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The cross-border insolvency: european and transnational provisions

Luciano M. Quattrocchio-Federica Antonella Vincent

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1. Introduction

The financial and economic crisis that occurred in the past years inevitably undermined the ability of businesses operating in the western economies to create wealth for their stakeholders. The result was a long period of worldwide recession that caused the increase of the number of insolvent companies forced to file for bankruptcy because unable to solve their financial difficulties. In that context, what influenced the relevance of cross-border insolvency was that many companies going bankrupt were multinational companies: that was due to the fact that business operates beyond national borders and when companies fail, assets and creditors are likely to be located in different jurisdictions.¹ Consequently, the relevance of cross-

¹ BEBCHUK L.A., GUZMAN A.T., (1999) *Economic Analysis of Transnational Bankruptcies*, *An*, 42 J.L. & Econ. 775: 775.

border insolvency has become a paramount matter upon which many States have focused.

Nevertheless, not only multinational companies fail. The amount of private individuals that go bankrupt in the European Member States has also increased. Such numbers led to a deep reorganization of the insolvency law both at each Member State level and at the EU level. What is more, it is the bankruptcy law to be the most subject to economic and financial changes that cyclically occur to our economic system. It means that we cannot understand its legal provisions without deeply understand the historical context in which a law is issued. And also, the subsequent judicial interpretation at which insolvency law has always been subject to depends on economic and political justification.²

However, there are many reasons causing the entrepreneur to go bankrupt. Going bankrupt, indeed, may be a matter of well-balanced equilibrium between adversity, mismanagement and dishonest behaviour: an improper management of assets, debts and credits leaves the business susceptible of financial difficulties whereas mismanagement deals with improper managerial choices such as over-borrowing, too many employees, inadequate control of costs and financial resources, imprudent acquisitions and investments. Then, adversity beyond the control of businesses can be a further hurdle: the uncontrolled increase of interest rates, inflation and financial crisis may finally destroy a company.³ Certainly, the 2007 subprime mortgage crisis affecting the banking sector played a relevant role in triggering a worldwide recession.

Hence, the nowadays economic, financial and social crisis affecting the western economies has influenced the strategies of the worldwide legislative institutions in properly adapting their legal frameworks to the existing scenarios.⁴

At the European level the process of reorganization of the insolvency regulatory framework started in 2000 with the adoption of the Council Regulation 1346/2000 on insolvency proceedings and in 2012 through the deep analysis of its effectiveness. The need for a restructuring of the European bankruptcy law was based on the ill equipped legal infrastructure of the Union, in so far as

² ARROYO I. et al., (2014), *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 3.

³ WOOD F.R., (2007), *Principles of International Insolvency, The Law and Practise of International Finance Series*, 2nd edition, Sweet and Maxwell, para 1-017.

⁴ ARROYO I. et al., (2014) *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 4.

the insolvency laws were handled nationally and consequently they were not able to properly deal with cases of cross-border insolvency.⁵

2. Regulation 2015/848 of the European Parliament and of the Council on insolvency proceedings

The complex context previously described required the issuance of a new regulation which could extend its scope of application to anyone was the debtor, both a legal entity, natural person and merchant with the purpose of granting them a second chance of recovery. That role is currently played by Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, which repeals previous EC Regulation 1346/2000.

In the international scenario previously explained, it is undeniable the influence of the cross-border insolvency. For this reason, it is paramount that the international institutions guarantee a bankruptcy legislative framework which is in line with the changes of the commercial world and that they provide proper legislative tools to safeguard the interests of creditors and protection of debtors by preventing the mere liquidation of their assets.

Consequently, the European Union moved toward that direction with the approval, on 20th May 2015, of Regulation 2015/848 on insolvency proceedings. This legislative instrument meets the need of implementing a tool to ensure the cooperation among two or more courts involved in cross-border insolvency, as well as the need of cooperation among different national bankruptcy laws. Such a cooperation is necessary in order to reduce the risk that the opening of insolvency proceedings in two countries may not always lead to the same result. E.g. is the case in which the goal pursued by two different national laws may be, in the first situation, the mere liquidation of the entrepreneur's assets and the close of its business while, in the latter case, the willingness of granting a second chance of recovery. Obviously, that circumstance may hinder the cooperation between the courts. What is more, even if supposing the same objective is pursued, provisions and instruments to reach the full cooperation may be differently established by two national insolvency laws.⁶

⁵ BEBCHUK L.A., GUZMAN A.T., (1999) *Economic Analysis of Transnational Bankruptcies*, *An*, 42 J.L. & Econ. 775: 775.

⁶ ARROYO I. et al., (2014), *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 45.

2.1. Objectives and scope of application of EU Regulation 2015/848

The EU Regulation 2015/848 of the European Parliament and of the Council on insolvency proceedings was published on the Official Journal of the European Union No. L.141 on 5th June 2015 and it entered into force on 25th June 2015.⁷ It was meant to repeal CE Regulation 1346/2000 of 29th May 2000 and replace it from 26th June 2017⁸ apart from Articles 86,⁹ 24(1)¹⁰ and 25.¹¹ It is applicable in each Member State without any further action of transposition at national level, it is binding for all Member States apart from Denmark¹² and it prevails over the provisions included in the International Conventions among Member States on insolvency proceedings.¹³

The Regulation does not provide a unique law on insolvency but it is aimed at providing supranational tools in order to coordinate the administration and the recognition of insolvency proceedings in the EU and to foster the cooperation among national insolvency laws and courts involved in cross-border proceedings.

The great novelty introduced by Regulation 2015/848 is the purpose of giving a second chance to businesses that file for bankruptcy: it means not just the liquidation and the dismissal of the debtor's assets by forcing the shut-down of the activity but it means designing the Regulation with a view to grant prospects of recovery to those companies that are temporary in trouble.¹⁴⁻¹⁵ Hence, the Regulation extends its scope of application over those in-

⁷ Data available at <http://eur-lex.europa.eu/>.

⁸ Pursuant to Art. 84(1).

⁹ On “*Information on National and Union Insolvency Law*” which will enter into force on 26th June 2016.

¹⁰ On “*Establishment of Insolvency Registers*” which will enter into force on 26th June 2018.

¹¹ On “*Interconnection of Insolvency Registers*” which will enter into force on 26th June 2019.

¹² In accordance with Articles 1 and 2 of Protocol No. 22 on the position of Denmark, which is annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of the Regulation and is not bound by it or subject to its application.

¹³ However the Regulation does not prevail over the Conventions agreed between EU Member States and third countries.

¹⁴ Such as in the case in which a company is facing non-financial difficulties, unless the difficulties become a serious threat to the entrepreneur's ability to pay its future debts and affect the medium-term liquidity. A non-financial threat may be the loss of a fundamental contract for the business.

¹⁵ SICILIANO R., (2016), *La crisi dell'impresa e la gestione delle procedure d'insolvenza*

solvency proceedings involving a still economically viable debtor which only shows a likelihood of insolvency.¹⁶ The reasoning is to provide a tool for a proper restructuring of the business and leave the entrepreneur to partially control the assets. In addition, Regulation 2015/848 applies to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by extending the payment period granted to the debtor.¹⁷

Pursuant to article 1(1): “*This Regulation shall apply to public collective proceedings, including interim proceedings,*¹⁸ *which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation: a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; b) the assets and the affairs of a debtor are subject to control or supervision by a court; c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors (...)*”. In the last event just envisaged by the Article, the stay of enforcement actions brought by individual creditors against the debtor is allowed with the purpose of giving a second chance of recovery to the entrepreneur. However, in order to authorize the stay, the detrimental feature of the stay is required: it is to say that any action brought by creditors aimed at negatively affecting the negotiations or at hampering the restructuring of the debtor’s business is excluded by the scope of application of the Regulation.¹⁹

Anyway, at the same time, the proceedings must not damage the creditors’ ability to satisfy their claims.

Given the good faith of creditors, the European Insolvency Regulation allows for the participation at insolvency proceedings to all or a main part of creditors that own a portion of the debtor’s outstanding debts. To all the credi-

transfrontaliere secondo il regolamento UE n. 848/2015, available at http://www.eclegal.it/wp-content/uploads/pdf/2016-12-27_crisi-impresa-gestione-procedure-insolvenza-transfrontaliere-secondo-regolamento-ue-n-8482015.pdf.

¹⁶ As established by Art. 1(1) of Regulation 2015/848. It means that are also included cases of pre-insolvency, i.e. proceedings in which the bankruptcy just represents a risk that might occur.

¹⁷ As highlighted in Recital 10 of Regulation 2015/848.

¹⁸ Interim or provisional basis stands for proceedings opened prior to the issuance of an order of the court confirming the continuation of the proceedings on a non-interim basis, as highlighted in Recital 15 of Regulation 2015/848.

¹⁹ See Recital 11 of Regulation 2015/848.

tors not involved in insolvency proceedings remains unchanged the ability of lodging their claims.

Article 1(2) establishes that Regulation 2015/848 does not apply to insurance undertakings,²⁰ credit institutions,²¹ investment firms²² and collective investment undertakings. It also excludes by the scope of application proceedings that are based on general company law not designed exclusively for insolvency situations.²³ In addition, the Regulation does not apply to confidential proceedings, i.e. those proceedings that are not subject to publicity and consequently it is not possible for creditors to lodge their claims because they are unaware of the opening of such proceedings, as highlighted in Recital 13.

Lastly, the Regulation does not affect the rules on the recovery of State aid from insolvent companies as interpreted by the case-law of the Court of Justice of the European Union.²⁴

2.1.1. The Principles of Universalism and Territorialism

The principles of Universalism and Territorialism are deeply connected to the Regulations ruling the cross-border insolvency – both prior Regulation 1346/2000 and current Regulation 2015/848 – and, since both principles show advantages and shortcomings, they give rise to an endless debate among scholars and professionals.

The main feature of the principle of Universalism is that one single forum controls the administration and distribution of assets belonging to an international enterprise, wherever those assets are located. In order to determine the proper jurisdiction, within which territory the insolvency proceeding can be opened, the connecting factor is the court of the company's home country.²⁵

²⁰ On insurance undertakings it is applied the Directive 2001/17/EC of the European Parliament and of the Council of 19th May 2001 on the reorganization and winding-up insurance undertakings.

²¹ On credit institutions it is applied the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

²² Given the relevance of the crisis affecting the bank and investment sector the EU Institutions considered worthwhile the implementation of special arrangements and the supervision of national authorities having wide-range powers of intervention.

²³ See Recital 16 of Regulation 2015/848.

²⁴ See Recital 18 of Regulation 2015/848.

²⁵ As company's home country is meant the principal place of business of the enterprise. It is determined by the place where the company was incorporated or locate its assets, headquarter and main activities.

On that court, the debtor's creditors can lodge claims and participate to the distribution of the bankruptcy estate.²⁶

As far as the applicable law is concerned, under the universalist approach is applied the insolvency law of the company's home country (that is the one of the single forum ruling the insolvency proceeding). The home country's law is therefore empowered of governing the administration of the debtor's assets and managing the winding-up of the business, the priority ranking among creditors and actions brought against the insolvent entrepreneur. Hence, it requires the commitment of the States involved in the proceedings to cooperate in order to recognize the supremacy of the home country's bankruptcy law.

According to Universalism, the main insolvency proceeding opened within the jurisdiction of the business' home country empowers the insolvency practitioner of retrieving the debtor's good wherever they are located, to carry out all required actions to satisfy the creditors' claims and guarantee the *par-condicio* among the creditors, notwithstanding their nationality.²⁷

Consequently, the objectives pursued by the principle of Universalism are the following:²⁸

- Equality of treatment among the debtor's creditors;
- Value maximisation of the goods belonging to the insolvent company;
- The management of the proceedings by one single insolvency practitioner in order to enable it of a better and uniform handling of the issue related to the bankruptcy;²⁹

- *Ex-ante* predictability to creditors, with regard to the opening of the proceedings and the lodging of claims, resulting from the certainty about the choose of the home country's insolvency law as applicable regulatory framework.

The principle of Territorialism works in the opposite way of Universalism because it is based on the limitation of the scope of the court's powers solely

²⁶ FRANKEN S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University, 3.

²⁷ ARROYO I. et al., (2014), *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 55.

²⁸ As highlighted in Arroyo I. et al., (2014), *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 55.

²⁹ With this regard the lawmaker is willing to ensure a fair distribution of the debtor's assets in accordance to the principle of *par-condicio creditorum*. To achieve it, it is necessary to entrust the management of the proceedings to only one court or insolvency practitioner; it will guarantee a uniform treatment among all creditors' categories involved in the proceedings.

to assets located within the territory of its jurisdiction.³⁰ It means that it is preferred to subject the cross-border insolvency proceeding to the domestic laws regardless of whether the debtor has a foreign nationality or its centre of main interests is located in a foreign State. Territorialism allows for the recognition of proceedings in each Member State where the company situated its assets, admitting as a connecting factor to that State the exercise of the activity through an establishment. Hence, it fails the relevance of the registered office, the head quarter or the centre of main interests as leading factors in determining the opening of only single main proceedings.³¹

In addition, the dispute between Universalism and Territorialism focuses on three main issues:³²

- A) *Ex-ante* predictability;
- B) Protection of local creditors and local policies;
- C) Maximization of the insolvent company's assets.

A) *Ex ante* predictability to creditors, which implies the knowledge of the applicable law to insolvency proceedings – in so far as it is the one applied by the single forum entitled to open and manage the main proceeding – has the main advantage of reducing the informational costs, i.e. those costs that otherwise creditors would have incurred in order to know what national insolvency law should have been applied.³³ However, it is not possible to affirm that Universalism ensures a higher degree of *ex-ante* predictability more than the Territorialism, in so far as according to scholars – actually – the informational costs cannot be reduced because of the different connecting factors that are simultaneously involved, which makes it more challenging to determine the jurisdiction within which universal proceedings can be initiated.³⁴

B) With regard to the protection of local policies, some scholars contrary to Universalism argue that, by applying the insolvency law of the single forum that manages the proceeding, it would disregard the local policies that are in

³⁰ FRANKEN S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University, 4.

³¹ ARROYO I. et al., (2014), *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 51.

³² As highlighted in FRANKEN S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University.

³³ FRANKEN S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University, 5.

³⁴ *Ibid*, 5-6.

favour of local creditors who, otherwise, would have been protected if insolvency proceedings had been opened in each Member State where the debtor located its assets. This applies in particular with regard to statutory priority rights and security rights.³⁵

What just mentioned, however, is a theoretical argument against Universalism. That is why, in practical cases involving creditors not protected by local policies, such creditors may recoup their losses by charging adjusted competitive rates of return to loans towards debtors.³⁶

C) The value maximization³⁷ of the insolvent company's assets in paramount especially in those proceedings aimed at ensuring a second chance of recovery to still economically viable entrepreneurs. In fact, Universalism faces the issue of the business reorganization and of the assets' sales basing on the business' going concern assumption so that it achieves the bankruptcy's goal of value maximization.

What is more, opponents of Territorialism agree on the fact that it hampers the efficient management of company's assets in so far as it handles the insolvency within national borders and thus it makes it more difficult to insolvency practitioners to get a fair estimate of the assets' value located in foreign countries and to administrate the insolvency proceeding on a fair going concern assumption. Only thanks to the unified management of the debtor's assets it is possible to prevent detrimental actions brought by individual creditors; consequently the involvement of a single court allows to better assemble and sell the debtor's assets.³⁸

Since both principles of Universalism and Territorialism show advantages and shortcomings the European legislator included elements of both systems while drafting CE Regulation 1346/2000 and EU Regulation 2015/848. The result is a form of limited Universalism with the main purpose of safeguarding the interests of local creditors. Indeed, the main feature of a limited Universalism is both the application of the business' home country's law and the ability of each Member State to invoke their own territorial bankruptcy regime. This means that when insolvent businesses file for bankruptcy the limited Univer-

³⁵ *Ibid*, 7.

³⁶ *Ibid*, 17.

³⁷ Some of the concepts expressed in this subparagraph are based on Franken S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University, 10.

³⁸ WESTBROOK J.L., (2000), *A global Solution to Multinational Default*, Michigan Law Review Association, available at <https://papers.ssrn.com/>.

salisms provides for the opening of main proceedings in the States where the company located its centre of main interests,³⁹ as well as the ability to open secondary insolvency proceedings in the Member States where the debtor has an establishment (the effects of the secondary proceedings are limited to the assets located in those Member States and it is required the cooperation between the courts of main and secondary proceedings.)⁴⁰

In conclusion, the implementation of a limited Universalism at the international level was thought to be a kind of compromise due to the unrealistic possibility of adopting both a pure universalist and territorialist approach to practical cases.⁴¹

2.1.2. *EC Regulation 1346/2000 and EU Regulation 2015/848 in comparison. Similarities and differences*

Council Regulation 1346/2000 on insolvency proceedings was adopted on 29th May 2000 and it came into force on 31st May 2002.⁴² The need for the adoption of the Regulation was to provide common provisions on cross-border insolvency to be applied in the Member States of the European Union. The result was a well-balanced legislative tool generally considered to successfully work in simplifying the management of transnational insolvency proceedings.

The Regulation applied to proceedings involving debtors – both legal and natural persons – having assets or creditors located in more than one Member State and it established that more insolvency proceedings could have been initiated: main proceedings had to be opened in the Member State where the debtor had its centre of main interests (usually identified as the place of incorporation or headquarter) whereas secondary proceedings could have been opened in the Member States where the debtor had an establishment (meant to be the country where the debtor conducted its activity on a permanent basis). The effects of the judgement pronounced by the court of main proceedings widened the scope of application of such main proceedings to all the debtor's assets wherever they were located. On the contrary, the effect on the second-

³⁹ FRANKEN S.M., (2004), *Three Principles of Transnational Corporate Bankruptcy Law: a Review*, TILEC Discussion Paper, Vol. 2004-017, Tilburg University, 17-18.

⁴⁰ See Recital 23 of Regulation 2015/848.

⁴¹ ARROYO I. et al., (2014) *Profili storici, Comunitari, Internazionali e di Diritto Comparato*, Volume V, Giappichelli, Torino, 64.

⁴² Art. 47 of Regulation 1346/2000.

ary proceedings encompassed solely the goods located within the territory where such proceedings were opened.⁴³

After ten years since the adoption, in 2012 the European Commission promoted the drawing up of a report on the actual efficiency and effectiveness of the Regulation.⁴⁴ The reasons for the review based on the fact that, despite the Regulation achieved its objectives it still had shortcomings and provisions that could have been improved.⁴⁵⁻⁴⁶ Indeed, as expressed in Recital 1 of Regulation 2015/848 with regard to Regulation 1346/2000: “*The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Since that Regulation has been amended several times and further amendments are to be made, it should be recast in the interest of clarity.*”.

In order to draft the Report, the European Commission announced a public consultation and created study groups in order to identify the deficiencies of Regulation 1346/2000 and to propose potential solutions.⁴⁷ From the analysis, it resulted that what needed to be improved concerned the following areas of interest:⁴⁸

⁴³ See *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012), 2. Available at urlex.europa.eu.

⁴⁴ See the *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, (2012).

⁴⁵ As highlighted in the conclusions of the Report, 17.

⁴⁶ The result of the analysis realized on the efficiency of Regulation 1346/2000 led to the adoption of the new Insolvency Regulation no. 2015/848.

⁴⁷ On 29th March 2012 the Commission launched a public consultation to which one hundred thirty-four among Member States, International Institutions and experts participated. As mentioned in the *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012): p 4, the Commission required the intervention of external studies for the evaluation of the application of the Insolvency Regulation and therefore between April and October 2012 two meetings with national experts took place. The *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, (2012), 3, specifies the subjects involved in the public consultation. They were: a) the Universities of Heidelberg and Vienna which conducted a comparative legal study among twenty-six Member States; b) the consortium of GHK and Milieu; c) a web-based public consultation to which all the Member States participated, a part from Bulgaria and Malta.

⁴⁸ The shortcomings of such areas are described in the *Proposal for a Regulation of the Eu-*

- Scope of application of Regulation 1346/2000;
- Identification of the jurisdiction competent to open main insolvency proceedings;
- Relation between main and secondary proceedings;
- Publication of information related to insolvency proceedings;
- Lodgement of claims;
- Lack of *ad hoc* provisions on group members' coordination.

Scope of application: it was considered worthwhile to extend the scope of application of the forthcoming Regulation 2015/848 also to pre-insolvency proceedings and hybrid proceedings. For this reasons, the first change inserted in Regulation 2015/848 was the amendment of Article 1(1) of previous Regulation 1346/2000. The result is that current Article 1(1) of Regulation 2015/848 enlarges the definition of insolvency proceedings by including those proceedings which do not involve a liquidator but in which the debtor retains the control over parts of its assets under the supervision of a court, i.e. hybrid insolvency proceedings.⁴⁹

The amended Article also inserts a reference to the possibility of opening the so called pre-insolvency proceedings – i.e. proceedings commenced in situations where there is only the likelihood of insolvency⁵⁰ – as well as it enlarges the scope of application of the Regulation also to private individuals and self-employed persons. The European Commission, indeed, argued that the exclusion of such debtors could retain them liable to foreign creditors. In fact, the risk is that even discharging their debts in one Member State, they still could have been considered liable in other Member State and therefore prevented in commencing a new activity in that country.⁵¹

Identification of the jurisdiction competent to open main insolvency proceedings: even if Regulation 1346/2000 established provisions on the identification of the jurisdictions authorized to open main insolvency proceedings, it did not clearly specified how those rules had to be applied. The con-

European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings, (2012), 2-3.

⁴⁹ By doing so, the Regulation 2015/848 reflects the approaches of some Member States that include in their national regimes the so called hybrid insolvency proceedings.

⁵⁰ This represents the commitment of the EU Legislator in allowing for the rescue of still viable businesses.

⁵¹ See *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, (2012), 7.*

cept of the debtor's centre of main interests (C.O.M.I.) was explained too widely and consequently it did not provide for a narrow explanation about its practical application and interpretation.⁵² Hence, in order to fill the gap between what ruled and what perceived by users, the EU Legislator amended Article 3 of Regulation 1346/2000 by providing a more exhaustive definition of centre of main interests. What is more, it was added a new Recital that currently clarifies the case in which it is allowed the rebuttal of the centre of main interests of a legal person.

Relation between main and secondary proceedings: Regulation 1346/2000 allowed for the opening of secondary insolvency proceedings in the Member State in which the insolvent debtor located an establishment.⁵³ The rule for the applicable law to secondary proceedings was to apply the law of the Member State where secondary proceedings were opened (*lex situs*), pursuant to Art. 28 of Regulation 1346/2000. However, such a provision, in the way it was drawn up, allowed for the opening of secondary proceedings to which it could not be extended the power of the insolvency practitioners in the main proceedings. Therefore, the main problem was the risk that main and secondary proceedings might pursue two different objectives, in particular that the secondary proceedings only sought the mere winding-up of the company without granting a second chance of recovery to still economically viable entrepreneurs.⁵⁴ Consequently, the Commission's Report highlighted the need of establishing rules that allow for the cooperation between courts in main and secondary proceedings.⁵⁵

Publication of information related to insolvency proceedings: the absence of a European Insolvency Register at the time of the adoption of Regulation 1346/2000 was deeply criticized.⁵⁶ Therefore Regulation 2015/848 cur-

⁵² See *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012), 3.

⁵³ Recital 27 of Regulation 1346/2000.

⁵⁴ See *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012), 3.

⁵⁵ See *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, (2012), 13.

⁵⁶ In fact, the lack of provision that bound the publication in electronic registers of the decisions taken in insolvency courts was thought to hamper the efficient management of cross-border proceedings. Regulation 1346/2000 already provided for rules (Art. 21) on the publication of insolvency proceedings' related matters. Nevertheless, such provisions based on a voluntary basis depending on the insolvency practitioner's willingness. Consequently potential

rently requires the creation of a European Register (Art. 25) which gathers all the relevant information on cross-border insolvency proceedings and which is accessible by everybody. Besides the European Electronic Registers, the Proposal for the amendment of Regulation 1346/2000 also suggested the establishment of national insolvency registers in which insolvency practitioners and courts are bound to publish information that may be relevant to anybody involved in cross-border insolvency proceedings.⁵⁷

Lodgement of claims: as far as it is concerned, the main shortcoming highlighted by the Commission's Report was that Regulation 1346/2000 only provided for minimum rules, from Art. 39 to 42, to support the creditors' lodgement of their claims. The main problem perceived by users was the lack of specific procedures to follow in order to lodge claims and the consequent increase in the costs that needed to be sustained by creditors in order to translate national application forms for the lodgement of claims into foreign languages, as established by Art. 42.⁵⁸ Hence, it was reasonable to assess that the previous *status quo* dissuaded creditors from lodging claims and it resulted in a hurdle in satisfying their credits.⁵⁹ Therefore, in order to solve this issue, Regulation 2015/848 currently requires the creation of a standard form for the lodgement of claims: it is available in all the official languages of the European Union so that no further translation costs need to be sustained, as highlighted in Recital 64. What is more it has been inserted a detailed clarification at Art. 55 about the procedural framework that creditors may follow to lodge claims.

Lack of ad hoc provisions on group members' coordination: Regulation 1346/2000 lacked of provisions ruling the cross-border insolvency of companies belonging to the same group. Given the internationality of the businesses, it was considered paramount to provide specific provisions in order to manage

creditors might have been excluded from lodging their claims because they were unaware of opened insolvency proceedings.

⁵⁷ See *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012), 5.

⁵⁸ See *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, (2012), 18.

⁵⁹ From the studies commissioned by the European Commission it resulted that the average costs for a creditor to translate the claim form from its national language into foreign languages was about EUR 2000. See *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, (2012), 17.

the bankruptcy of group members. The problem was that previous Regulation 1346/2000 established the separate handling of the insolvency proceedings opened in relation to other group members. This clearly hampered the efficient management of the group's asset and the restructuring of the group.⁶⁰ Therefore, the EU Legislator remedied to such an issue including in Regulation 2015/848 rules on the cooperation⁶¹ among group members' proceedings and provisions on group coordination proceedings, all contained in chapter V of the Regulation.

2.2. The C.O.M.I. as the business' centre of main interests and the opening of main insolvency proceedings

The C.O.M.I., i.e. the business' centre of main interests, has become the guideline in determining what insolvency court is entitled to open main insolvency proceedings.

The definition of centre of main interests is provided by Art. 3(1) of Regulation 2015/848 that states as follows: “(...) *The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. (...) In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. (...) In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary (...).*”.

In Art. 3(1) of Regulation 2015/848 the EU Legislator inserted a clear statements affirming that the centre of main interest has to be interpreted as the place where the debtor's interests and affairs are administrated on a regular basis and which is ascertainable by third parties. Hence, the aforementioned conditions have become the criteria for the identification of the real centre of main interests.

⁶⁰ See *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no.1346/2000 on Insolvency proceedings*, (2012), 3.

⁶¹ In accordance to Regulation 1346/2000 there were no binding requirements that imposed the cooperation and the communication among insolvency practitioners and courts involved in group members' proceedings. Such a cooperation based only on a voluntary basis.

A further aspect upon which focusing is that the presumption that the place of registered office of legal persons coincides with the centre of main interests and it subsists until it is given proof to the contrary.⁶² It means that the competent court, while evaluating the existence of the C.O.M.I. within its jurisdiction, presumes that the centre of main interests corresponds to the place where the business was incorporated. However, it may be possible that such a presumption is overtaken and consequently it is possible to object the fact that the C.O.M.I. is situated in the place of incorporation.⁶³ Hence, the national competent court carefully analyses what third parties think about the real location of the business' centre of main interests; in particular, the court must take into consideration what perceived by creditors and, in the event that the debtor shifted its registered office, the court informs such creditors.⁶⁴ Summarising, according to Recital 30 of Regulation 2015/848, the aforementioned presumption may be rebutted in the event that the business' headquarter is situated in other Member States different from the one in which it was incorporated and if the court has analysed all the ascertainable criteria. The presumption's rebuttal may be applied not only to legal entities but also to individuals that do not exercise an independent business or professional activity; in this case, to the competent court it is sufficient that the major part of the debtor's assets are situated in other Member States from the one where the debtor's habitual residence is located.

If the debtor has just moved the registered office or the habitual residence within a period of 3 months before the request to open insolvency proceedings, such a debtor may be suspected of fraudulent forum shopping with the purpose of falling into a more favourable insolvency regime, according to Recital 31 of Regulation 2015/848. In addition, in the event that the court's territorial competence is in doubt, the debtor should disclose additional evidence to better assess where its real centre of main interests is located.⁶⁵ Consequently, if all aforementioned circumstances occur, the court before which it was requested the opening of the

⁶² Art. 3(1), subparagraph 2 of Regulation 2015/848.

⁶³ On this topic see VELLANI C., *I rapporti tra procedura principale e procedure secondarie nel Reg. CE 1346/2000*, 13-14 and the Judgement of the European Court of Justice of 2nd May 2006 involving *Eurofood IFSC LTD*, case-law C-341/04, available at <http://curia.europa.eu/>, about the clarification on the practical application of Art. 3(1) of Regulation 1346/2000 and about what should be considered as a determining factor for the identification of the centre of main interests in the event that a parent company and its subsidiary located their respective registered offices in different Member States (see the ECJ' Judgement, point 26).

⁶⁴ Recital 28 of Regulation 2015/848.

⁶⁵ Recital 32 of Regulation 2015/848.

main proceedings does not open main insolvency proceedings.⁶⁶

Pursuant to Art. 19 of Regulation 2015/848, once that the judgement opening main insolvency proceedings have been pronounced by the competent court of a Member State it must be recognized in all the other Member States from the moment that it becomes effective in the State of the opening. Furthermore, Art. 20(1) establishes that the judgement opening main proceedings immediately produces the same effects in any other Member State as under the law of the State of the opening of the proceedings.

As far the applicable law is concerned, Art. 7(1) specifies that: “*Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the ‘State of the opening of proceedings’)*”. In addition, Art. 7(2) establishes that the State of the opening of the proceedings is entitled to manage both the opening, the conduct and the closure of such proceedings, in accordance to its national law.

2.3. Secondary insolvency proceedings

Regulation 2015/848, as already explained, allows for the opening of other insolvency proceedings different from the main one: i.e. secondary insolvency proceedings.

Secondary proceedings are established by Art. 3(2) which states that, in case that the debtor’s C.O.M.I. is situated within the territory of a Member State, it is possible to open proceedings in another Member State if the debtor owns an establishment⁶⁷ in that other Member State. The effects of the opening of secondary proceedings affect only the assets located in the territory where such proceedings are opened.

The foremost reasons why the EU Legislator authorises the opening of secondary proceedings is to protect the diversity of interests involved in the insolvency proceedings.⁶⁸

According to previous Regulation 1346/2000 secondary proceedings were mainly aimed at liquidating all the debtor’s assets in order to pay off the debts. On the contrary, through the issuance of Regulation 2015/848, current objec-

⁶⁶ Recital 33 of Regulation 2015/848.

⁶⁷ As establishment is meant, pursuant to Art. 2(10), any place of operation where a debtor runs, or has run in the 3-months period before the request to open main insolvency proceedings, a non-transitory economic activity with human resources and assets.

⁶⁸ Recital 23 of Regulation 2015/848.

tive is to give the entrepreneur a second chance of recovery and protect, at the same time, the interests of creditors, as highlighted in Recital 10.

Besides the protection of local interests and the equal treatment among the debtor's creditors, secondary proceedings may be also opened with the purpose of a better administration of the entrepreneur's estate. For instance, such a goal may be pursued in the event that the debtor's assets are too complex and wide to administer as a unit; or the legal systems of the Member States involved in the bankruptcy are so different that it is necessary the opening of parallel proceedings where the debtor's establishment is located.⁶⁹

The subject empowered to open secondary proceedings is the court of the Member State within whose territory the business' establishment is situated, pursuant to Art. 3(2).

The request for the opening of secondary proceedings may be presented by the insolvency practitioner in the main proceedings⁷⁰ or by any other person in accordance with the national law of the Member State of the opening of secondary proceedings.⁷¹ However, there are specific circumstances in which the opening of secondary proceedings is allowed. First of all, in accordance with Art. 3(3), secondary proceedings may be opened subsequent to the opening of main proceedings. Otherwise, Art. 3(4) establishes that territorial proceedings may be opened prior to the opening of main proceedings and independently from them only whether:

- “(a) *Insolvency proceedings under paragraph 1⁷² cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated*”; or

- “(b) *The opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.*”.

Pursuant to Art. 34, once that main insolvency proceedings have been opened and the debtor has been declared insolvent, the debtor's insolvency is not re-examined in the Member State in which secondary proceedings may be opened.

⁶⁹ Recital 40 of Regulation 2015/848.

⁷⁰ Art. 37(1), letter a.

⁷¹ Art. 37(1), letter b.

⁷² Which refers to main insolvency proceedings.

As far as the applicable law to secondary proceedings is concerned, it is applied the law of the Member State where secondary proceedings are opened (*lex situs*), pursuant to Art. 35. Consequently, the effects of secondary proceedings affect solely the assets located in that Member State.

The Regulation envisages two situations in which the court in charge of opening secondary proceedings may postpone or refuse the opening, at the request of the insolvency practitioner in main proceedings: it occurs in the event that it was given an undertaking in order to avoid secondary insolvency proceedings or a stay of the process of realization of assets was opened.

As far as the refusal to open secondary insolvency proceedings is concerned, it is established by Art. 38(2): it requires that the court seized of a request of opening secondary proceedings shall not open it if it is satisfied that the undertaking given by the insolvency practitioner in the main proceedings protects the general interests of local creditors.

Lastly, it is paramount that a close cooperation among insolvency proceedings is put in place, especially when main and secondary proceedings involve the same debtor; a proper cooperation has to be meant as the exchange of sufficient amount of information among manifold insolvency practitioners and courts.

2.4. The cross-border insolvency of a company belonging to a group

As previously mentioned, a shortcoming of Regulation 1346/2000 was the lack of provisions dealing with the cross-border insolvency of multinational groups.

In such an inefficient regulatory framework, Regulation 2015/848 inserted set of rules on cooperation and communication in Chapter V, Section 1. In particular, Art. 56(1) states that: “*Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate to facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest. That cooperation may take any form, including the conclusion of agreements or protocols.*”. Art. 56(2) specifies what are the practical actions that insolvency practitioners must implement. First of all, as soon as possible, they must communicate to each other any information that might be relevant to the other proceedings. Secondly, they must coordinate and supervise the administration of assets and affairs of the group members involved in the

insolvency proceedings, if such coordination and supervision is allowed. Lastly, they verify the possibility to implement a restructuring plan involving members that are subject to insolvency proceedings and, if such a chance exists, they coordinate the restructuring plan.

The same reasoning is applied in order to impose the cooperation and communication between courts. Hence, Art. 57(1) establishes that the court which has opened the insolvency proceedings involving two or more members of a group of companies must cooperate with any other court before which the request to open proceedings related to another member of the same group of company is pending. In addition, Art. 57(2) provides for a rule that allows courts to communicate directly with each other or request information or assistance directly from each other.

The cooperation among group of companies is also closely connected to the concept of C.O.M.I. In particular, the ECJ's case-law (*Interedil*) have allowed the opening of insolvency proceedings over a subsidiary in the Member State where the holding company located its registered office. It is possible only if specific conditions are met such as that the place of incorporation of the parent company is ascertainable by third parties. The connection between centre of main interests and the rules on group of companies has been remarked by Recital 53. It states the impossibility of the rules on the insolvency proceedings concerning a group to restrict 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 those companies is located in a single Member State.

2.4.1. Group coordination proceedings

The group coordination proceedings are procedures aimed at improving the coordination of the insolvency proceedings opened against different group's members which, just for the fact of being part of the same group, should be handled jointly. For this reason, the main purposes of group coordination proceedings are to facilitate the effective administration of the insolvency proceedings of the group members and to allow for a coordinated restructuring of the group and positively affect creditors. However, first of all, it is relevant to bear in mind that group coordination proceedings have been designed with the purpose of safeguarding the separate legal personality of each group's member.⁷³ Secondly, Regulation 2015/848 does not oblige any court or insolvency practitioner to adopt group coordination proceedings but such a commitment is based

⁷³ Recitals 54.

on a voluntary basis. Therefore, this latter approach may hamper the effective achievement of the Regulation's purpose in the matter of group coordination.

Pursuant to Art. 61 of Regulation 2015/848, group coordination proceedings may be requested by an insolvency practitioner who has been appointed in insolvency proceedings opened in relation to a member of the group; then such a request is submitted to any court which has jurisdiction over the insolvency proceedings of a member of the group, in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed. Furthermore, the insolvency practitioner must provide for additional documents, together with the proposal.

Once that the insolvency practitioner requested the opening of the group coordination, the court before which such request has been submitted informs as soon as possible the other insolvency practitioners appointed in relation to the group's members. The notice⁷⁴ can be given if the conditions for the opening of the group coordination are satisfied. Such conditions imply, first of all, that the opening of the group coordination is considered worthwhile in order to facilitate the effective management of the insolvency proceedings relating to the different group members; secondly the group coordination must not be financially detrimental to none of the creditors of the group members that are expected to participate to the proceedings.

Another aspect to highlight as far as the opening of the group coordination is concerned is that, in the event in which the request for the opening of the group coordination is submitted to more than one competent court in different Member States, any court other than the court firstly seized shall decline jurisdiction in favour of that first court.⁷⁵

After that all the above mentioned requirements and conditions are met, the competent court⁷⁶ finally opens group coordination proceedings pursuant to Art. 68.

In such a complex context, the coordinator plays a relevant role in handling it all. First of all it must provide recommendations to all the insolvency practitioner involved in the insolvency proceedings; secondly, he or she is required

⁷⁴ Sent by registered letter and attested by an acknowledgment of receipt, pursuant to Art. 63(3).

⁷⁵ Art. 62.

⁷⁶ In accordance to Art. 66, the identification of the most appropriate court for the opening of group coordination proceedings is decided by at least two-thirds of all insolvency practitioners appointed in insolvency proceedings related to the group members. What is more, in order to be effective, the choice of the court must be a written joint agreement.

to propose and manage the group coordination plan. The plan is a set of measures to be undertaken in order to face the insolvency of a group member and it bases on a unitary and coordinated conduct of the insolvency proceedings. Hence, the plan is the best way to allow for the restructuring not only of a single group member but of the group as a whole.

Technically speaking, the coordinator has many duties⁷⁷ in coordinating the manifold insolvency practitioners involved in the group coordination proceedings. Some of such duties are to actively attend the creditors' meeting in any of the proceedings opened in relation to a group member, play the role of intermediary between two or more insolvency practitioners of the group members and mediate them, outline the group coordination plan to the authorities to whom he must report – in accordance to the law of his or her Member State – and request a stay of the proceedings initiated in relation to any member of the group.

Nevertheless, bear in mind that the insolvency practitioner is not bound to respect the coordinator's plan in its entirety. In the event that such a situation occurs, the reluctant insolvency practitioner outlines directly to the coordinator and to the competent authorities the reasons why he or she did not apply the recommendations of the coordinator.⁷⁸

3. The UNCITRAL Model Law on cross-border insolvency

3.1. Background and implementation of the Model Law

The Model Law was adopted on 30th May 1997 by the United Nations Commission on International Trade Law (UNCITRAL) by consensus, during its thirtieth session in Vienna occurred for the final negotiations on the draft text.

The preparatory project was commenced in 1995 when UNCITRAL decided to provide States with a legislative tool to be used with the purpose of facilitating the management of insolvency cases in which an insolvent debtor has assets or debts situated in more than one State. The drawing up of the text took two years and UNCITRAL entrusted the Working Group V⁷⁹ on Insolvency Law to prepare the draft of the Model Law.

⁷⁷ Pursuant to Art. 72(2).

⁷⁸ Art. 70(2).

⁷⁹ Working Group V is one of the subsidiary bodies of UNCITRAL specialized in international insolvency.

Eventually, in December 1997 the United Nations' General Assembly endorsed and adopted the final edition of the Model Law.⁸⁰

Comparing the EU Regulation 2015/848 and the UNCITRAL Model Law, it is evident that the European Institutions adopted the Insolvency Regulation 2015/848 in order to provide for a supranational and useful legislative instrument in order to guarantee the cooperation among national insolvency laws and courts involved in cross-border proceedings. However, the scope of application of such a legislative tool encompasses solely the Member States of the Union; it means that the Regulation it is applicable in each Member State without any further action of transposition at national level but it has no legal force among States outside the European Union.

For this reason, in order to grant a supranational instrument that is applicable by the European Member States as well as third countries all around the world, the United Nations Commission on International Trade Law provided a Model Law on Cross-border Insolvency.

Despite of the different territorial scopes of application, both the EU Regulation and the UNCITRAL Model Law pursue similar objectives. Indeed the Model Law does not provide a unique law on insolvency but it is aimed at respecting differences among national insolvency procedures. As a consequence, it provides a framework for cooperation among jurisdictions in so far as it envisages potential solutions to be applied in cases of cross-border insolvency proceedings.⁸¹ Indeed, the UNCITRAL has designed the Model Law with the purpose of encouraging enacting⁸² States to use it by making useful additions and improvements to their national insolvency regimes, without imposing that the Model Law prevails on their national regulatory frameworks.⁸³

The UNCITRAL has also endorsed the issuance, together with the Model Law, of a *Guide to Enactment and Interpretation*⁸⁴ which main objective is to

⁸⁰ UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 12-17, available at <http://www.uncitral.org/>.

⁸¹ See *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*, (2013), para 27, available at <http://www.uncitral.org/>.

⁸² According to the *UNCITRAL Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 3(a), available at <http://www.uncitral.org/>, the term “enacting State” stands for a State that has enacted legislation based on the Model Law. Therefore, unless otherwise provided, that term is used to refer to the State receiving an application under the Model Law.

⁸³ See *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*, (2013), para 26, available at <http://www.uncitral.org/>.

⁸⁴ It is the *UNCITRAL Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), available at <http://www.uncitral.org/>.

provide explanatory information to be used by States in order to adapt their national insolvency regimes to the provisions of the Model Law.

The first edition of the Guide was drafted and issued in 1997 by the Secretariat in order to comply with the request of UNCITRAL for its adoption. Subsequent to its issuance, the Guide has been revised several times during the working sessions of both the Commission and of the Working Group V. The updates were considered worthwhile in order to allow the Model Law to keep pace with the changes and new trends in the field of cross-border insolvency, in particular with regard to the interpretation and usage of the concept of centre of main interests (C.O.M.I.).

The latest adoption and update were released on 18th July 2013.⁸⁵

3.2. *Objectives pursued by the Model Law and scope of application*

As already mentioned, the main purpose of the Model Law is to assist States by providing them with a supranational legislative instrument that enhances cooperation among national insolvency regimes and courts involved in cross-border insolvency proceedings. Indeed, the Model Law is not aimed at erasing national regulatory frameworks but it makes up for the lack of harmonization of rules on cross-border proceedings with an international regulatory framework on insolvency. Anyway, it is likely that States, while adopting legislation based on the Model Law's provisions, modify or amend part of their national insolvency regimes in order to comply with the Model Law. Indeed, the Model Law has a flexible structure and it operates as an integral part of the national existing insolvency regimes.

With regard to the objectives pursued by the Model Law, they are the following:⁸⁶

- Cooperation among courts and competent authorities of enacting States and foreign countries in relation to cross-border insolvency;
- Creation of suitable market conditions in order to boost international trades and investments by ensuring a greater legal certainty;
- Protection of local interests of creditors, debtors and other interested persons through the fair and efficient management of cross-border insolvency proceedings;

⁸⁵ UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 18.

⁸⁶ As highlighted in the preamble of UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014).

- Safeguard of the debtor's estate and maximization of assets' value;
- The commitment in giving a second chance of recovery to still financially viable entrepreneurs in terms of protection of investments and preservation of employment.

Art. 1(1) of the Model Law, as far as the scope of application is concerned, establishes that States apply the Model Law's provisions where: “(a) Assistance is sought in this State⁸⁷ by a foreign court or a foreign representative in connection with a foreign proceeding; or (b) Assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or (c) A foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency].”.

However, pursuant to Art. 1(2), enacting States are free to establish the circumstances in which the Model Law's rules do not apply; in particular the scope of application may not encompass any types of entities that may be subject to special insolvency regimes such as banks and insurance companies.

Nevertheless, the scope of application of the Model Law does not encompass the insolvency of a member of a group of companies. To remedy to such an absence, UNCITRAL issued in 2010 a Guide⁸⁸ for the administration of insolvency proceedings involving members of the same group.

From the territorial point of view, the UNICITRAL Model Law may be enacted by any State around the globe.

Currently forty-three States⁸⁹ worldwide are based on the Model Law; among those countries there are United States of America, Canada, UK, Australia, Mexico and Japan.

A further feature of Model Law is that it has a more flexible structure compared to the structure of a convention; it means that States, when adapting their national regulatory frameworks to the provisions of Model Law, are free to decide how to apply the Model Law's principles and they are allowed to modify or to omit in part its provisions. From a certain point of view, the flex-

⁸⁷ I.e., the State which has adopted legislation based on the Model Law's provisions.

⁸⁸ The guide is the UNCITRAL *Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency*, (2010).

⁸⁹ The counting and the status about legislations based on the model Law is available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

ibility of the Model Law is a good chance for States to properly adapt their national interests to the ideals of UNCITRAL but on the other way around such a flexibility lowers the degree of harmonization of international insolvency regimes and it may undermine the effective achievement of the Model's Law goals. Therefore, States are recommended to modify the Model Law to a minimum.⁹⁰

Although to date the United Nations has opted for the adoption of the Model Law, the UNCITRAL Working Group V, in its meeting held in 2013 in Vienna, proposed to commence the preparatory project for the drawing up of an international convention on insolvency to substitute current Model Law.⁹¹

The need for the international convention is based on the evidence that it has not sufficiently pursued its goals in so far as States, even if they have enacted legislation based on the Model Law, are still reluctant to cooperate with each other. For this reason, a binding convention may be the proper legislative instrument to ensure a higher degree of harmonization. Furthermore, the fact that the Model Law does not provide any provision ruling cross-border insolvency of group members it is an additional proof of the Model Law's failure.

3.3. The four pillars of the Model Law for the administration of cross-border insolvency proceedings

3.3.1. Right of access

Model Law focuses on four areas considered the key areas for the conduct of cross-border insolvency proceedings. Such areas are the right of access, recognition, relief and coordination.⁹²

The right of access⁹³ refers both to the chance of foreign representatives and creditors to access local courts and the authorization of local practitioners to request assistance in foreign proceedings in other countries. Consequently, the main feature of the right of access is its dual value in terms of inbound and outbound assistance.

⁹⁰ UNCITRAL *Model Law on cross-border Insolvency with Guide to Enactment and Interpretation*, (2014), para 19-20.

⁹¹ On this topic please refer to the International Bar Association, (2014), *Executive Summary and Working Papers for International Insolvency Convention Discussion*, available at <http://www.ibanet.org/>.

⁹² UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 24, available at <http://www.uncitral.org/>.

⁹³ *Ibid*, para 25.

First of all, in order to fully grant the right of access, it is paramount to highlight that the Model Law fosters the direct access to local courts by foreign representatives; hence, Art. 9 clearly states that: “*a foreign representative is entitled to apply directly to a court in this State*”. Although it may seem redundant to emphasize the possibility that a foreign representative may directly participate to local insolvency proceedings, that is not the case. Indeed, there are some countries⁹⁴ in which, even if they enacted legislation based on the Model Law, the foreign representative is subject to bureaucratic obstacles and it is prevented to directly apply to local courts. What is more, the lack of provisions promoting such a direct access may hamper the achievement of an efficient cross-border insolvency regulatory framework in so far as it does not encourage international cooperation. The resulting risk is that the foreign representative is not able, at least in the early stages of the insolvency proceeding, to properly safeguard the debtor’s interests against creditors’ individual actions or to prevent that the debtor undertakes fraudulent behaviours in order to be in a more favourable legal position.⁹⁵

Art.11 deals with the application submitted by a foreign representative to commence a proceeding under the law of the enacting State, provided that certain conditions for such an application are met.

In addition, Art. 11 provides that the foreign representative may request the commencement of a proceeding under the law of the enacting State before the recognition of the foreign proceeding. The resulting advantage is the chance of ensuring the safeguard of the debtor’s assets in a short time. Nevertheless, pay attention that the foreign representative shall respect certain conditions for the commencement of the aforementioned proceeding; such conditions are established by the laws of the enacting States.⁹⁶

Pursuant to Art. 12, once that a foreign proceeding has been recognized, the foreign representative is allowed to participate in local proceedings. The Article gives the right to the foreign representative to request the commencement of actions aimed at safeguarding the realization and distribution of the debtor’s assets and the enhancement of international cooperation among courts involved in the proceedings. However, the Article leaves power to the law of the enacting State to rule the practical implementation of such actions.⁹⁷

⁹⁴ Such as Mexico.

⁹⁵ GAGNON H.P., (2006), *Bill C55 and the UNCITRAL Model Law on Cross-border Insolvency: the harmonization of Canadian insolvency legislation*, Faculty of Law, McGill University, Montréal, 64, available at http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1494601612191~114.

⁹⁶ *Ibid*, para 113-114.

⁹⁷ *Ibid*, para 115-116.

With regard to creditors, Art. 13(1) rules the access of foreign creditors to insolvency proceedings under the law of the enacting State. It establishes that foreign creditors are treated equally as local creditors in relation to the right to commence local insolvency proceedings under the law of the enacting State and to participate in such proceedings.

To conclude, as far as outbound assistance is concerned, Art. 5 authorizes a person or a body, identified by the law of the enacting State, to act in a foreign State in behalf of enacting State. Such a person or body is allowed by the law of the enacting State to manage the reorganization or the liquidation of the insolvent business in foreign countries complying, however, with the law of that foreign country. The need for this Article is based on the fact that some jurisdictions do not authorize an insolvency practitioner of the enacting State to act as a foreign representative in foreign countries; consequently, once again, this may hamper the efficient management of cross-border insolvency proceedings and therefore the Model Law is aimed at preventing such a circumstance.

3.3.2. Recognition of foreign proceedings

The recognition of foreign proceeding is the second key area upon which the Model Law focuses. Together with the access to local courts, the recognition of foreign proceedings is aimed at improving international cooperation in cross-border insolvency.

Chapter III of the Model Law, from Arts 15 to 18, establishes provisions for the recognition of foreign proceedings.

First feature to highlight, as already discussed, is the fact that the foreign representative is subject to certain requirement in terms of documental evidences to be submitted to the local court of the enacting State so that such a court might accord recognition to the foreign proceedings. About that, Art. 15(2) establishes what is the additional documentation that shall accompany the application for recognition; some of such documentation is a certified copy which shows the decision about the commencement of the foreign proceeding and the appointment of the foreign representative – in the case that the aforementioned documentation is not available, any other evidence which demonstrates that the foreign proceeding exists and that the foreign representative has been appointed – and a statement that identifies all the foreign proceedings that have been commenced in relation to the same debtor and that are known to the foreign representative.

The purpose of Art. 15(2) is to simplify the process for the recognition of foreign proceedings by establishing few official requirements that the foreign representative is subject to. In support of the purpose of simplifying as much as possible the procedure, the Model Law establishes in Art.

16(2) that such documentation should not be *legalized*⁹⁸⁻⁹⁹.

Bear in mind that Art. 15(3) establishes that the court shall be informed by the foreign representative of any foreign proceeding involving the same debtor. The aim is to increase the court's level of knowledge about the debtor's assets and affairs worldwide and thus be able to grant a more effective relief to that debtor.

Whereas, Art. 16(3) states that: "*in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests*". The relevance of the identification of the debtor's centre of main interests is given by the fact that the enacting State's court is willing to grant a more immediate and automatic relief to the foreign proceeding opened in the country where the C.O.M.I. is located. The Article establishes that the debtor's registered office shall be presumed to be the centre of main interests. Nevertheless, there may be cases in which such a presumption is rebutted because the real debtor's C.O.M.I. does not coincide with its place of registration. In the event that proofs to the contrary are shown, the Model Law grants to take into consideration other elements useful to the identification of the real debtor's centre of main interests. Such elements are the place where the management of the debtor's business takes place and that this location is ascertainable by third parties.

So far it stands to reason assuming that both the Model Law and the EU Insolvency Regulation 2015/848 use the presumption of the centre of main interest with the same meaning but it is not the case. Indeed, as already highlighted, the goal of the Model Law is to simplify and to speed up the process of recognition of foreign proceeding and the presumption of C.O.M.I. is used to that end. The EU Insolvency Regulation, on the contrary, uses the presumption of centre of main interest in order to identify the Member State within which jurisdiction the insolvency proceeding falls and so to determine the applicable law and the subsequent recognition of that proceeding by the remain-

⁹⁸ To be legalized means that the documentation shall be authenticated by a diplomatic of the State where the documentation has been produced and signed. With this regard, the Article establishes: "*the court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized*".

⁹⁹ However, the chance of relaxing any requirement of legalization fails in the event that the enacting State is already a party of an international treaty or a bilateral convention. If such a treaty or convention requires the documentation to be legalized, the Model Law and the treaty are in conflict and thus, pursuant to Art. 3 of the Model Law, the treaty prevails. See UN-CITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 130, available at <http://www.uncitral.org/>.

ing Member States. As a consequence, the request for the recognition of the foreign proceeding may be submitted in different times depending on whether the proceeding applies the Model Law's provisions or the EU Insolvency Regulation's ones.¹⁰⁰

Once that the application for the recognition of foreign proceedings has been submitted, Art. 17 applies to the decision to recognize such proceeding and it identifies what are the requirements that shall be met so that the foreign main proceeding may be recognized.¹⁰¹

In addition, it is paramount to bear in mind that the foreign proceeding shall not be recognized if it is contrary to the public policy¹⁰² of the enacting State.¹⁰³

Then, a foreign proceeding may be recognized as a foreign main proceeding or as a foreign non-main proceeding, depending on whether it takes place respectively in the place where the debtor's centre of main interests is located or in the State where the debtor has an establishment.¹⁰⁴ However, the main consequence of the recognition of the foreign proceeding as main or non-main one is that, depending on whether it is the first or the latter type of proceeding, different levels of reliefs are provided by the enacting State's court, as analysed later on.

3.3.3. Relief effects

The relief is the assistance that the court of the enacting State grants to foreign proceedings with the purpose of fairly handling the cross-border insolvency.

The Model Law envisages three types of relief: discretionary relief that may be granted upon application for recognition of a foreign proceeding (Art. 19), automatic relief upon the recognition of a foreign proceeding (Art. 20) and discretionary relief that may be granted upon the recognition of a foreign proceeding (Art. 21).

Art. 19(1) deals with the pre-recognition effects in so far as it allows the court to grant temporary relief before that the decision recognizing the foreign

¹⁰⁰ *Ibid*, para 141.

¹⁰¹ Such the documentation to be submitted – as previously analysed – and that the application shall be applied to the proper competent court or authority among those specified by Art. 4 of the Model Law.

¹⁰² The public policy exception is ruled by Art. 6 of the Model Law.

¹⁰³ Art. 17(1).

¹⁰⁴ Art. 17(2).

proceeding is taken. The main features of this type of relief is that it is ordered at the discretion of the court and it is aimed at providing an urgent tool to properly protect the debtor's and creditors' interests, in so far as it may be granted immediately after the application for recognition has been submitted.

As far as the scope of application of Art. 19(1) is concerned, it encloses the relief into a few types of actions, such as the stay of the execution against the debtor's assets, the chance to entrust the administration or realization of the debtor's assets located in the enacting State to the foreign representative with the purpose of preserving the asset's value as well as the suspension of the right to transfer or dispose any debtor's asset whether such a right has not been yet suspended in accordance to Art. 20(1)(c).

As previously explained, the relief granted under Art. 19 is on a temporary basis; indeed, unless otherwise provided, its effect cease to exists from the moment that the decision for recognition is decided.¹⁰⁵

Art. 20 deals with the automatic relief that is granted upon the recognition of a foreign main proceeding. First feature to highlight is that the Article refers solely to foreign main proceedings, i.e. those insolvency proceedings commenced in the foreign country where the debtor located the centre of main interests. Secondly, a difference between the relief granted under Art. 19 and the effects of the recognition of a foreign main proceeding under Art. 20 is that the resulting relief of the latter arises automatically. The automatic relief implies that the effects produced by Art. 20(1)¹⁰⁶ are still effective even in the event that the effects produced by such an Article in the foreign State, where the foreign proceeding was commenced, are different from the effects produced in the enacting State. This is due because the effects of the recognition of a foreign main proceeding under Art. 20 produce their own consequences that are independent from the consequences produced in the foreign State. Moreover, the relief granted under Art. 20(1) apply also to interim proceedings.¹⁰⁷

¹⁰⁵ Art. 19(3).

¹⁰⁶ Which establishes that: “Upon recognition of a foreign proceeding that is a foreign main proceeding, (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended”. Bear in mind that subparagraph (a) also refers to individual proceedings; it means that it applies also to those proceedings against the debtor that were commenced by creditors outside the court system.

¹⁰⁷ UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 176, 178 and 179 available at <http://www.uncitral.org/>.

Art. 21 deals with the discretionary relief as it give the possibility to the court to grant any appropriate relief with the purpose of properly protecting the debtor's and the creditors' interests. Such a relief shall be request by the foreign representative and may be granted upon the recognition of the foreign proceeding, no matter if it is a foreign main proceeding or a foreign non-main proceeding. The main difference with the relief under Art. 20 is that relief under Art. 21 does not flow automatically from the decision of recognition but it is at the discretion of the court. Moreover, the difference between relief under Art. 19 and the one under Art. 21 is that, even being both discretionary reliefs, the first one is granted on a temporary basis from the moment the application for the recognition is submitted until the decision about the recognition is taken (unless the court of the enacting State decides to extend such a provisional relief pursuant to Art. 21(1) subparagraph f) which grants the extension of the relief granted under paragraph 1 of Art. 19). On the contrary, the relief under Art. 21 is granted on a permanent basis upon the recognition of a foreign proceeding.

Another difference is that the scope of application of Art. 21 is wider than the scope of application of Art. 19 because Art. 21(1) envisages additional circumstances for the grant of the relief.

To conclude, it should be noted that the relief under Art. 21 may be granted in a foreign main proceeding or in a foreign non-main proceeding. Subparagraph 3 requires that the relief granted in a foreign non-main proceeding relates solely to the assets that are administered in the foreign non-main proceeding. This is due to the fact that the relevance of the foreign non-main proceeding is lower than the one of the foreign main one.¹⁰⁸

3.3.4. Cooperation with foreign courts and with foreign representatives

Chapter IV of the Model Law, from Arts 25 to 27, deals with the cooperation among courts and foreign representatives of two or more countries.

The aims of cross-border cooperation are mainly to administrate insolvency proceedings with an orderly conduct, to adequately safeguard the debtor's assets, the maximisation of their value and the creditors' interests and to guarantee businesses with the most appropriate professional skills. For this reason the Model Law addresses this need in terms of both inbound and outbound cooperation and it fosters cooperation at all the insolvency stages, even prior to the application for recognition. Cooperation may be available towards foreign

¹⁰⁸ UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), para 193, available at <http://www.uncitral.org/>.

main and non-main proceedings or in the event of proceedings commenced in the enacting States in which the court seeks assistance in foreign countries.¹⁰⁹

The best way in order to guarantee inbound and outbound assistance is the direct communication and cooperation among courts. With this regard, Art. 25 deals with the cooperation and the direct communication between a court of the enacting State and foreign courts or foreign representatives. The Article provides a legal tool with the purpose of imposing court to cooperate to the *maximum extent possible*. It also highlights that courts are entitled to directly communicate with each other or with foreign representatives in order to obtain information or assistance. This provision is useful especially in insolvency cases that require urgent measures to be taken and when the first prerogative is to save time.

The same objective of Art. 25 is pursued by Art. 26 which deals with the cooperation and direct communication between persons or bodies who are appointed to manage the debtors' assets¹¹⁰ in enacting States and foreign courts or foreign representatives.

With regard to forms of cooperation, Art. 27 establishes that any means may be appropriate.

4. Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU

4.1. Objectives of the Directive's proposal and scope of application

The proposal for a Directive on *preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU* was drawn up by the European Commission and addressed to the European Parliament and to the Council in 2016.¹¹¹

The proposal highlights the need to draft a Directive that focuses on the relevance of creating a harmonized insolvency regulatory framework within

¹⁰⁹ UNCITRAL *Model Law on cross-border insolvency with Guide to Enactment and Interpretation*, (2014), available at <http://www.uncitral.org/>, para 211-212.

¹¹⁰ Such subjects, usually insolvency practitioners, may cooperate and communicate with foreign courts and foreign representatives within the exercise of their functions and they are subject to the supervision of the court.

¹¹¹ The text of the proposal is available at <http://eur-lex.europa.eu/>.

the whole territory of the European Union. It is no more enough having an Insolvency Regulation aimed at building up bridges among national insolvency proceedings; it is necessary, indeed, to create a strong and interconnected insolvency regime which is more efficient in terms of practical implementation and which may face more efficiently the issue of business restructuring and second chance to entrepreneurs.

The creation of a harmonized insolvency framework has direct consequences on the market of the European Union and on the ability of attracting investors. Indeed, the aforementioned Directive will lead to a higher degree of legal certainty in the field of cross-border insolvency and business restructuring and it will make investors interested in increasing their investments in Europe and in the European businesses.

Consequently, the proposal for the European Directive focuses on three main areas:

- A) Preventive restructuring frameworks;
- B) Second chance to entrepreneurs;
- C) Measures to increase efficiency of restructuring, insolvency and discharge procedures.

A) Art. 2, subparagraph 2, of the Directive's proposal describes "restructuring" as: "*changing the composition, conditions, or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, including share capital, or a combination of those elements, including sales of assets or parts of the business, with the objective of enabling the enterprise to continue in whole or in part*". Therefore, preventive restructuring frameworks refer to procedures or measures that Member States shall grant to those entrepreneurs who are in cases of financial troubles in which there is only the likelihood of insolvency. To that end, the Directive's proposal pursues the objective of binding Member States to create the most favourable circumstances so that above-mentioned debtors may easily have access to proper pre-insolvency procedures and consequently restructure their businesses and debts.¹¹²

The need to look for the implementation of efficient restructuring procedures and measures is demonstrated by statistical data which shows that viable entrepreneurs in financial troubles are almost forced to eventually file for bankruptcy rather than restructure their businesses and restore their viability. This is mainly due to the lack of preventive measures in some Member States

¹¹² Art. 4 of *Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU*.

and, in the case instead that such preventive procedures exist, they are not timely and they do not succeed in preventing insolvency. Consequently, the goal of the Directive is to overcome national differences and to allow the access by cross-border debtors to effective restructuring plans.¹¹³

B) The concept of giving a second chance to honest entrepreneurs is closely connected to debt discharge. Very often it happens that entrepreneurs and businesses are in dire straits; such troubles, that are usually financial difficulties, may not be caused by the entrepreneur's fraudulent behaviours, rather they may be caused by the economic and financial crisis that Europe and the western economies are currently going through. As a consequence, entrepreneurs are no more able to create wealth for themselves and their stakeholder and they run up debts.

The debtor, therefore, is trapped into a damaging situation from which it becomes harder day after day to get out. For this reason, it is paramount that honest debtors are given the chance to restore the viability of their enterprises and prevent bankruptcy. For this reason, one of the most appropriate solutions for insolvent and honest entrepreneurs in order to have a second chance of recovery is to provide them with efficient procedures of debt discharge. Toward this purpose, the objective of the Directive's proposal is to bind Member States to "*ensure that over-indebted entrepreneurs are fully discharged of their debts*", pursuant to Art. 19(1) of the Directive's proposal.

What is more, it is paramount that discharge procedures are promptly adopted; indeed, only a timely intervention is the best solution for the insolvent debtor.

C) The relevance of implementing measures aimed at increasing the efficiency of restructuring, insolvency and discharge procedures is an important objective of the Directive's proposal. Such improving measures shall be established in order to face current and inefficient status quo. Indeed, it has been demonstrated by the European statistical data that insolvency proceedings taking place in the majority of Member States take from two to four years to come to an end, which is actually a too long period of time.

Consequently, the Directive's proposal establishes certain provisions aimed at providing Member States and insolvency practitioners with higher professional skills and knowledge as far as the practical implementation of insolvency, restructuring and discharge measures is concerned. The improvement of

¹¹³ *Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU*, (2016), Strasbourg, 2-3.

the technical skills of aforementioned subjects will have as a direct effect a higher degree of efficiency of the restructuring and discharge procedures.

For instance, the Directive's proposal requires at Arts 24 and 25 that Member States ensure that subjects and authorities with jurisdiction in the areas of restructuring, insolvency and second chance are given appropriate training before complying with jobs they are appointed to.

4.2. Restructuring plans as a way to recover from financial difficulties

The forthcoming Directive is composed of six Titles, five chapters and thirty-six Articles; however, for the herein purposes, the core part is Title II, which concerns preventing restructuring frameworks and it includes 5 chapters. In this Title, provisions on restructuring plans are mostly included in Chapter 3, from Arts 8 to 15.

The Directive allows for the adoption of restructuring plans as a way for the debtor to recover from financial troubles by changing the composition, conditions and structure of assets and liabilities with the purpose of restoring its financial viability. Restructuring plans are fundamental in order to safeguard the continuation of the debtor's activity; therefore, a restructuring plan should be implemented at an early stage, i.e. in that moment in which there are still chances to avoid bankruptcy.

The Directives 'proposal requires the adoption of restructuring plans to be subject to certain strict provisions in terms of documental evidences, voting rights and confirmation by a judicial authority. Consequently, the first main provision is included in Art. 8 which establishes the minimum information to be included in the draft of the plan before it is submitted for confirmation to the judicial or administrative authority. Some of such information is the personal data of both the debtor and the interested parties to which the restructuring plan is addressed to, a valuation which includes the present value of the debtor's business and the causes that led to the debtor's financial difficulties, the terms of the plan and a reasoned statement which certifies the financial viability of the debtor for which the restructuring plan is proposed.

Subsequently to the inclusion of the relevant information, the Directive establishes the rules for the adoption of a restructuring plan.¹¹⁴ In particular, the Directive provides that the plan can be adopted after that any affected creditors, included equity creditors, have voted on its adoption. In addition, the Directive ensures that aforementioned creditors are properly split into separate

¹¹⁴ Those rules are provided by Art. 9 of the Directive.

classes applying the class formation criteria; the aim of such a distinction is to gather claims or interests with similar rights. As far as the rules for the adoption of the restructuring plan is concerned, the Directive establishes that the plan is adopted when the majority in the amount of affected parties' claims or interests is obtained in each class.¹¹⁵

Creditors too may submit the proposal for the restructuring plan, provided that the debtor agrees with the proposal's initiative; in this way, the restructuring plan becomes binding upon all classes of creditors. Indeed, pursuant to Art. 14, the confirmation of the adoption of the restructuring plan by a judicial authority makes the restructuring plan binding upon every party involved in the plan, whereas those creditors not affected by the plan will not be required to comply with the requirements of the restructuring plan.

As just discussed, the confirmation of a restructuring plan is a complex procedure in so far as it involves many different parties that may pursue various objectives. For this reason the adoption of a restructuring plan is subject to requirements, that are provided by Art. 10(1). First of all, it establishes that the restructuring plan becomes binding upon parties only subsequently to the confirmation of a judicial or administrative authority. Nevertheless, such judicial or administrative authority entrusted with the task of confirming the plan is allowed to refuse the confirmation of the plan in the case in which it believes that the financial difficulties of the debtor are so huge that a restructuring plan would be useless in trying to restore the debtor's financial viability.¹¹⁶ Lastly, once that the proposal for confirmation of the plan is submitted, the judicial or administrative authority shall promptly decide on the confirmation, in a timeframe not higher than thirty days.¹¹⁷

It is also paramount to highlight that it is up to Member States to ensure that equity holders may not wittingly and unreasonably jeopardise the adoption of the restructuring plan, and consequently prevent the restore of the debtor's financial viability, in the event that there is only the likelihood of insolvency. In order to prevent that situation, the Directive establishes that Member States shall provide for rules aimed at gathering above-mentioned equity holders into one distinct class to which it is given voting right upon the restructuring plan's adoption.¹¹⁸

¹¹⁵ It is granted, anyhow, the application of Art. 11 on the cross-class cram-down.

¹¹⁶ Art. 10(3).

¹¹⁷ Art. 10(4).

¹¹⁸ Art. 12.

As far as the right of challenging the adoption of the restructuring plan is concerned, Art. 13 establishes that, in the event that such a challenge occurs because of an alleged breach of the best interest of creditors test,¹¹⁹ the judicial or administrative authority shall proceed with the determination of the liquidation value.

What is more, the Directive allows to appeal the decision confirming the restructuring plan.¹²⁰ The appeal shall be submitted to the judicial authority higher than the one which took the decision;¹²¹ however the appeal does not produce the effect of suspending the execution of the restructuring plan. Then, once that the appeal against the decision confirming the plan has been upheld by the judicial authority, as a consequence, the restructuring plan may be called off.

The Directive's proposal seeks to create the most favourable circumstances so that the debtor can benefit from restructuring procedures; therefore, it provides for rules aimed at facilitating the negotiations for restructuring plan, which are inserted in Title II, Chapter 2. First of all, the debtor may retain partial or total power over the administration of its business' assets when the appointment of a practitioner is not necessary for the implementation of the restructuring plan;¹²² in this way there are fewer levels of mediation and the administration of the plan is easier. However, a practitioner in the area of restructuring is appointed in the case in which the debtor benefits from a stay of individual enforcement actions.¹²³ The main objective of a stay is to grant the debtor the best circumstances for the negotiations of the restructuring plan. Pursuant to Art. 6(2) the stay has two main features: it may be ordered in relation to any type of creditors and it may be general¹²⁴ or limited depending on whether it encompasses few

¹¹⁹ Such a test is implemented with the purpose of ensuring that the restructuring procedure does not create disadvantages to any dissenting creditor higher than those disadvantages that this creditor could have suffered in an insolvency proceeding. This test should be done every time that the confirmation of a restructuring plan is pending. On this topic see Recital 27.

¹²⁰ Which is ruled by Art. 15.

¹²¹ On the contrary, in the case in which the decision for the confirmation of the plan was taken by an administrative authority, such a decision shall be appealed before a judicial authority.

¹²² Art. 5(1) and 5(2).

¹²³ Art. 5(3) subparagraph a.

¹²⁴ In case in which the competent authority orders a general stay of individual actions it implies that during the period of the stay the debtor is relieved of the obligation of filing for insolvency, pursuant to Art. 7(1). Nevertheless, in the event that the debtor becomes illiquid and unable of repaying its debts during the period of the stay, the competent authority shall evaluate the ability to reach the agreement on the restructuring plan which should restore the

individual creditors or all creditors.¹²⁵ As far as the maximum duration of a stay is concerned, it cannot be higher than four months;¹²⁶ nevertheless, the judicial or administrative authority may extend it, provided that the extension of the timeframe is necessary for the negotiations of the restructuring plan.¹²⁷ The judicial or administrative authority is also entrusted with the task of lifting the stay in the case that affected creditors do not support anymore the negotiations for the restructuring plan or whether the debtor or the appointed practitioner have requested the suspension. In addition, it is important to highlight that the stay may not be granted by the competent authority if it may be detrimental to an individual creditor or to a class of creditors.¹²⁸

4.3. *The Capital Markets Union (CMU)*

The Capital Markets Union Action Plan is a medium-term project started by the European Commission which is aimed at creating a single market for capitals in the area of the Union by 2019. The plan was published on 30th September 2015 and it has been envisaged with the purpose of encouraging and make it possible the achievement of the Capital Markets Union (CMU), which is one of the key pillars of the Investment Plan for Europe.¹²⁹

debtor's financial viability and consequently decide whether or not to postpone the opening of the insolvency proceeding or to leave the benefit of the stay unchanged, pursuant to Art. 7(3).

¹²⁵ However, pursuant to Art. 6(3) a stay of individual enforcement actions shall not be applied to outstanding claims of workers, provided that such claims are safeguarded by other means implemented by the Member States.

¹²⁶ Art. 6(4).

¹²⁷ Art. 6(5) subparagraph *a*). Anyway the maximum extension cannot exceed twelve months, even if the extension is necessary for the negotiations.

¹²⁸ Art. 6(8) and (9). In accordance to Recital 20, an example in order to evaluate the possibility that the stay is detrimental to creditors is that the competent authority shall evaluate if the stay preserve the overall value of the debtor's estate or assess whether the debtor is acting with a fraudulent behaviour.

¹²⁹ The *Investment Plan for Europe* is a plan launched in 2015 with the objective of boosting the investments within the boundaries of the European Union by removing all the obstacles that somehow may prevent people to invest in the EU. To that end, the goal of the Plan is to raise EUR 315 billion within three years, to be invested in European businesses, through the creation of a European Fund for Strategic Investments. The Capital Markets Union Action Plan is a tool that should create the most favourable environment to investments by removing the inefficiency in the national regulatory frameworks, that are perceived as barriers to the free movement of capitals. On this topic refer to https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-investment-plan_en_0.pdf.

The CMU is one of the more ambitious objectives of the European Commission and its aim is to benefit Member States by removing the barriers to the free flow of capitals in the European Union, boosting jobs and increasing growth.

Aforementioned objectives, indeed, come from the necessity of reinforcing the European financial market and make it relevant as much as the one of United States, with tangible effects also with regard to the Economic and Monetary Union.¹³⁰

The CMU Action Plan has received large consensus both among European Institutions and throughout Member States and businesses; such a widespread consensus is based on the benefits that will arise from the implementation of the short and medium term measures arranged in the Action Plan. Aforementioned measures have the purpose of increasing the relevance of European capital markets with resulting benefits in terms of more unlocked new investments from both the European Union and worldwide in favour of businesses located in the Union, more channels for flow of capitals between consolidated markets and smaller ones within the boundaries of the EU, a more stable European financial system so that potential shocks in certain markets will be better faced and will not affect the whole European economy and the increase of competitiveness of European Union worldwide.¹³¹

The CMU Action Plan is composed of manifold measures to be undertaken by 2019. The *proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU* is part of the Action Plan's steps.

The relevance of harmonisation in the field of restructuring, second chance and insolvency is given by the fact that one effective way to establish and guarantee the functioning of a European single market is to reduce the differences among national regulatory frameworks in certain key areas and therefore to remove inefficiencies and obstacles for cross-border investments. As also highlighted in Recitals 7 and 9 of the Directive's draft text, abovementioned differences do not create favourable circumstances to business financing and the free flow of capitals throughout EU. Nor ignoring the international

¹³⁰ As highlighted in the *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions; Capital Markets Union – Accelerating Reform*, 2016, COM(2016) 601 final, Brussels,. 2.

¹³¹ See the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Action Plan on Building a Capital Markets Union*, 2015, COM(2015) 468 final, Brussels,. 3.

dimension of company law and insolvency law – without considering the effects that an enterprise located in a Member State may have against other companies and stakeholders located in other Member States – helps to create the more favourable conditions for the free movement of capitals, people and goods and the establishment of the Capital Markets Union.

The commitment of the European Commission for the adoption of the restructuring and second chance Directive, as well as all the other legislative initiatives in the areas of capital markets, is to provide to worldwide and European investors a higher degree of legal certainty. Such a legal certainty will play a fundamental role during the decision making process of cross-border investors in terms of a greater awareness about the available measures to address, manage and share risks linked to investments' initiatives. If such regulatory infrastructure will be promptly and properly implemented, the willingness of investors to invest in Europe it is going to increase.

5. The Italian regulatory framework on bankruptcy

5.1. Current status quo of the Italian Bankruptcy Law and reforms undertaken

The Italian insolvency regime is governed by the Royal Decree of 16th March 1942 no. 267, known as *Legge Fallimentare*. The Decree, which was issued before the birth of the Italian Republic, has undergone a process of several reforms only during recent years. The very first comprehensive and systematic reform, indeed, was in 2006 when the Italian Government adopted the Legislative Decree of 9th January 2006 no. 5.

The reform occurred in 2006 received a widespread consensus from professionals and scholars because it was the result of many years of attempts and negotiations aimed to adapt the Italian insolvency regulatory framework to the European and international standards. The main success of the reform was that, for the first time, it inserted in the Italian insolvency regime the concepts of the debtor's rescue and of the maximisation of the entrepreneurs' assets; therefore, the reform sought to introduce new procedures as alternative to the filing for bankruptcy, which was till then the common procedure to undertake as solution to the debtor's financial distress.¹³²

¹³² See PRASCINA E., *La Riforma del Diritto Fallimentare. Principali novità.*, Ordine degli Avvocati di Trani: par. 1, available at <http://www.ordineavvocatitrani.it/pubblica/articolo.php?articolo=549>.

To that end, the following areas are just some of the most relevant changes introduced by the reform of 2006 to previous Italian insolvency regime:¹³³ the modification of the threshold established by Art. 1 of the *Legge Fallimentare*, that are required in order to subject the debtor to the procedure of bankruptcy; the increase in relevance of the role played by the official receiver (the Italian *Curatore Fallimentare*) and by the creditors' committee; the insertion of debt discharge procedures that allow the insolvent debtor to discharge its outstanding debts – provided that he/she is compliant with certain strict requirements; the insertion of provisions governing assets and financing intended for a specific business (to that end, the reform provides that the official receiver may handle such assets and financing through a separate management from the insolvency proceeding) and the reform of the preventive composition with creditors and its speeding up.

Subsequently to the reform of 2006, a further reform occurred the following year. On 12th September 2007 the Legislative Decree no. 169 was issued, which included supplementary and corrective provisions aimed at partly modifying and clarifying those aspects introduced by the Legislative Decree no. 5 of 2006 that were ambiguous in their practical application. Once again, the new reform mostly involved the thresholds required in order to subject the debtor to the insolvency proceeding, the coordination between the preventive composition with creditors and the bankruptcy agreement, discharge procedures and rules on the professionals suitable to be appointed as receivers.¹³⁴

In more recent times, a further reform was issued in 2016 with the adoption of the Decree Law no. 59 of 3rd May 2016, also known as *Decreto Banche*. The Decree was mainly aimed at reforming goods' foreclosures, bank financing, accelerating credit execution and also at introducing modification to the provisions in the area of bankruptcy previously reformed.

Lastly, the Italian Parliament has just approved a bill for the new bankruptcy's reform in 2017, as it will be discussed in the following paragraphs.

5.2. Rordorf commission

The project of the reforms of the Italian Bankruptcy Law did not only encompass the main reforms occurred in 2006 and 2007. Indeed, on 28th January

¹³³ *Ibid.*

¹³⁴ On this topic refer to *La Riforma delle Procedure Concorsuali. Il percorso della Riforma e la Sintesi delle Principali Novità*, 15, available at https://www.tuttocamere.it/files/pconcorsuali/Riforma_Novita.pdf.

2015, the Minister of Justice Andrea Orlando, approved the Decree for the establishment of a special commission known as the “Rordorf Commission”¹³⁵ and the appointment of its members. The Commission was created with the purpose of undertaking a deep analysis of the amendments to the Bankruptcy Law introduced by previous reforms in order to evaluate the practical impacts of such reforms and to implement necessary and urgent additional changes to the regulatory framework.

The result of the work undertaken by the Commission was the drawing up of the draft of the enabling Act to the Government with the purpose of proposing a new comprehensive reform which could adapt the Italian regulatory frameworks on insolvency to the more recent international and European legislative acts, such as Regulation 2015/848.

The Decree of 28th January 2015, which appointed the Commission, also provided a brief but exhausted lists of the areas upon which the expert should have focused on. Such areas¹³⁶ included the assessment of the effects that the newly issued European Regulation 2015/848 might have had on the national bankruptcy regime (in terms of insolvency proceedings involving groups of companies), the creation of a national insolvency register available online, suitable measures aimed at fostering the implementation of early warning procedures and the aggregation of statistical data on insolvency proceedings and preventive composition with creditors.

The Decree also emphasized the need for the implementation of measures and procedures with the goal of granting a second chance of recovery to still viable entrepreneurs, that face financial difficulties, and of discharge procedures, as well as the speeding up of the insolvency proceedings.

Then, the Commission drew up the draft text of the enabling Act to the Government, which was submitted to the analysis and vote of the Parliament.

In conclusion, the approved version¹³⁷ of the bill including the enabling Act to the Government for the issuance of a new reform on insolvency is a clear commitment of the Italian Institutions in adapting the national insolven-

¹³⁵ From the name of its president, Renato Rordorf, which is president of section of the Supreme Court (Corte di Cassazione).

¹³⁶ *Decree of the Minister of Justice of 28/02/2015 appointing the Rordorf Commission*, 2. Available at http://www.fallimentiesocieta.it/sites/default/files/Riforma_DirFall.pdf, 1-2.

¹³⁷ Available at <http://www.camera.it/leg17/126?tab=2&leg=17&idDocumento=3671-BIS&sede=&tipo=>.

cy regime to the most recent European and international Acts, that are: the EU Regulation 2015/848, the Commission's Recommendation no. 2014/135/UE of 12th March 2014 *on a new approach to business failure and insolvency* and the UNCITRAL's Model Law.¹³⁸

5.3. The just approved reform of 2017

The text of the enabling Act to the Government – drafted by the “Rordorf Commission” – was approved by the Italian Chamber of Deputies on the 1st February 2017 and, then, also by the Senate of Italian Republic on the 11th October 2017, under the name of “Draft Law n. 2681”. This law, formally known as “Delegation to the Government for the reform of the regulations governing corporate crisis and insolvency”, establishes a timeframe within which the Government shall issue a legislative decree containing the aforementioned reform to the Italian Bankruptcy Law. The legislative decree will also amend current Law no. 3 of 27th January 2012, which rules the composition of over-indebtedness crises.

As far as the main areas upon which the Government shall focus on, they are the following:

- Insolvency proceedings;
- The regulation of the composition of over-indebtedness crises, known as “company crisis”;
- The system of privileges and guarantees.

The very first change to current Italian Bankruptcy Law will concern the elimination of the words “failed” and “failure”; the reform, indeed, is aimed at providing a reference to the entrepreneur's bankruptcy which is less defamatory and to prevent the debtor to fall under that negative *social stigma*. In addition, to that end, the reform is aimed at replacing the name of bankruptcy procedure with that of liquidation by court order.¹³⁹

Secondly, an additional area of intervention will be about the rules governing the insolvency of group of companies. With that regards, Art. 3 of the just

¹³⁸ Art. 1(2) states: “Nell'esercizio della delega di cui al comma 1 il Governo tiene conto della normativa dell'Unione europea e in particolare del regolamento (UE) 2015/848 del Parlamento europeo e del Consiglio, del 20 maggio 2015, relativo alle procedure di insolvenza, della raccomandazione 2014/135/UE della Commissione, del 12 marzo 2014, nonché dei principi del *model law* elaborati in materia di insolvenza dalla Commissione delle Nazioni Unite per il diritto commerciale internazionale (UNCITRAL) (...)”.

¹³⁹ In Italy, known as Liquidazione Giudiziale.

approved Draft Law n. 2681 inserts specific provisions dealing with the insolvency proceedings commenced in relation to two or more companies belonging to the same group; to bear in mind that this is a paramount change because the Italian insolvency regime currently does not provide provisions for the insolvency of a group of companies. The reform will, therefore, insert rules aimed at fostering cooperation and communication among insolvency courts involved in insolvency proceedings of members of the same group, as well as rules that establish the opening of a single insolvency proceeding which encompasses all the insolvent group's members. In particular, Art. 3 establishes, among other requirements, what follows: that the reformed Bankruptcy Law will provide a definition of group of companies which is based on Arts 2497 et seq. and 2545-*septies* of the Italian Civil Code; that the companies belonging to the group can submit a single application for the approval of a single debt restructuring agreement, as well as with regards to the preventive composition with creditors (however it is fundamental that the assets and liabilities of the group's companies remain separate from each other); that it will be fostered the cooperation among the management bodies involved (in the event that the group's companies are subject to separate insolvency proceedings); that the reformed Bankruptcy Law will provide the deferral of the reimbursement of credits of companies belonging to the group, provided anyhow the application of Art. 2467 of the Italian Civil Code. Lastly, in the event that a single preventive composition with creditors is submitted or in the event of a single management of the compulsory liquidation procedure, the reformed Bankruptcy Law shall provide the appointment of a single delegated judge, a single receiver and a single official receiver,¹⁴⁰ the simultaneous and separate vote of the creditors of each company, as well as the criteria for the drawing up of a single plan which allows the entire group to exit the crisis it is facing.

As previously said, the reform will also concern the regulation of the composition of over-indebtedness crises and of the warning procedures. With that regard, Art. 4 of the just approved enabling Act mainly establishes what follows: the creation at each Chamber of Commerce, Industry, Crafts and Agriculture of a specific body, composed of three professional experts, which assists the debtor throughout the procedure resolving the crisis (this body is also entrusted with the powers of convening the debtor – in order to identify, as soon as possible, the necessary measures to be implemented with the goal of solving the crisis – and of commencing the negotiations between the debtor and the creditors, provided that this procedure take no more than six months);

¹⁴⁰ In Italy, they respectively stand for “Commissario Giudiziale” and “Curatore Fallimentare.”

to entrust the supervisory bodies of the company and the Accounting Firms with the duty of alerting the company's management about the presences of signals concerning the increase of the company's crisis; to entrust the Italian Tax Authority, as well as other particular public creditors, with the task of promptly informing the debtor about the level of exposure of the credits toward such creditors and eventually to benefit the debtor who as promptly applied for the procedure of assisted resolution of the company crisis.

As far as the debt restructuring agreements is concerned, Art. 5 of the just approved Draft Law n. 2681 is aimed at fostering the application for such agreements. In particular, first of all, it allows to extend the procedure envisaged by Art. 182-*septies* of the Italian Bankruptcy Law to the agreements for the restructuring of debts and to the moratorium agreements – in situations of continuation of the company's activity – provided that the creditors, to which such agreements are addressed to, represent at least 75% of the debts of homogeneous classes of creditors. Secondly, the Article removes the limit of the 60% of the credits – which is currently provided by Art. 182-*bis* of the Italian Bankruptcy Law – provided that the debtor, in particular, will not apply for the protective measures that are provided by Art. 182-*bis*, paragraph 6. In addition, Art. 5 will allow to extend the rules, that govern the protective measures applicable in the preventive composition with creditors, to the debt restructuring agreements – as well as to extends the effects of the debt restructuring agreements to the shareholder with unlimited liability, under the same conditions applicable in the preventive composition with creditors. Lastly, the Article provides that the certified debt restructuring agreement plan shall be in writing, with a specific date and properly detailed.

Last important area of intervention envisaged by the Draft Law will concern the procedure for the preventive composition with creditors. With that regard, Art. 6 of aforementioned Draft Law establishes that the Government shall: admit liquidators' agreements only in cases in which the presence of external resources will allow to significantly increase the creditors' satisfaction (anyhow, the repayment of at least 20% of the unsecured creditors shall be granted); review the rules applicable to protective measures, especially with regards to their duration and effects; identify the cases in which it is compulsory the partition of the creditors into homogeneous classes; establish the powers of the competent courts, in particular with regards to the evaluation of the plan's feasibility; erase the creditors' meeting, provided that – anyhow – the exercise of the vote by means of telecommunications systems is granted. And also: integrate the regulation of the measures concerning pending relations; in the case of a preventive composition with creditors in a situation of business continuity, to provide for a moratorium which allows the repayment

of preferential, secured or mortgaged creditors – even for a period of time higher than one year – provided that to such creditors is recognized the right to vote; provide for a more detailed discipline of the execution phase of the plan, with a specific regard to the purgative effects and to the derogation from passive solidarity referred to in Art. 2560 of the Italian Civil Code, with possibility for the court to entrust a third party with the task of implementing the necessary measures for the execution of the proposal of the preventive composition with creditors; rule the provisions governing the revocation, the cancellation and the resolution of the preventive composition with creditors, providing for the legitimation of the judicial commissioner to request, at the request of a creditor, the resolution of the agreement for failure to fulfil obligations; in the event of extraordinary transactions like transformation, merger and division, inserted in the context of the preventive composition with creditors, to limit the creditors' opposition only to the moment in which the proposal for the arrangement is analysed – in terms of legitimacy of its request – and also to establish that aforementioned extraordinary transactions may not be reversed in the event that the preventive composition with creditors is cancelled or completed.