Cross-border Mobility of Insolvent Companies Within the European Union

by

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Insolvent companies that meet the conditions of Article 54 of the TFEU and have access to the right of establishment provided for by Article 49 of the TFEU can, in principle, move freely within the European area. However, the cross-border mobility of insolvent companies presents a risk of abuse or fraud and may be detrimental to the rights of third parties. Therefore, the law on insolvency proceedings intervenes to provide a framework for this cross-border mobility by combating forum shopping and law shopping, while protecting local interests by means of private international law rules as well as substantive rules.

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1. Introduction

1. Since the origins of the European Union (EU), cross-border activities and the mobility of companies[1] have been seen as means of promoting the development and prosperity of the common market. This is why companies are granted the right of establishment enshrined in Articles 49[2] and

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1 See *La mobilité des sociétés dans l'Union européenne*, *B. François* (dir.), Joly éd., 2020.

2 Article 49 of the TFEU reads: "(...) restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or

54[3] of the Treaty on the Functioning of the EU (TFEU). Cross-border operations such as mergers, divisions, and conversions, which imply the relocation of the company's registered office and/or central administration, are the most important way by which the freedom to move the principal establishment is exercised. The establishment of entities without legal personality (such as offices, agencies, and branches), which allows the company to relocate its activities or assets, is the main expression of the right of secondary establishment.

2. A necessary but difficult-to-achieve aim of the European institutions was to establish a legal framework conducive to cross-border mobility and freedom of establishment of companies. Consequently, a European company law regime of liberal inspiration slowly emerged, focusing on enhancing the right of establishment and facilitating the movement of companies within the European area. Apart from efforts to coordinate national company laws pursued through directives, most of which being presently codified in Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law[4], the first real step towards the cross-border mobility of companies was taken by the Court of Justice, which issued several fundamental decisions[5] that have liberalised the right of secondary establishment[6] and the right of primary establishment and the recognition of foreign companies.[7] European legislation then

subsidiaries by nationals of any Member State established in the territory of any Member State.
Freedom of establishment shall include the right (...) to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected (...)".

3 Article 54 of the TFEU reads: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall (...) be treated in the same way as natural persons who are nationals of Member States.
'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

4 [2017] OJEU L169/46.

5 See *W. F. EBKE*, "The European Conflict-of-Corporate-Laws Revolution : Überseering, Inspire Art and Beyond", EBLR, 2005, 9.

6 Case C-212/97, *Centros*: D. 1999. 550, note *M. Menjucq*; JDI 2000. 484, note M. Luby; Rev. sociétés 1999. 386, note G. Parléani. – Case C-167/01, *Inspire Art*: D. 2004. 491, note E. Pataut; JDI 2/2004, note M. Menjucq; Rev. crit. DIP 2004. 151, note H. Muir-Watt; Rev. sociétés 2004. 135, note J.-Ph. Dom; *H.C. Hirt*, "Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd", EBLR, 2004, 1189.

7 Case C-208/00, *Überseering*: Rev. crit. DIP 2003. 508, note P. Lagarde; Rev. sociétés 2003. 315, note. J.-P. Dom; JCP E 2003, n° 448, note *M. Menjucq*.

took over with two founding texts for carrying out cross-border operations: first, the Regulation (EC) n° 2157/2001 of 8 October 2011 on the Statute for a European company[8], which allowed cross-border mergers between public limited liability companies to form an SE[9] but also granted to the SE the right to transfer its registered office to another Member State;[10] secondly, the Directive (EC) 2005/56 on cross-border mergers of limited liability companies.[11] These decisive developments were supported by the Court of Justice which promoted cross-border operations as specific means of exercising the freedom of establishment.[12] The idea of enhancing the mobility of national companies by updating the legal regime for cross-border mergers and by introducing a legal regime for cross-border conversions and cross-border divisions into a joint Directive on cross-border mobility was then relaunched by the Reflection Group on the Future on EU Company Law.[13] Following public consultations and two European Parliament resolutions[14] in favour of an initiative on companies' cross-border mobility, the European Commission asked the Informal Company Law Expert Group (ICLEG) to work on the preliminary drafts.[15]

8 [2001] OJEC L294/1.

9 Reg. (EC) n° 2157/2001, art. 2.

10 Reg. (EC) n° 2157/2001, art. 8.

11 [2005] OJEC L310/1.

12 About cross-border mergers: Case C-411/03, *Sevic Systems*: Rev. crit. DIP 2006. 662, note J. Heymann; JCP G 2006, II 10077, note R. Dammann; M.M. *Siems*, « SEVIC : Beyond Cross-Border Mergers », EBOR, 8 : 2, 2007, p. 307. – About cross-border conversions: Case C-210/06, *Cartesio*: JCP G 2009, II 10027, note M. *Menjucq* ; Gaz. Pal. 24 mars 2009, n° H3644, p. 12, note Th. *Mastrullo*; Europe, 2009, comm. 82, obs. L. Idot; Rev. société 2009. 147, note G. Parléani; Rev. crit. DIP 2009. 236, note J. Heymann. – Case C-378/10, *VALE*: JCP G 2012, 1089, note M. *Menjucq*; Rev. sociétés 2012. 645, note G. Parléani; JCP E 2012, 1547, note Th. *Mastrullo*; Rev. crit. DIP 2013. 236, note J. Heymann. – Case C-106/16, *Polbud*: D. 2017. 2512, note L. d'Avout; JCP E 2018, 1014, note M. *Menjucq*; Rev. Sociétés, 2018, 47, note G. *Parléani* ; BJS, 2018, 19, note *Th. Mastrullo*. – Case C-276/22, *Edil Work 2 et ST*: BJS sept. 2024, n° BJS203f9, p. 7, note M. Menjucq.

13 See Report of the Reflection Group on the Future of EU Company Law (April 5, 2011): *B. Lecourt*, "Quel avenir pour le droit européen des sociétés ? (à propos du « Rapport du groupe de réflexion sur le futur du droit européen des sociétés »)", Rev. Sociétés, 2011, 649.

14 European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)). – European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

15 http://ec.europa.eu/transparency/regexpert/. Date of last access – See also Commission, "Action plan : European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies", COM,2012, 740/2.

This eventually led to the publication of a Proposal for a Directive in 2018,[16] followed by the adoption of the Directive (EU) 2019/2121 of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.[17] Considerable progresses have thus been made in favour of the cross-border mobility of companies in the European area, although there are still some obstacles, such as the failures of simplified forms of European grouping – namely the SPE[18] and the SUP.[19]

Notably, cross-border conversion stands out as the purest expression of the right of principal establishment. By facilitating the transfer of the registered office from one Member State to another, without losing legal personality, this operation offers the company a means of changing its applicable law (*lex societatis*), thereby enabling a genuine legal mobility and law shopping during the company's life. In the *VALE* judgment of 12 July 2012, cross-border conversion was expressly defined as a "right granted by the European Union legal order,"[20] Illustrating how legal mobility is key to the existence of a European legal status for companies.[21]

3. On the contrary, the insolvency of companies has long remained beyond the scope of concern for European authorities.

Insolvency law—referred to as law on insolvency proceedings according to European regulations' terminology (see below n° 6)—is a crucial subject heavily influenced by local legal cultures and practices. In comparison to company law, insolvency law therefore traditionally appears resistant to Europeanisation and unfavourable to the freedoms of movement outlined in European treaties.

This explains the limited consideration insolvency law has often received in EU law: it is excluded from the scope of private international law texts, notably the Brussels Ibis Regulation (Regulation (EU) n° 1215/2012 of 12 December

16 Proposal of 24 April 2018 for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, COM (2018), 241 final: Dossier "Le Paquet européen « Droit des sociétés » de 2018", P.-H. Conac (dir.), Rev. sociétés, 2019, 7.

17 [2019] OJEU L321/1. – *B. Lecourt*, "Enfin une directive sur la mobilité transfrontalière des sociétés !", Rev. Sociétés, 2020, 338.

18 *B. Lecourt*, "La société privée européenne a-t-elle encore un avenir ? (à propos du retrait de la proposition de règlement)", Rev. Sociétés, 2014, 133.

19 *B. Lecourt*, "Société unipersonnelle à responsabilité limitée (SUP) : accord du Conseil sur une orientation générale", Rev. Sociétés, 2015, 692.

20 Case C-378/10, *VALE*, para. 49.

21 See *Th. Mastrullo*, *Le droit international des sociétés dans l'espace régional européen*, PUAM, 2009, n° 956.

2012);[22] it is simply referenced to national law, as seen in Regulation (EC) n ° 2157/2001 on the Statute for a European company;[23] or it is merely mentioned in ancillary provisions, such as in the Directive (EU) 2017/1132, where "insolvency proceedings" or "bankruptcy proceedings" are referred to only three times concerning the documents and particulars to be disclosed in respect of branches[24] and the possibility for Member States not to apply the provisions on mergers of public limited liability companies in cases where companies undergoing acquisition or dissolution are the subject of bankruptcy proceedings, winding-up proceedings of insolvent companies, judicial arrangements, compositions, and analogous proceedings.[25]

Furthermore, the concept of insolvency is not even defined in EU law.[26] In the absence of a European definition, insolvency is understood here as any financial difficulties of a company warranting the commencement of insolvency proceedings as per the meaning outlined in European Regulations on insolvency proceedings.[27]

4. The cross-border mobility of companies poses major difficulties when the company becomes insolvent or even when there is a likelihood of insolvency.

Firstly, a company may have exercised its right of principal and/or secondary establishment before facing with financial difficulties. Once the company's insolvency is declared, appropriate solutions are required due to its cross-border nature.

Secondly, a company may continue to operate while insolvent,[28] either because the insolvency proceedings have not yet been commenced, or because the ongoing proceedings are of a restructuring nature which does not preclude the company from operating. Under these circumstances, if the company meets

22 [2012] OJEU L351/1. – Reg. (EU) n° 1215/2012, art. 1(2)(b).

23 Reg. (EC) n° 2157/2001, art. 63.

24 Dir. (EU) 2017/1132, art. 30 et 37.

25 Dir. (EU) 2017/1132, art. 87.

26 The proposal of Directive harmonizing certain aspects of insolvency law of 7 December 2022 does not provide for a general definition of insolvency but refers several times to the inability of the debtor to pay its mature debts (See art. 6 and art. 38).

27 It should be recalled that CJEU has ruled that "once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation" (Case C-116/11, *Bank Handlowy*, para. 33: *JCP* G 2012, 1050, note L. d'Avout; *Rev. proc. coll.* 2013, comm. 29, obs. *Th. Mastrullo*). Insolvency proceedings listed in Annex A to the regulation may thus be restructuring proceedings (such as French *sauvegarde* or *redressement judiciaire*) or liquidation proceedings (such as French *liquidation judiciaire*).

28 See *A. Keay, P. Walton and J. Curl QC*, "Corporate governance and Insolvency – Accountability and transparency, Edward Elgar Publishing", 2022, n° 1.015.

the conditions outlined in Article 54 of the TFEU (i.e. it is formed in accordance with the law of a Member State and has its registered office, central administration, or principal place of business within the Union), the company may, in principle, freely circulate within the European Union, even if it is insolvent.

It should be noted that the cross-border mobility of an insolvent company is based on mechanisms similar to those of a solvent company: transfer of the registered office or central administration by a cross-border merger, division, or conversion, relocation of assets or activities by setting up a secondary establishment, among other methods. The insolvency of a company may even lead it to relocate, either for the purpose of restructuring or to benefit from a more favourable national insolvency regime, bearing in mind that forum shopping necessarily entails law shopping in this context due to the application of the *lex fori concursus*.[29]

Under these circumstances, the cross-border mobility of insolvent companies cannot be ignored by EU law.

5. As a consequence, EU law began to take into account insolvent companies in the 2000s, a trend that has since strengthened to the point where we are witnessing the emergence of a genuine European insolvency and restructuring law.[30]

This development is linked to three main factors.

Firstly, the increased mobility of companies within the European area: due to the liberalisation of the right of establishment, the activities of companies increasingly have cross-border effects. And the cross-border insolvency of companies is perceived as undermining the proper functioning of the internal market.[31]

Secondly, the 2008 financial crisis revealed the inefficiency of national insolvency laws and their negative impact on the exercise of the freedoms of establishment and movement of capital which implied the need for a European response to deal with enterprises in financial difficulties and improve the efficiency of national insolvency rules.[32]

29 *A. Jacquemont*, *N. Borga* et *Th. Mastrullo*, « Droit des entreprises en difficulté », 12ème ed., LexisNexis, n° 1261.

30 On the development of European restructuring and insolvency law: *I.L. Fannon, J.L. L. Gant and A. Finnerty*, "Corporate Recovery in an Integrated Europe – Harmonisation, Coordination and Judicial Cooperation, Edward Elgar Publishing", 2022.

31 EIR, recital 3. – EIR Recast, recital 4.

32 See Commission, "A new European approach to business failure and insolvency", COM (2012), 742 final.

Thirdly, the lack of harmonised insolvency regimes has been identified as one of the key obstacles to the freedom of capital movement in the EU and to greater integration of the EU's capital markets.[33]

6. In these circumstances, the primary objective of EU law has been to resolve conflicts of jurisdiction and conflicts of laws that may arise from cross-border insolvency. This is the purpose of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (hereafter – "EIR")[34] recast, for insolvency proceedings opened after 26 June 2017, by Regulation (EU) No 2015/848 of 20 May 2015 (hereafter – "EIR Recast").[35]

Following a Communication of 12 December 2012[36] and a Recommendation of 12 March 2014,[37] the European Commission has also advocated for substantive harmonisation of national laws on insolvency proceedings. This led to the adoption of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending the Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (hereafter – "PRD").[38] Furthermore, on 7 December 2022, a new proposal of Directive of the European Parliament and of the Council "harmonising certain aspects of insolvency law" (hereafter – "Proposal of 7 December 2022") was published[39], in relation to the deepening of the Capital Markets Union (CMU).[40]

33 See Proposal for a Directive "harmonising certain aspects of insolvency law", COM (2022) 702 final, 2022/0408 (COD).

34 [2000] OJEC L160/1.

35 [2015] OJEU L141/19. – See *R. Bork and R. Mangano*, "European Cross-Border Insolvency Law", Oxford University Press, 2e ed., 2022. – *M. Menjucq*, 'Droit international et européen des sociétés", LGDJ, coll. « Précis Domat », 7e ed., 2024, p. 527 and seq. – European Insolvency Regulation, M. Brinkmann (ed), Beck – Hart – Nomos, 2019. – *G. Cuniberti, P. Nabet et M. Raimon*, « Droit européen de l'insolvabilité », LGDJ, 2017.

36 Commission, "A new European approach to business failure and insolvency", COM (2012), 742 final.

37 Commission Recommendation on a new European approach to business failure and insolvency, COM (2014), 1500 final.

38 [2019] OJEU L172/18. – See *G. McCormak*, "The European Restructuring Directive", Edward Elgar Publishing, 2021.

39 COM (2022) 702 final, 2022/0408 (COD). – See *Th. Mastrullo*, "Vers une nouvelle avancée du droit européen des faillites. La proposition de directive « harmonisant certains aspects du droit de l'insolvabilité »", Rev. sociétés 2023, 140.

40 See Commission, "A Capital Markets Union for people and businesses-new action plan", COM (2020), 590 final. About the disappointing first decade of the Capital Markets Union and the need to revitalise it: *N. Véron*, "Capital Markets Union: Ten Years Later" (2024).

Similar to company law, the harmonisation of certain aspects of substantive law on insolvency proceedings encourages the movement of companies within the EU and tends to remove obstacles to the freedom of establishment. Companies are gradually gaining access to equivalent or comparable insolvency proceedings in the Member States, reducing the differences between insolvency laws as an obstacle to their cross-border mobility.

7. Encouraged by the liberalisation of the right of establishment and the harmonisation of national laws, the cross-border mobility of insolvent companies nonetheless presents two major risks: (1) it may be abusive or fraudulent, and (2) detrimental to "local interests."[41] It is these risks that the law on insolvency proceedings seeks to minimise.

2. *A potentially abusive or fraudulent mobility*

(3) Since the *Van Binsbergen* judgment,[42] the European Court of Justice has consistently held that EU law cannot be relied upon for abusive or fraudulent ends. This "general legal principle"[43] has been clearly affirmed concerning the freedom of establishment of companies, notably by the *Centros*[44], *Inspire Art*[45] and *Polbud*[46] judgments, which state that Member States may adopt "any ap-propriate measure for preventing or penalising fraud."[47] Directive (EU) 2019/ 2121 also allows Member States to prohibit any cross-border operation set up for abusive or fraudulent purposes by not issuing the pre-operation certificate required for the operation to be valid notably.[48] It should be noted that, in the context of the freedom of establishment, abuse and fraud are confused: both the CJEU[49] and the European lawmaker[50] use the two concepts interchange-

41 See EIR, recital 19. – EIR Recast, recital 40.
42 Case 33/74: *Rec. CJCE* 1974, I, p. 1299, pt 13.
43 See Case C-116/16 et C-117/16, *T Danmark*, para. 70.
44 Case C-212/97, *Centros*, para. 24.
45 Case C-161/01, *Inspire Art*, para. 86.
46 Case C-106/16, *Polbud*, para. 61.
47 Case C-212/97, *Centros*, para. 38. – Case C-106/16, *Polbud*, para. 61.
48 Dir. (EU) 2019/2121, recital 35, art. 86m(8) (cross-border conversions), art. 127(8) (cross-border mergers) and art. 168m(8) (cross-border divisions).
49 For example, in the *Inspire Art* judgment, the Court of Justice used the terms "fraud" and "improper recourse to freedom of establishment" and, finally, stated that a company cannot be deprived from its freedom of establishment "save where the existence of an abuse is established on a case-by-case basis" (Case C-161/01, *Inspire Art*, paras. 95, 136 and 143).
50 Dir. (EU) 2019/2121, recital 35.

ably, without providing any criterion for distinguishing between them.[51] However, an analysis of European case law and texts suggests that abuse or fraud must be sanctioned on a case-by-case basis by the national authorities to protect the rights of third parties, such as creditors or employees.

Regarding insolvent companies more specifically, their cross-border mobility may be carried out for abusive or fraudulent purposes when it tends towards *forum shopping* (2.1) or *law shopping* (2.2).

2.1 Mobility and Forum Shopping

9. EIR and EIR Recast define *forum shopping* as the act of the debtor "transfer {ing} assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors."[52] Accordingly, for an insolvent company, *forum shopping* corresponds to the situation in which the debtor company manipulates the connecting factor to benefit from the jurisdiction of the national court that it considers most favourable for dealing with its financial difficulties.[53]

10. More specifically, according to Article 3(1) EIR and EIR Recast, the courts with jurisdiction to open the main insolvency proceedings with universal scope against an insolvent company are the courts of the Member State within the territory of which the centre of the company debtor' main interest is situated. According to the same text, the centre of main interest (hereafter – "COMI") is presumed to be the place where the company's registered office is located in the absence of proof to the contrary. This presumption becomes

51 However, fraud seems to have a broader and more fundamental scope than abuse. Indeed, fraud is analysed as a key concept in EU law because it is perceived as a general threat to the European integration (see "La Fraude et le droit de l'Union européenne", *D. Berlin, F. Martucci and F. Picod* (dir.), Bruylant, 2017). This explains why fraud finds expression not only in the case law of the CJEU pertained to freedoms of movement, but also in many European texts adopted in very different fields (regulations combating illegal immigration, tax fraud or counterfeiting, for instance). Comparatively, the concept of abuse appears narrower and is mostly used as a limit to fundamental freedoms of movement. In the context of the freedom of establishment, in particular, the link between fraud and abuse is very close: according to European case law, the use of the freedom of establishment to commit fraud gives rise to abuse and allows a national restriction (see *Th. Mastrullo*, « Le droit international des sociétés dans l'espace régional européen », *op. cit.*, n° 500). Fraud is seen here as a form of protection against abuse of right of establishment (see *E. Pataut*, "Liberté d'établissement et droit international privé des sociétés : un pas de plus", *D.* 2004, p. 491, note II, B, p. 493).

52 EIR, recital 4. – EIR Recast, recital 5.

53 *A. Jacquemont, N. Borga et Th. Mastrullo*, n° 1261.

irrebuttable if the central administration is located in the same place as the registered office.[54]

While moving its registered office – which presumes the situation of the COMI – or its central administration from one Member State to another, an insolvent company may therefore manipulate the connecting factor and, consequently, influence the determination of the national court with jurisdiction to open insolvency proceedings in accordance with its interests. Such manipulation is even more practicable given that, according to the *Staubitz-Shreiber* judgment,[55] COMI is assessed on the date of the application to open insolvency proceedings. Therefore, it is sufficient for a company to move its registered office to another Member State before applying for insolvency proceedings to be opened, to influence to its advantage the choice of national court with jurisdiction to open the proceedings.

Thus, company cross-border mobility appears to be closely linked to the issue of forum shopping in insolvency proceedings.

11. However, insolvency law tends to limit this potentially abusive or fraudulent cross-border mobility. Essentially, the aim is to minimize the impact of the transfer of the registered office on the determination of the COMI and, consequently, on the designation of the national court with jurisdiction to open main insolvency proceedings, in order to prevent "fraudulent or abusive forum shopping."[56]

This can be observed both at the time of the request to open insolvency proceedings and afterward.

12. At the time of the request to open insolvency proceedings, two provisions can be highlighted.

Firstly, the substantive approach of the concept of COMI, combined with the rebuttable nature of the presumption that the COMI is at the place of the registered office, moderates the consequences of a cross-border transfer of the registered office on judicial jurisdiction.

In line with the *Eurofood*[57] and *Interedil*[58] judgments, EIR Recast defines the COMI as "the place where the debtor conducts the administration of its inter-

54 Case C-396/09, paras. 50 and 51: *Rev. proc. coll.* 2011, étude 32, note *M. Menjucq* ; *Rev. sociétés* 2012, 116, note *Th. Mastrullo*.

55 Case C-1/04: *Rec. CJCE* 2006, I, p. 701 ; *D.* 2006, 1752, note *R. Dammann* ; *Rev. sociétés* 2006, 346, note *J.-L. Vallens*. – "For an application in French law: Cass. com.", 15 févr. 2011, n° 10–13.832, *Bull. civ.* 2011, IV, n° 28: *D.* 2011, 1738, note Dammann et Rapp.

56 EIR Recast, recital 29.

57 Case C-341/04: *Rec. CJCE* 2006, I, p. 3813; *JCP* G 2006, II, 10089, note *M. Menjucq*; *D.* 2006, 1752, note *R. Dammann*.

58 Case C-396/09.

ests on a regular basis and which is ascertainable by third parties."[59] Accordingly, where the central administration and the registered office of the insolvent company are not located in the same Member State, the presumption that the COMI is at the place of the registered office may be rebutted provided that "a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State."[60] The location of COMI is then determined on the basis of a body of corroborating evidence showing that the company is substantively connected to the territory of the Member State in which the main insolvency proceedings are likely to be opened. The approach is faithfully followed by national courts seized of a request to open insolvency proceedings[61] which, under Article 4 EIR Recast, are obliged to examine if they have jurisdiction pursuant to Article 3.[62] The location of the company's operational management, its main business relationships and/or its assets, the employment of staff or even the completion of a "complete business cycle"[63] in the concerned Member State may be taken into account.

13. This substantive approach to COMI is applicable when the insolvent company relocates its registered office. In cases such as *Leonmobili and Leone*,[64] the Court of Justice ruled that if the registered office of a company is moved from one Member State to another, the court of the Member State subsequently approached to open insolvency proceedings may disregard the presumption that the COMI is at the place of the new registered office, and consider that the COMI remained in Member State of origin, if through "a comprehensive assessment of all the relevant factors (...), in a manner that is ascertainable by third parties," it is found that the company's actual centre of management and supervision and of the management of its interests was still located there at the time of the request.

59 EIR Recast, art. 3(1).

60 Case C-396/09, *Interedil*, para. 53.

61 See in France, the judgements handed down in *Mansford* case (CA Paris, 26 November 2009: *Rev. sociétés* 2010, 395, note *Th. Mastrullo*), *Heart of la Défense* case (CA Versailles, 13e ch., 19 January 2012: *JurisData* n° 2012-002287), *Eurotunnel* case (Ca Paris, pôle 5, ch. 8, 26 June 2012 : *JurisData* n° 2012-015265) ou *WCDF* case (CA Paris, pôle 5, ch. 8, 21 December 2016: *Rev. proc. coll.* 2017, comm. 63, obs. M. Menjucq). – See in Luxembourg: CA Lux., 6 July 2021, n° 96/21 ; T. arr. Lux., 15 November 2019, n ° 2019-06530 ; CA Lux., 12 November 2008, n° 32256.

62 For a first application in France: Cass. com., 11 March 2020, n° 19–10.657: *JCP* E 2020, 1285, note L. Sautonie-Laguionie; *Rev. proc. coll.* 2021, comm. 89, obs. *Th. Mastrullo*.

63 See in Luxembourg: CA Lux., 12 November 2008, n° 32256.

64 Case C-353/15: *Rev. proc. coll.* 2016, comm. 170, ob. *M. Menjucq*.

Therefore, the substantive approach to COMI and the possibility of rebutting the presumption in favour of the registered office may render the transfer of the registered office ineffective for the purposes of *forum shopping*.

14. Secondly, EIR Recast also mitigates the consequences of cross-border mobility of the insolvent company by an anti-forum shopping rule inspired by Article R. 600-1, paragraph 2, of the French Commercial Code. According to Article 3(1), second subparagraph of EIR Recast, the presumption that the COMI is at the place of the registered office only applies if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. Therefore, a transfer of the registered office that occurs shortly before the request to open insolvency proceedings, particularly during the suspect period, has no implications regarding the determination of jurisdiction in insolvency proceedings.

15. Limiting the insolvent company's cross-border mobility aimed at forum shopping may also occur after the request for the opening of insolvency proceedings.

Indeed, an insolvent company may be tempted to move its registered office, its central administration and/or its COMI to another Member State after the request to open insolvency proceedings but before the court seized has ruled on that request, in order to influence the determination of the jurisdiction court.

However, in the *Galapagos* judgment,[65] the CJEU held that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where the COMI's debtor is moved to another Member State after that request has been lodged, but before that court has delivered a decision on it. And the court of another Member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction.

In *Galapagos* case, the insolvent company had invoked the transfer of its central administration to prove the transfer of its COMI. The same solution would apply *a fortiori* in the event of a transfer of the registered office. In both cases, the cross-border mobility of the company is not such as to deprive the court first seized of its exclusive jurisdiction to rule on the opening of the main insolvency proceedings.

65 Case C-723/20: Rev. proc. coll. 2022, comm. 72, obs. *M. Menjucq*. – See also Case C-1/04, *Staubitz-Shreiber*.

16. At this juncture, it should be noted, however, that although promoted by the CJEU and the Directive (EU) 2019/2121 (see above n° 2), the transfer of the company's registered office is not so straightforward to carry out. Indeed, such a transfer involves a cross-border conversion which must comply with a rather burdensome procedure,[66] must provide protection to shareholders (right of withdrawal), creditors (right to request additional safeguards), and employees (information, consultation and even participation, if applicable), and is precluded when set up for abusive or fraudulent purposes.[67] Accordingly, it is practically easier for the company to relocate its central administration, assets and/or activities to shift its COMI rather than transferring its registered office and carrying out a cross-border conversion.

2.2 Mobility and Law Shopping

17. The opening of insolvency proceedings cannot remain without implications for the insolvent company, its shareholders, and its directors. The *lex societatis* applicable to the company has a role to play here. For instance, the liability of directors for violation of their duty of care may have to be assessed in view of the company law applicable to the insolvent company. Another example: it is for the *lex societatis* to determine whether or not the company will disappear at the end of a liquidation procedure.[68]

Accordingly, an insolvent company may wish to transfer its registered office or central administration, either so that its insolvency is governed by a more favourable law, in which case law shopping concerns the *lex fori* concursus, or so that it is itself subject to a law that is more in line with its interests during insolvency proceedings, in which case law shopping concerns the *lex societa-*

66 The completion of a cross-border conversion notably involves a draft terms of the cross-border conversion and a report for members and employees drawn up by the company's administrative or management body, an independent expert report, the disclosure of the documents pertained to the operation (such as the draft terms of the cross-border conversion), the approval by the company's general meeting, the issue of a pre-conversion certificate, the scrutiny of the legality of the cross-border conversion by the destination Member State, and the registration of the operation according to the laws of the departure Member State and of the destination Member State.

67 Dir. (EU) 2019/2121, art. 86a and seq. – See in French law: *G. Parléani*, "Le transfert de siège social à l'intérieur de l'Union européenne après l'ordonnance n° 2023-393 du 24 mai 2023", *Rev. sociétés* 2023, 726 ; *Th. Mastrullo*, "L'introduction de la transformation transfrontalière en droit français", BJS, 2023, BJS202i5, 61.

68 See *A. Jacquemont, N. Borga et Th. Mastrullo*, n° 1241. – *M. Menjucq*, n° 622.

tis – which is determined in the Member States having regard to the location of the registered office[69] or the central administration.[70]

18. Where *law shopping* concerns the *lex fori concursus*, it is actually related to the issue of *forum shopping*, since the *lex fori concursus* corresponds to the law of the Member State within the territory of which insolvency proceedings are opened.[71] *Law shopping* relating to the *lex fori concursus* is therefore limited by the same rules as those limiting *forum shopping* (see *above*, n^{os} 9 and seq.).

19. As for law shopping relating to the *lex societatis*, it is perfectly legal in the EU: by liberalizing the cross-border conversion, the *Polbud* judgment clearly stated that "the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse."[72]

When an insolvent company pursues *law shopping* relating to *the lex societatis*, its mobility may nevertheless be limited in three ways.

20. Firstly, the mobility of a company and the carrying out of cross-border operations may be prohibited, thereby blocking the change of the *lex societatis*. In this sense, the Directive (EU) 2019/2121 as regards cross-border conversions, mergers and divisions does not apply to companies in liquidation where the distribution of assets has begun.[73] This mechanism has already been transposed into French law.[74]

In addition, the Directive (EU) 2019/2121 gives Member States the choice not to apply the Directive to companies subject to insolvency proceedings, as defined by national law, or to preventive restructuring frameworks, as defined by national law, irrespective of whether such proceedings are part of a national

69 For instance, in France (C. com. art. L. 210-3 et C. civ., art. 1837; see: *M. Menjucq*, n° 108) or Belgium (C. dr. int. pr., art. 110).

70 For instance, in Luxembourg (Amended law of 10 August 1915 on commercial companies, art. 1300-2).

71 EIR, art. 4(1). – EIR Recast, art. 7(1).

72 Case C-106/16, *Polbud*, paras. 40 and 62. – Case C-276/22, *Edil Work 2 et ST*, para. 47.

73 Dir. (EU) 2019/2121, recital 9, art. 86a(3), art. 120(4) and art. 160a(4).

74 See C. com., art. L. 236-32, 1° et 2° (cross-border merger), art. L. 236-46, al. 2 (cross-border division) and art. L. 236-50 (cross-border conversion). – About the French transposition of the Directive (UE) 2019/2121: Dossier "Ordonnance n° 2023-393 du 24 mai 2023 portant réforme du régime des fusions, scissions, apports partiels d'actifs et opérations transfrontalières des sociétés commerciales", *H. Le Nabasque and M. Menjucq* (dir.), BJS, 2023, p. 37, n° BJS202h1. – Dossier "Transposition de la directive « Mobilité transfrontalière des sociétés »", *B. Lecourt* (dir.), Rev. Sociétés, 2023, 719.

insolvency framework or regulated outside of it.[75] As a consequence, Member States may deprive companies subject to local insolvency law of their right to carry out a cross-border conversion,[76] merger[77] or division.[78] Company's insolvency is therefore likely to prevent its cross-border mobility aimed at changing its *lex societatis*[79], without prejudice to the general application of abuse or fraud (see above n^{os} 8 and 16).

21. Secondly, the scope of *law shopping* relating to the *lex societatis* may be limited by the application of the local *lex fori concursus*.

It is true that, by virtue of the right of establishment liberalised by the *Centros* and *Inspire Art* judgements notably (see above n° 2), the law of the Member State of origin chosen as *lex societatis* has sole jurisdiction to govern the formation and operation of the company, regardless of the fact that company does all its business in another Member Stage.[80]

However, the law of the Member State in which the company carries on its business and has its COMI, for example through a branch which is confused with its central administration, also has the right to intervene as *lex fori concursus* when insolvency proceedings are opened against the insolvent company.

This is the important lesson of the *Kornhaas* judgment[81] in relation to the liability of the directors of an insolvent company. It follows from this ruling that the scope of the free choice of the *lex societatis*, resulting from the free localisation of the registered office, tends to be moderated by the intervention of the *lex fori concursus* applicable to the insolvency proceedings to which the company may be subject by reason of the concrete activities it carries on in the

75 Dir. (EU) 2019/2121, recital 9. The text of the Proposal of 25 April 2018 was more restrictive, by providing that the company would not be entitled to carry out a cross-border operation if it was subject to preventive restructuring proceedings initiated because of the likelihood of insolvency (Proposal of 25 April 2018, art. 86(c)(2) (cross-border conversions), art. 120(4) (cross-border mergers) and 160(d)(2) (cross-border divisions)). The Council has amended this aspect and made the exclusion from the scope of the Directive (EU) 2019/2121 optional unless the company is in liquidation.

76 Dir. (EU) 2019/2121, art. 86a(4).

77 Dir. (EU) 2019/2121, art. 120(5).

78 Dir. (EU) 2019/2121, art. 160a(5).

79 The option has not been exercised by France.

80 See *Th. Mastrullo*, "L'entreprise privée face au commerce international", in *Droit du commerce international*, dir. J. Béguin et M. Menjucq, LexisNexis, 3ème éd., 2019, n° 714.

81 Case C-594/14: JCP G 2016, doctr. 241, n° 10, obs. *M. Menjucq*; JCP G 2016, 304, note L. d'Avout ; Rev. sociétés 2016.311, note *G. Parléani*; Europe 2016, n° 84, note L. Idot; Dr. sociétés 2016, n° 7, chron. 1, spéc. n° 1, obs. *E. Schlumberger*; Rev. proc. coll. 2016, n° 171, obs. *Th. Mastrullo*.

Member State within territory of which the COMI is located, irrespective of whether the provisions of the *lex fori concursus* are formally provided for by a company law text.

Thus, while the cross-border mobility of companies authorized by the right of establishment enables managers to circumvent the company law of the Member State in whose territory they intend to do business, it does not enable them to escape the obligations and liability actions provided for by the insolvency law of the Member State where the insolvent company's business is effectively conducted.

22. Thirdly, whether the company is insolvent or not, non-compliance with the national company law chosen for the incorporation and operation of the company may sometimes be sanctioned by insolvency law.

Luxembourg law offers a particularly interesting example with Article 1200-1 of the amended Law of 10 August 1915 on commercial companies. Closely linked to the attractiveness of Luxembourg marketplace and to the framework for establishment and law shopping in Luxembourg,[82] this text punishes a company's failure to comply with the provisions of the Luxembourg *lex societatis* by dissolution and liquidation of the company.[83] For example, failure to publish annual accounts,[84] failure to obtain authorisation for establishment,[85] absence of a registered office,[86] or irregular constitution of a corporate body[87] are irregularities that may justify the company's liquidation.[88]

And the liquidation of the illegal company often takes the form of bankruptcy proceedings (so called "Faillite" under Luxembourg law)[89] listed among the insolvency proceedings mentioned in EIR Recast's Annex A.

Used here as a sanction, Luxembourg insolvency law makes companies and their directors accountable by forcing them to assume the consequences of

82 See TA Lux., 14 July 2021, n° TAD-2021-00477. – TA Lux., 3 June 2010, n° 755/2010. – TA Lux., 19 February 2009, n° 239/2009.

83 See J.-P. Winandy, *Manuel de droit des sociétés*, Legitech, 2019, p. 312 et s.

84 CA Lux., 4 July 2012, n° 38271. – CA Lux., 23 March 2011, n° 36199.

85 CA Lux., 27 November 2019, n° CAL-2019-00412.

86 CA Lux., 14 December 2021, n° CAL-2021-00436.

87 Ibid.

88 This statement needs to be qualified since the Law of 28 October 2022 creating the procedure for administrative dissolution without liquidation. – See *Th. Mastrullo*, "Un nouvel instrument au soutien de la compétitivité de la place luxembourgeoise: la dissolution administrative sans liquidation des « coquilles vides »", JurisNews Procédures d'insolvabilité, Larcier, n° 2-3/2023, 193.

89 C. com. Lux., art. 440 to 572.

their law shopping and to comply with the provisions of the national company law they have freely chosen.

23. These limitations on forum shopping and law shopping reduce the risk of insolvent companies moving their registered office or central administration for abusive or fraudulent purposes. However, the cross-border mobility of insolvent companies is also likely to be detrimental to local interests.

3. A Mobility Potentially Detrimental to Local Interests

24. By moving within the European single market by making use of the freedom of establishment, the company may disconnect its legal seat from its economic establishment. Indeed, the company can do business and invest assets within the territory of Member States other than the one under the law of which it is incorporated and within the territory of which its registered office – and, presumably, its COMI – is situated.

When the company is insolvent, this cross-border establishment may be detrimental to "local interests," an expression used by EIR and EIR Recast[90] to refer to local creditors, i.e. creditors whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the COMI's debtor is located.[91]

25. Indeed, insolvency proceedings opened in the place of the COMI are the main proceedings. These proceedings have universal scope and aim "at encompassing all the debtor's assets."[92] The universal scope of main insolvency proceedings, which is expressed through the principle of mutual recognition of the opening judgement and of judgements deriving directly from the insolvency proceedings and which are closely linked with them[93], is reflected in the extraterritorial application of the *lex fori concursus* and of the prerogatives of appointed insolvency practitioners.[94] The main insolvency proceedings opened in one Member State are therefore likely to affect the rights of third parties located in other Member States, especially as these third parties are not necessarily aware of the existence of the main insolvency proceedings and of the content of the law applicable to these proceedings.

90 EIR, recital 19. – EIR Recast, recital 40.
91 EIR Recast, art. 2(11).
92 EIR, recital 12. – EIR Recast, recital 23.
93 EIR, art. 16 and 25. – EIR Recast, art. 19 and 32.
94 See *A. Jacquemont, N. Borga et Th. Mastrullo*, n^{os} 1277 and 1298.

Moreover, once a company has moved and established itself in several Member States, its insolvency may justify the opening of insolvency proceedings in the Member States concerned. Creditors should be able to defend their rights in the insolvency proceedings opened in Member States other than the one in which they themselves are established.

26. Insolvency law, therefore, aims to protect local interests by limiting the consequences of an insolvent company's cross-border mobility.

Methodologically, this protection is ensured by private international law rules (3.1) and substantive rules (3.2).

3.1 Protecting Local Interests through Private International Law Rules

27. European law on insolvency proceedings has adopted the "attenuated universality model,"[95] which makes it possible to reconcile the treatment of cross-border insolvency – a result of cross-border mobility – within a truly European perspective while taking into account the territorial issues arising from the protection of local creditors.

The "attenuated universality model" is primarily expressed through private international law rules, the purpose of which is to safeguard the rights of local creditors from the extraterritorial effects of main insolvency proceedings initiated abroad, taking into consideration the location of the insolvent company's COMI.

Rules of jurisdiction and choice-of-law rules will apply.

28. On the one hand, concerning rules of jurisdiction, courts of the Member State within the territory of which the insolvent company possesses an establishment have jurisdiction to open secondary insolvency proceedings.[96] The secondary insolvency proceedings, whose effects are restricted to the assets of the debtor situated in the territory of the Member State where it has been opened, has a territorial scope. The term "establishment" is defined as "any place of operations where a debtor carries out {or has carried out in the 3-month period prior to the request to open main insolvency proceedings, since EIR Recast} a non-transitory economic activity with human means and assets."[97] The *Interedil* judgment has specified that an establishment requires "a minimum level of organisation and a degree of stability" and that, conversely,

95 See Case C-195/15, *Senior Home*, para. 17: *JCP* E 2017, 1198, spéc. n° 14, obs. *M. Menjucq*; *Rev. proc. coll.* 2017, comm. 59, obs. *Th. Mastrullo*.

96 EIR and EIR Recast, art. 3, § 2.

97 EIR, art. 2(h). – EIR Recast, art. 2(10).

"the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment.'"[98] Secondary establishments with no legal personality, such as branches, are mainly targeted here.[99]

29. Although subordinate to the main insolvency proceedings,[100] secondary insolvency proceedings protect the rights of local creditors, since the interests of the latter will be considered in local insolvency proceedings governed by local law. The principle of mutual recognition applies to secondary proceedings and plays a defensive role: it ensures that the territorial effects of secondary insolvency proceedings are not challenged in other Member States.[101] The opening of secondary insolvency proceedings constitutes the main exception to the universal scope of the *lex fori concursus* applicable to the main insolvency proceedings, since secondary insolvency proceedings are always subject to the law of the Member State within the territory of which they are opened.[102] And the secondary insolvency proceedings are managed by their own insolvency practitioners appointed in accordance with the law applicable to these proceedings. Accordingly, the application of the *lex fori concursus secundarii* limits the influence of the law and the insolvency practitioners of the main proceedings on the rights of local creditors.

Admittedly, according to Article 36 EIR Recast, the insolvency practitioner in the main insolvency proceedings may give a "unilateral undertaking" in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, in order to avoid the opening of such proceedings. However, when distributing those assets or the proceeds received as a result of their realisation, the practitioner will have to comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened.

From the point of view of insolvency proceedings, the mobility of the company through the secondary establishment thus tends to limit the scope of its mobility through the main establishment.

30. On the other hand, EIR and EIR Recast provide for choice-of-law rules which derogate from the principle application of the *lex fori concursus*.[103] These

98 Case C-396/09, para. 62.

99 See, however, for the opening of a secondary insolvency proceedings against a subsidiary: Case C-327/13, *Burgo Group*: *D.* 2015, 45, note *R. Dammann et A. Rapp*; *Rev. proc. coll.* 2015, comm. 142, obs. *Th. Mastrullo*.

100 See *A. Jacquemont, N. Borga et Th. Mastrullo*, n^{os} 1275 to 1277.

101 EIR, art. 17(2). – EIR Recast, art. 20(2).

102 EIR, art. 28. – EIR Recast, art. 35.

103 EIR, art. 5 to 15. – EIR Recast, art. 8 to 18.

special choice-of-law rules apply "in the case of particularly significant rights and legal relationships."[104] The aim is to make acceptable the extraterritorial application of the main insolvency proceedings' *lex fori concursus*, by ensuring the protection of local creditors who have acquired rights under the law of other Member States.

The choice-of-law rules applicable to third parties' rights *in rem* and to detrimental acts provide a good example of this solution. EIR and EIR Recast provide that the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.[105] Admittedly, this rule does not preclude the avoidance actions provided for by the *lex fori concursus* against legal acts detrimental to the general body of creditors.[106] But the special choice-of-law rule relating to detrimental acts can then be used[107]. Indeed, the legal act providing for the right in rem may escape the sanction laid down by the main insolvency proceedings' *lex fori concursus* where the person who benefited from this act provides proof, on the one hand, that the act is subject to the law of a Member State other than that of the State of the opening of proceedings and, on the other hand, that the law of that Member State does not allow any means of challenging that act in the relevant case.[108]

31. Article 20 of the Luxembourg Law of 5 August 2005 on financial collateral arrangements makes remarkable use of this mechanism to protect financial collateral arrangement subject to Luxembourg law from the effects of any insolvency proceeding, given that this protection is a key factor in the legal attractiveness of the Grand Duchy financial centre. According to Luxembourg case law, the purpose of the Law of 5 August 2005 is to "immunize the performance of financial collateral arrangements against all incidents" and to "render the financial collateral arrangement unassailable in order to benefit from the exception of the regulation on insolvency proceedings."[109] Indeed, Article 20(1) of the Law of 5 August 2005 states that "financial collateral arrangements (...) are valid and enforceable against third parties, commissioners, receivers, liquidators and other similar persons notwithstanding reorganisation measures, wind-

104 EIR, recital 11. – EIR Recast, recital 22.
105 EIR, art. 5(1). – EIR Recast, art. 8(1).
106 EIR, art. 5(4). – EIR Recast, art. 8(4).
107 EIR, art. 13. – EIR Recast, art. 16.
108 See Case C-557/13, *Lutz*, para. 42: *D.* 2015, p. 2015, note *R. Dammann et A.-M. Dang*; *Rev. proc. coll.,* 2015, comm. 87, *Th. Mastrullo*.
109 See CA, Lux., 15 February 2017, n° 25/17 – VII – REF, n^{os} 43925 et 44011. – T. arr. Lux., 7 April 2017, n° 515/17, n° 178052.

ing-up proceedings or any other similar national or foreign proceedings". As for Article 20(4), it renders Book III of the Luxembourg Commercial Code on bankruptcy proceedings ("Faillite") inapplicable to financial collateral arrangements, including Article 448, which provides that "all acts or payments made in fraud of creditors are null and void."[110] Only the principle "fraus omnia corrumpit" would therefore seem to provide a basis for the annulment of a Luxembourg financial collateral arrangement.[111]

Thanks to the derogatory choice-of-law rules provided for by European law on insolvency proceedings, creditors are thus able to protect themselves against the cross-border mobility and establishment of insolvent companies and the opening of insolvency proceedings with universal scope abroad.

3.2 Protecting Local Interests through Substantive Rules

32. Creditors' rights should not be ignored within insolvency proceedings opened abroad as a result of the cross-border mobility of insolvent companies.

Accordingly, several substantive rules of European law on insolvency proceedings enable local creditors to assert their rights in main and secondary insolvency proceedings opened against the debtor company in another Member State. Once again, the aim is to protect local creditors from the consequences of the legal mobility of insolvent companies.

33. EIR and EIR Recast have thus adopted the principle of equal treatment of creditors, while adapting it to the cross-border perspective:[112] equal treatment of creditors must be ensured not only within the same insolvency proceedings, but also in the different insolvency proceedings opened against the same debtor. The Court of Justice has emphasized the fundamental nature of this principle which "mutatis mutandis, underpins all insolvency proceedings."[113]

The principle of equal treatment applies to all creditors having their habitual residence, domicile or registered office in the Union, and in particular to creditors established in the territory of Member States other than those in the territory of which the insolvent company is established, on a principal (COMI) or secondary (establishment) basis, and where principal or secondary insolvency proceedings are likely to be opened.

110 CA Lux., 16 May 2018, n° 39827.
111 Cass. Lux., 14 févr. 2019, n° 27/2019. – CA Lux., 22 janv. 2020, n° CAL-2017-00004.
112 EIR, recital 21. – EIR Recast, recital 63.
113 Case C-212/15, *Enefi*, para. 33.

34. European law on insolvency proceedings also protects local creditors by providing them with information.

This information is twofold. Firstly, creditors are informed of the existence of insolvency proceedings opened against the insolvent company in another Member State. Individual information[114] is provided for known foreign creditors through the sending of an individual notice which, since EIR Recast, is a standard notice form published on the European e-Justice Portal. Collective information[115] is also provided by the publication and, in certain cases, by the registration in public registers in other Member States of the judgement opening insolvency proceedings. EIR Recast has further strengthened this collective information by creating insolvency registers that contain essential information on insolvency proceedings and are interconnected via the European e-Justice Portal notably.[116]

The information also focuses on the content of national insolvency laws. Pursuant to Article 86 EIR Recast, Member States were required to provide a "short description of their national legislation and procedures relating to insolvency", information that can be accessed on the e-Justice Portal. However, the content of the pages devoted to the various Member States is not aligned in a way that lets investors easily compare the different national regimes. As a result, the Proposal of directive of 7 December 2022 "harmonising certain aspects of insolvency law" aims at strengthening the transparency of national laws on insolvency proceedings by requiring Member States to produce and regularly update a clearly defined, standard factsheet with practical information on the main features of their domestic laws on insolvency proceedings for investors.[117]

35. Besides, EIR and EIR Recast grant to any creditor who has his habitual residence, domicile or registered office in a Member State other than the Member State where the insolvency proceedings are opened the right to lodge his claims in the main or secondary proceedings.[118]

EIR Recast specifies that any foreign creditor may lodge claims in insolvency proceedings "by any means of communication, which are accepted by the law of the State of the opening of proceedings"[119] and provides for a standard claims form.[120]

114 EIR, art. 40. – EIR Recast, art. 54.
115 EIR, art. 21 to 23. – EIR Recast, art. 28 to 30.
116 EIR Recast, art. 24 and 25.
117 Proposal of 7 December 2022, art. 68.
118 EIR, art. 39. – EIR Recast, art. 53.
119 EIR Recast, art. 53.
120 EIR Recast, art. 55(1).

EIR and EIR Recast also allow for collective lodging of claims: insolvency practitioners in the main proceedings and any secondary proceedings may lodge claims in other proceedings which have already been lodged in the proceedings for which they were appointed,[121] in accordance with the law applicable to the proceedings in which claims are lodged.[122]

36. Finally, once creditors' rights have been admitted into insolvency proceedings, additional measures are provided to ensure the effectiveness of their protection during the proceedings.

An insolvent company may have taken advantage of the European freedom of movement to transfer part or all of its assets. In this case, European law on insolvency proceedings allows the insolvency practitioner to claim that moveable property was removed from the territory of the State of the opening of proceedings to the territory of another Member State after the opening of the insolvency proceedings, and to bring any action to set aside "which is in the interests of the creditors."[123] Moreover, the regime of avoidance actions[124] and tracing assets belonging to the insolvency estate[125] may soon be improved within the Union. On the latter point, in particular, the Proposal of Directive of 7 December 2022 lays down that Member States shall ensure that, upon request of the insolvency practitioner appointed in ongoing insolvency proceedings, the designated national courts have the power to access and search, directly and immediately, bank account information, where necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in that proceedings.[126] And the Proposal also envisages insolvency practitioners' "timely" access to the beneficial ownership registers set up in the Member States and accessible through the system of interconnection of beneficial ownership registers.[127]

37. And another system to protect the interests of foreign creditors during the insolvency proceedings may soon be adopted. Following the inspiration of German law[128], the Proposal of 7 December 2022 provides for the introduction of a creditors' committee to strengthen to position of the creditors in the procedure, ensuring a fair and predictable distribution of recovered values among

121 EIR, art. 32(2). – EIR Recast, art. 45(2).
122 Case C-25/20, *Alpine Bau*: BJS, 2022, n° BJS 200s2. p. 45, obs. *F. Jault-Seseke and D. Robine*; Rev. proc. coll. 2022, comm. 73, obs. *Th. Mastrullo*.
123 EIR, art. 18. – EIR Recast, art. 21.
124 Proposal of 7 December 2022, art. 4 to 12.
125 Proposal of 7 December 2022, art. 13 to 18.
126 Proposal of 7 December 2022, art. 13 to 16.
127 Proposal of 7 December 2022, art. 17.
128 *InsO,* art. 68 and seq.

creditors, notably. The Proposal presents the creditors' committee as a "key tool" to ensure that insolvency proceedings are conducted in a way that protects creditors' interests and ensures the involvement of individual creditors who might otherwise not participate in the proceedings due to lack of geographic proximity.[129]

Once again, it is the protection of local creditors in the face of cross-border mobility and establishment of insolvent companies which is at the heart of the European insolvency law's developments.

Conclusion

Thanks to the progress of freedom of establishment, even insolvent companies are able to circulate within the European area, notably through cross-border operations. But this legal mobility, which is the very essence of the European status of companies, entails risks of abuse and fraud, through forum shopping and law shopping, and can be carried out to the detriment of local interests.

That is why, while affirming the freedom of establishment of companies by the development of a European company law, EU law also mitigates the risks incurred by the cross-border mobility of insolvent companies by the development of a European law on insolvency proceedings. The focus is then on the company's substantive mobility and establishment, linked to the location of the centre of main interests and on the protection of third parties' rights, rather than on formal mobility and establishment, linked to the move of the registered office and the change of registration and *lex societatis*. The realism of the law on insolvency proceedings is thus used to moderate the liberalism inherent in the right of establishment of companies.

The balance struck is satisfactory. On the one hand, by focusing on the company's substantive establishment and the place where it does effectively business, which are ascertainable by third parties, the law on insolvency proceedings promotes the legal certainty and the predictability of the creditors within the insolvency procedures opened against the debtor company. On the other hand, the insolvency law does not prevent in principle the mobility allowed by the company law and the freedom of establishment: it simply curbs the registered office's, central administration's or assets' relocation by limiting its scope, when the company becomes insolvent and is most likely to commit fraud or abuse or to affect the interests of third parties.

129 Proposal of 7 December 2022, p. 19.

This remarkable combination between company law and law on insolvency proceedings enables a reasoned expression of the cross-border mobility of insolvent companies within the European Union.