provision to avoid the difficulties encountered in the *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud Vilma"*, Case C-213/10 situation where the Courts in two countries declined jurisdiction to hear a transaction avoidance claim because neither Court could be certain of which Court had jurisdiction.

Insolvency Registers

20. One of the simplest changes (but equally one which is likely to be comparatively costly to implement in practice) introduced by the proposed revised Regulation is the creation of an insolvency register in each Member State. The idea behind such a register is to improve the flow of information across European borders about insolvencies in relation to entities which trade in the European marketplace. In principle, the register will be internet-based, and freely searchable (i.e. not unlike the present Companies House Register for England and Wales).

21. Specifically, new Article 20(a) provides that the following information should be available on the said register:

> "(a) the date of the opening of insolvency proceedings;
>
> (b) the court opening insolvency proceedings and the case reference number, if any;
>
> (c) the type of insolvency proceedings opened;
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> (d) the name and address of the debtor;
>
> (e) the name and address of the liquidator appointed in the proceedings, if any;
>
> (f) the time limit for lodging claims;
>
> (g) the decision opening insolvency proceedings;

(h) the decision appointing the liquidator, if different from the decision referred to inpoint (g) of this paragraph;

(i) the date of closing main proceedings"

22. Pursuant to new Article 20(c), it will fall to the Courts of the Member States to ensure that the relevant information is published in the Register. In turn, from a UK perspective, this is likely to require an officeholder to liaise and communicate much more closely with the Courts than is already the case; this is necessarily likely to impose an additional burden on insolvency estates.

23. Within 3 years of the implementation of the revised proposed Regulation, it is envisaged that there will be one point of enquiry, being a centralised European e-Justice portal: see revised Article 20(b).

Working with Johnny Foreigner

Secondary proceedings

24. The Commission tacitly accepts that secondary proceedings under the Regulation are not always helpful in achieving the best possible result from an insolvency situation. The scheme of the revisions to the Regulation is very much axed towards making it harder to open secondary proceedings. For example, proposed new recital 19(a) envisages secondary proceedings only being opened if it is *necessary* to protect the interests of local creditors. The same recital goes on to provide an example of when it would not be necessary to protect local creditors: for instance, where the liquidator in the main proceedings has given assurances that local creditors would be treated (so far as the ranking of their claims is concerned) in the same way as if secondary proceedings had been opened. In England and Wales, that was already the approach adopted by the High Court in the context of administrations under Schedule B1: *Re Collins & Aikman Europe SA* [2006] EWHC 1341 (Ch) [2006] BCC 861 and *Re MG Rover Belux SA/NV* [2007] BCC 446.

25. The key feature of secondary proceedings under the Regulation is that the assets that fall into the secondary estate, essentially those within the Member State where secondary proceedings were opened, are dealt with by the secondary liquidator, but creditors are entitled to claim in all estates Article 32(1) and the secondary liquidator therefore realises his local assets for the benefit of all creditors, not merely those from his own jurisdiction.

26. The Commission, in its report to the European Parliament, notes that:

> "There seems to be only a relatively small number of cases where it was the main liquidator who actually applied for the opening of secondary proceedings. Rather, they were used (and abused) for different reasons, in particular, as a tool for the protection of local interests and as an instrument in jurisdictional conflicts where the opening of secondary proceedings was regarded as the second-best solution to the opening of main proceedings in a specific Member State.

27. The authors' experience is that secondary proceedings opened by the main liquidator are more beneficial to creditors generally than those opened for selfish or hostile reasons. A factor in this conclusion is the enhanced cooperation likely to be experienced (although not invariably) when one European cross-border practitioner seeks the appointment of another.

28. Cooperation and communication is key to the effective working of secondary proceedings, but, as the Commission goes on to report:

> "The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are

confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings."

29. The Commission's Impact Assessment provides a case example:

> "Case example: The liquidation of Alitalia
> By August 2008, the well-known airline Alitalia was heavily insolvent. In September of the same year, extraordinary administration proceedings aiming at reorganising the company were opened in Italy and an administrator was appointed. Since Alitalia's COMI was in Italy, these proceedings were main proceedings for the purposes of the EIR. The administrator found a buyer for the company's assets which, however, took over only those employees indispensable for the operational activity. All other employment contracts were terminated but the administrator reached an agreement with the employees which provided for a payment of an equivalent of 3 months' salary in compensation for the failure to comply with the information and consultation requirements under the Directive on Transfer of Undertakings. The administrator kept one of the company's UK bank accounts with funds sufficient to make the compensation payment to the 46 UK employees. In November 2008, secondary proceedings over the UK branch of Alitalia were opened in the UK. The UK liquidator blocked the distribution of the monies to the UK employees, arguing that under UK law employees had no priority rights and divided the sum among all of Alitalia's UK creditors. This argument was approved by the High Court. As a consequence, the Italian administrator was obliged to pay the UK employees from the funds of the Italian estate to the detriment of other unsecured creditors."

and comments:

> "This shows that the opening of secondary proceedings can jeopardize the efficient administration of cross-border insolvency because the main administrator is no longer in control of assets located in the country where secondary proceedings have been opened."

30. In the authors' opinion it shows nothing of the sort, but rather that the Italian administrator was ill-advised on the consequences of secondary proceedings being opened in England & Wales. In *re Alitalia Linee Aeree Italiane S.p.A.* (in which one of the authors appeared for the English liquidators), Newey J explained that:

> "A winding-up petition was presented on 27 November 2008 by the trustees of the Alitalia Italian Airlines Pension and Assurance Scheme, founded on indebtedness put at £20,631,000. The trustees had informed Professor Fantozzi [the Italian administrator] in a letter dated 5 November that they had resolved to bring secondary insolvency proceedings "with a view to triggering a relevant insolvency event for the purposes of commencing an assessment period under the regulations governing the Pension Protection Fund". A winding-up order was made on the petition on 22 January 2009."

31. What the Italian administrator should have appreciated was that any assets in the English estate at the date of winding-up would fall to be distributed in accordance with English law. If he wished to use some of those assets differently he had more than two months during which he could have distributed them to the English employees, transferred them out of the UK, or made other arrangements.

32. By way of comparison, in Alkor-Venilia GmbH (in liquidation) – where one of the authors is a secondary liquidator – the Italian secondary liquidator has paid preferential creditors, including English employees, from Italian assets. What is unusual is the Italian liquidator simply recognising the priority afforded to certain employee claims under English law. The English estate has insufficient assets to permit a distribution to preferential creditors.

33. In some ways the Alkor-Venilia liquidation is a model of cross-border cooperation, although there have been some challenges in this respect. When the German main proceedings were

opened it was clear to the German liquidator that he had insufficient readily realisable and free assets in the German estate to facilitate his dealing with the continuing operations and hundreds of employees in the UK, France, Spain, Italy and Belgium. His strategy was therefore to appoint secondary liquidators. The case is one of the relatively small number where the secondary proceedings were instigated by the main liquidator.

33.1 Whilst most of the liquidators knew of each other, none had worked together before. With the exception of the Belgian liquidator, who has taken no part in the rest of the cross-border proceedings as there were no realisable assets in the Belgian estate, communication and cooperation has been frequent. Indeed, all the liquidators attended the creditors' meeting in the main proceedings and took the opportunity, chaired by the main liquidator, to agree strategy and the principles of a protocol.

33.2 There was also a subsidiary in The Netherlands, which was subject to separate insolvency proceedings. The main liquidator has experienced a somewhat lesser degree of cooperation from the subsidiary liquidator.

33.3 The current situation in the main and secondary proceedings is that a protocol is being prepared in order to facilitate the agreed distribution mechanism between the estates and various liquidators are cooperating in relation to legal proceedings against the company's management and others.

34. Cooperation between liquidators is only part of the story. The Impact Assessment notes that:

> "There are no similar duties of cooperation between the courts and between insolvency administrators and the courts. As a result, the judge in the main proceedings is not informed of relevant developments in the secondary proceedings before deciding on further actions and vice-versa. Further the judge who exercises control of the activities of the liquidator in the main or secondary proceedings has no means to control the coordination.
>
> "The failure to co-ordinate can result in numerous problems and impacts which reduce the efficiency of proceedings, and increase their length and costs. Ultimately, chances to maximise the value of the assets may be lost. Problems are disagreements over the distribution of assets, difficulties in achieving restructuring plans, and a lack of notice or information about proceedings which prevents creditors from effectively participating in them. . . .
>
> ". . . The requirement that courts cooperate and communicate with each other would entail some additional costs in terms of working time and possible costs of translation. As a specific impact, the requirement to hear the main liquidator before opening secondary proceedings would entail certain costs for the court but these costs are likely to be outbalanced by the guidance the liquidator can give the court in determining whether to open secondary proceedings. About 10% of the 50,000 cross-border insolvencies per year involve establishments and subsidiaries. That means that judges will have additional coordination work for up to 5,000 cases per year (compared with the total of about 200,000 insolvencies per year in the EU). Thus, the number of cases involved is relatively small compared to the total number of insolvency cases, and the costs of additional working time would, moreover, be at least partly offset by savings of working time achieved by a more efficient flow of information which the cooperation between courts would bring about. Costs for translation of documents or other may be borne by the proceedings. Based on average costs of translation of €30 per page, the translation costs can be estimated at between €90 and €300, depending on the length of the court decision to be translated. Additional costs incurred by courts are also likely to be compensated by a decrease of legal dispute resulting from the proposed procedural improvements and the consequent diminution of judicial claims."

35. The result of these concerns and considerations is that the proposals provide for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of

secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved.

36. Specifically, the proposals improve the coordination of main and secondary proceedings by extending the obligation to cooperate (which currently only applies to the liquidators) to the courts involved in the main and secondary proceedings. Consequently, courts will be obliged to cooperate and communicate with each other; moreover, liquidators will have to cooperate and communicate with the court in the other Member State involved in the proceedings. Cooperation between courts will improve the coordination of main and secondary proceedings. It can notably be crucial to ensure a successful restructuring, e.g. concerning the approval of a protocol setting out a rescue plan.

37. These concepts are encapsulated in a new Recital 20:

> "(20) Main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the liquidator should be able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings. In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law."

38. In relation to cooperation in main and secondary proceedings, the proposal is for a replacement to Article 31 and the addition of Articles 31a and 31b:

> *Article 31*
> Cooperation and communication between liquidators
> 1. The liquidator in the main proceedings and the liquidators in the secondary proceedings shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. Such cooperation may take the form of agreements or protocols.
>
> 2. In particular, the liquidators shall:
>
> (a) immediately communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;
>
> (b) explore the possibility of restructuring the debtor and, where such possibility exists, coordinate the elaboration and implementation of a restructuring plan;
>
> (c) coordinate the administration of the realisation or use of the debtor's assets and affairs; the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.
>
> *Article 31a*
> Cooperation and communication between courts

1. In order to facilitate the coordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.

2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. Cooperation may be implemented by any appropriate means, including

(a) communication of information by any means considered appropriate by the court;

(b) coordination of the administration and supervision of the debtor's assets and affairs;

(c) coordination of the conduct of hearings,

(d) coordination in the approval of protocols.

Article 31b
Cooperation and communication between liquidators and courts
1. In order to facilitate the coordination of main and secondary insolvency proceedings opened with respect to the same debtor,

(a) a liquidator in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings and

(b) a liquidator in secondary or territorial insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings is pending or which has opened such proceedings,

2. The cooperation referred to in paragraph 1 shall be implemented by any appropriate means including the means set out in Article 31a (3) to the extent these are not incompatible with the rules applicable to each of the proceedings.

39. Re-examining the example of Alkor-Venilia GmbH (in liquidation) outlined in paragraph 32 above, what difference would there be if the proposed amendments had applied to it?

32.1 Given the existing extent of cooperation, there is little more that could be done. It seems unlikely that more requirements would generate cooperation from the Belgian liquidator if there were still no assets in that estate.

32.2 The possibility of restructuring the debtor was explored anyway, even to the extent of exploring mechanisms for achieving and appropriate restructuring through the winding-up proceedings in each of the secondary estates. In the UK the initial secondary proceedings were administration proceedings, although the order provided that the administrator could not fulfil the first statutory objective of rescuing the company as a going concern (in order to be clear that it was a winding-up proceeding).

32.3 There has not been a great deal of activity in any of the proceedings that might have been facilitated by cooperation between the courts, although, given the closer involvement of civil law courts in insolvency proceedings, there may well be procedural matters in some of the non-UK proceedings that might be facilitated.

32.4 The attendance of the secondary liquidators at the creditors' meeting in the main proceedings – which was a court procedure – illustrates the ability of the existing regulation, when approached constructively and flexibly by cooperating professionals, to achieve the level of cooperation anticipated in the proposals.

32.5 None of this suggests that the proposals in relation to cooperation and communication in secondary proceedings are unnecessary. On the contrary, most instances hitherto of main and secondary proceedings appear to have been less cooperative and potentially less successful.

Groups of Companies

40. Proposals for the Regulation to address group cross-border insolvency have been keenly awaited in some quarters, yet have proved to be controversial. Some Member States are continuing to want more consideration of alternative mechanisms, such as the parent company liquidator dealing with the affairs of all the insolvent subsidiaries. However, at the time of writing the expectation is for the Commission's proposals to go forward in their current form, with groups of companies being dealt with through additional obligations on courts and liquidators to cooperate and communicate

41. The Commission's report to the European parliament explained that:

> "Although a large number of cross-border insolvencies involve group of companies, the Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group. The basic premise of the current Regulation is that insolvency proceedings relate to a single legal entity and that, in principle, separate proceedings must be opened for each individual member of the group. There is no compulsory coordination of the independent proceedings opened for a parent company and its subsidiaries with a view of facilitating the reorganization of these companies or – where this is not possible – to coordinate their liquidation. Neither the liquidators nor the courts involved in the different proceedings concerning members of the same group of companies are under a duty to cooperate and communicate. While liquidators may cooperate on a voluntary basis, judges are, in many Member States, prevented from cooperating with each other in the absence of a legal basis expressly authorizing them to do so. . . .
>
> ". . . Smoother cooperation between liquidators in different Member States should aid the rescue of the companies and maximise the value of their assets."

42. The proposals explain that they create a specific legal framework to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach which underlies the current Insolvency Regulation. The proposals introduce an obligation to coordinate insolvency proceedings relating to different members of the same group of companies by obliging the liquidators and the courts involved to cooperate with each other in a similar way as this is proposed in the context of main and secondary proceedings. Such cooperation could take different forms depending on the circumstances of the case. Liquidators should notably exchange relevant information and cooperate in the elaboration of a rescue or reorganisation plan where this is appropriate. The possibility to cooperate by way of protocols is explicitly mentioned in order to acknowledge the practical importance of these instruments and further promote their use. Courts should cooperate, in particular, by exchanging information, coordinating, where appropriate, the appointment of liquidators which can cooperate with each other, and approving protocols put before them by the liquidators.

43. In addition, the proposals give each liquidator standing in the proceedings concerning another member of the same group. In particular, the liquidator has a right to be heard in these other proceedings, to request a stay of the other proceedings and to propose a reorganisation plan in a way which would enable the respective creditors' committee or court to take a decision on it. The liquidator also has the right to attend the meeting of creditors. These procedural tools enable the liquidator which has the biggest interest in the successful restructuring of all companies concerned to officially submit his reorganisation plan in the proceedings concerning

a group member, even if the liquidator in these proceedings is unwilling to cooperate or is opposed to the plan.

44. In providing for the coordination of different proceedings relating to members of the same group, the proposals do not intend to prevent the existing practice in relation to highly integrated groups of companies to determine that the centre of main interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction.

45. Accordingly, there are two new recitals:

> (20a) This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. In addition, a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law.
>
> (20b) The introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same liquidator in all proceedings concerned.

and four new Articles concerning cooperation and communication:

> *Article 42a*
> Duty to cooperate and communicate information between liquidators
> 1. Where insolvency proceedings relate to two or more members of a group of companies, a liquidator appointed in proceedings concerning a member of the group shall cooperate with any liquidator appointed in proceedings concerning another member of the same group to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interests. That cooperation may take the form of agreements or protocols.
>
> 2. In the exercise of the cooperation referred to in paragraph 1, the liquidators shall
>
> (a) immediately communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;
>
> (b) explore the possibilities for restructuring the group and, where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated restructuring plan;
>
> (c) coordinate the administration and supervision of the affairs of the group members subject to insolvency proceedings;
>
> The liquidators may agree to grant additional powers to the liquidator appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings.
>
> *Article 42b*
> Communication and cooperation between courts

1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open proceedings concerning a member of the group is pending or which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.

2. The courts referred to in paragraph 1 may communicate directly with each other, or to request information or assistance directly from each other.

3. Cooperation shall take place by any appropriate means, including

(a) communication of information by any means considered appropriate by the court provided that such communication shall be free of charge and respect the procedural rights of the parties to the proceedings and the confidentiality of information;

(b) coordination of the administration and supervision of the assets and affairs of the members of the group;

(c) coordination of the conduct of hearings;

(d) coordination in the approval of protocols.

Article 42c
Cooperation and communication between liquidators and courts
A liquidator appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the proceedings and is not incompatible with the rules applicable to them. In particular, the liquidator may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed.

Article 42d
Powers of the liquidators and stay of proceedings

1. A liquidator appointed in insolvency proceedings opened with respect to a member of a group of companies shall have the right

(a) to be heard and to participate, in particular by attending creditors' meetings, in any of the proceedings opened with respect to any other member of the same group;

(b) to request a stay of the proceedings opened with respect to any other member of the same group;

(c) to propose a rescue plan, a composition or a comparable measure for all or some members of the group for which insolvency proceedings have been opened and to introduce it into any of the proceedings opened with respect to another member of the same group in accordance with law applicable to those proceedings; and

(d) to request any additional procedural measures under the law referred to in point c) which may be necessary to promote rescue, including the conversion of proceedings.

2. The court having opened proceedings referred to in point b) of paragraph 1 shall stay the proceedings in whole or in part if it is proven that such a stay would be to the

benefit of the creditors in these proceedings. Such a stay may be ordered for up to three months and may be continued or renewed for the same period. The court ordering the stay may require the liquidator to take any suitable measure to guarantee the interests of the creditors in the proceedings.

Stefan Ramel, Guildhall Chambers
Chris Laughton, Mercer & Hole
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