
Competition Law versus Insolvency Law: When Legal Doctrines Clash

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It is probably seen in most jurisdictions as a fatal violation of the guiding principle of the law as a coherent unity – praised in Germany as ‘*Einheit der Rechtsordnung*’ – when the effect and goal of one segment’s application contradicts diametrically the effect and goal of another segment of law. There are good reasons to believe that it is one of the main tasks of academics to discover such discrepancies and to search for possible solutions. Usually, this is a demanding operation since the ‘compartmentalization’ of legal experts on all levels – that is, in the responsible executive, legislative, and jurisdictional branches as well as within the academic disciplines – tends to prevent a quick fixing of the problem. The best one can normally hope for is that the antagonistic sides sit together and work on an acceptable compromise.

The title of this article indicates that it is also pointing at such a contradiction – to be more precise, a clash between competition and insolvency law, particularly on a European level. However, it cannot, and does not, claim that others have not yet seen the clash. The contrary, at least partially, is true. The rigour with which European competition law disregards, or even tramples underfoot, insolvency law’s goals by means of its recovery procedure of unlawful aids has been addressed for quite some time by many commentators.¹ This is less true, though, with insolvency law’s intrusion into the competition domain.² Yet, in any case, it appears to be more than appropriate to publish a plea for the search for a uniform application of standards in the present journal, which carries the ideal of a uniform law even in its title.

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¹ See, for instance, C Koenig and N Ritter, ‘Das Unternehmen, sein Rechtsträger und dessen Anteilseigner im Rahmen der Rückforderung gemeinschaftsrechtswidriger Beihilfen’ (2004) 15(16) Europäische Zeitschrift für Wirtschaftsrecht 487 ff; V Götz and J Martínez Soria, ‘Subventionsrecht’ in M A Dausies (ed.), *EU-Wirtschaftsrecht* (Ergänzungslieferung 2012), H III, Subventionsrecht, para 272 ff; U Ehricke, ‘Rückzahlung gemeinschaftsrechtswidriger Beihilfen in der Insolvenz des Beihilfeempfängers’ [2001] Zeitschrift für Wirtschaftsrecht 489; Clavora, *Die Rückforderung unrechtmäßiger Beihilfen aus insolvenzrechtlicher Sicht* (forthcoming in 2013).

² See A Rokas, *Die Insolvenzprophylaxe als Bestandteil der Corporate Governance im deutschen Aktienrecht* (Nomos Verlagsgesellschaft 2012) p. 20; C Paulus, ‘Verbindungslinien des modernen Insolvenzrechts’ [2000] Zeitschrift für Wirtschaftsrecht 2189; C Paulus, ‘Die Insolvenz als Sanierungschance: ein Plädoyer’ (2005) 34(6) Zeitschrift für Unternehmens und Gesellschaftsrecht 309, 321; C Paulus, ‘Zur Auslegung anfechtungsrechtlicher Vorschriften’ [2008] Festschrift für Gero Fischer 445, 447; C Paulus, *Insolvenzrecht* (2nd ed, CH Beck 2012), rz 4.

Commonalities

Before pointing to the deficiencies and failures, a first look should examine whether there are possible commonalities of the envisaged opponents. And, indeed, there are some, and they are quite fundamental. Since it is fair to state that both competition law and insolvency law do strive ultimately for a common goal, namely market efficiency. This is common ground with respect to competition law: by protecting each economic actor's free and unhampered competition and, thus, stabilizing the fundamentals of a free market economy, competition law prevents, to the extent possible, market distortions. It thereby strives to complete the single market. An essential part of this effort is the prohibition of unlawful State aid – that is, aid that runs *par condicio concurrentium* (see discussion later in this article).

Insolvency law's approach to market efficiency is less obvious but nevertheless fundamental for the market. Seen from a traditional stance, one could say that insolvency law is providing a procedure – based on the principle of the *par condicio creditorum* – for an orderly market exit. As such, its enormous importance was discovered and recognized in the wake of the East Asia crisis in the late 1990s. Ever since, insolvency law is on the agenda of multilateral institutions such as the International Monetary Fund, United Nations Commission on International Trade Law (UNCITRAL), and the World Bank.³ However, insolvency law's concern for market efficiency can be rooted even deeper and, thus, also includes a fairly young additional feature that involves rescuing failing enterprises by means of a Chapter 11-type of proceeding.⁴ Speaking in economic terms, it is the ultimate goal of any effective insolvency law to reallocate assets that have become unproductive as rapidly as possible to their most productive use within an economy.

The modern rescue option within insolvency law is not a contradiction to this insight – even though it refrains, by definition, from the said reallocation. This new approach is quite likely a consequence of the changing structure of modern economy – more precisely, of the growing importance of what is commonly called the tertiary economic sector. Whereas the secondary sector's main assets are movables, immovables, and receivables (consider Ulpian's '*mobilia, immobilia et nomina*'⁵), all of which are (or have already been in Roman antiquity) perfectly marketable, the tertiary sector's particularity assets are know-how, goodwill, charisma, and so on – that is, assets that are much more intertwined with a

³ On this, see C Paulus, 'Der Internationale Währungsfonds und das Internationale Insolvenzrecht' [1999] *Praxis des Internationalen Privat- und Verfahrensrechts* 148 ff; C Paulus, 'Die Weltbank und das Insolvenzrecht' in T Kind, F Kießner and A Frank (eds.), *Unternehmenskrisen – Der Jurist als Notarzt: Festschrift für Eberhard Braun* (CH Beck, 2007) 447 ff; C Paulus, 'Global Insolvency Law and the Role of Multilateral Institutions' (2007) 33 *Brooklyn Journal of International Law* 755 ff.

⁴ Since the US Chapter 11 proceeding still serves today as a global model for all sorts of national variations, it appears to be justifiable to use this model *pars pro toto*.

⁵ Cf Ulpian, D 42.1.15.2.

person's individual capabilities and that are, accordingly, far less marketable. Given this distinction, it is in the *creditors's* common interest to rescue this very debtor in a way that those assets can be made more profitable than before (see discussion later in this article). One wonders what insolvency law's appropriate reaction should and will be with respect to the emergence of the so-called quaternary economic sector, which is based on an information or knowledge economy.

Discrepancies

Competition law

It is an essential part of the competition law's overall goal to prohibit State aid as a general rule of thumb. Accordingly, Article 107, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU) states:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.⁶

The purpose of this rather rigid approach is to protect competition within the European Union and, accordingly, to preserve the internal market as a place for the autonomous self-organization of that market. State aid is generally seen as distorting effective competition and, thus, preventing fairness in the free movement of goods, persons, services, and capital.⁷ Accordingly, it is not so much the granting of financial means that is at the centre of these deliberations but, rather, the undisturbed functioning of free market conditions. The Member States shall, thereby, be forced to adjust their steering tools to be compatible with the market economy. In order to safeguard this goal, the Member States are bound to have potential State aids controlled and permitted *ex ante* by the European Community Commission, pursuant to a particular procedure as provided for in Article 108, paragraph 3, of the TFEU and in connection with Article 3 of Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Application Regulation).⁸

If this procedure, however, has not been adhered to and State aid has been unlawfully provided to a market participant, a recovery regime will be applied.⁹ And, even though it is not explicitly expressed in the TFEU, it has been clarified

⁶ Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, [2010] OJ C83/49.

⁷ Cf *ibid* Article 26, para 2.

⁸ Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L083 [Application Regulation] (it was changed in 2004 and will be changed again in the near future).

⁹ Cf *ibid* Article 1, lit f.

from early on that such a regime has to be applied.¹⁰ Thus, the general outline is to be found nowadays in Article 10 ff. of the Application Regulation. Article 14, in particular, states:

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.
2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.
3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.

The recovery that encompasses interest as well as compounded interest is based on a two-step approach. The first step is the recovery decision by the Commission directed towards a particular Member State, which presupposes a preceding negative decision that recognizes the unlawfulness of the respective State aid. The second step is to be performed by the Member State, which is obliged to recover the aid as rapidly as possible,¹¹ 'in accordance with the procedures under the national law of the Member State concerned.'¹² The addressee is usually the beneficiary of this aid – that is, the one who has received the economic benefit.¹³

It is well settled that the recovery procedure is to be applied in all rigidity – that is, the granting of aid must be annulled by something akin to an *actus contrarius* in order to re-establish the *par condicio concurrentium*.¹⁴ A couple of objections

¹⁰ Case C-70/72 *EC Commission v Deutschland*, [1973] ECR 829, para 13; Case C-310/99 *Italy v EC Commission* [2002] ECR I-2289, para 13.

¹¹ Case C-232/05 *EC Commission v France* [2006] ECR I-10071.

¹² Cf Application Regulation (n 8) Article 14, para 3.

¹³ T Köster, Case C-303/88 *Italy v EC Commission* [1991] ECR I-1433, para 57. Within a group of companies context, a more specific determination of the beneficiary might be appropriate. Cf T Köster, *MünchKommBeihVgR* (CH Beck 2011) Article 14 VerfVO, para 12. Additionally, see Case T-111/01 *Saxonia Edelmetalle v EC Commission* [2005] II-1579, 122 ff; *MünchKommBeihVgR / Köster* Article 14 VerfVO para 13.

¹⁴ Case C-277/00 *Germany v EC Commission* [2004] ECR I-3925, para 76.

against this harsh consequence have already been eliminated by respective decisions of the European Court of Justice (ECJ). Accordingly, the complaint that this rigidity violates the principle of proportionality has been dismissed; it has to be seen rather as a logical consequence of the determination of the aid's unlawfulness. It is also generally not a valid objection when, and if, the aid recipient has claimed to have trusted the lawfulness of the grant. In response to this argument, it was proclaimed that a careful entrepreneur would double check the legality of the permission procedure – that is, an entrepreneur has to verify whether or not the respective Member State has rightly adhered to the requirements of Article 107 of the TFEU.¹⁵

In the present context, it is of particular interest that the objection that the recovery of the aid has resulted in the recipient's bankruptcy has also been rejected as irrelevant.¹⁶ As long as the recovery is not impossible for absolute reasons, but just due to legal reasons, the recovery must be pursued. Accordingly, even if the beneficiary of the State aid has changed ownership in the meantime – and be it by means of a liquidation sale as part of an insolvency proceeding – there is a good chance that the new owner will be obliged to repay that aid.¹⁷

The insolvency-related issues with respect to the recovery procedure are articulated in a *Notice from the Commission: Towards an Effective Implementation of Commission Decisions Ordering Member States to Recover Unlawful and Incompatible State Aid*:

3.2.4. The specific case of insolvent beneficiaries

60. As a preliminary observation, it is important to recall that the ECJ has consistently held that the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid.
61. In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interests), as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re-establish the ex-ante situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases. The Commission is therefore of the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary

¹⁵ Case C-24/95, *Land Rheinland-Pfalz v Alcan* [1997] ECR I-1591, para 25; MünchKommBeihVgR / Köster Article 14 VerfVO para 24; A Bartosch, *EU-Beihilfenrecht* (CH Beck 2009) Article 14, para 8 ff. It is said to be a different affair when and if there is a justified trust arising from certain behaviour of the EU organs or when a statute has retroactive effects.

¹⁶ Case C-52/84 *EC Commission v Belgium* [1986] ECR 89; Case C-499/99 *EC Commission v Spain* [2002] ECR I-6301, para 37.

¹⁷ For the necessary differentiation between a share and an asset deal, see Cases C-328/99 und C-399/00 *Italy and SIM 2 Multimedia v EC Commission* [2003] ECR I-4035, para 77.

- may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when the company is liquidated and its assets are sold under market conditions.
62. When implementing recovery decisions concerning insolvent beneficiaries, Member State authorities should ensure that due account is taken throughout the insolvency proceedings of the Community interest, and more in particular of the need to end immediately the distortion of competition caused by the granting of unlawful and incompatible aid.
 63. However, the Commission's experience has shown that the sole registration of claims in bankruptcy proceedings may not always be sufficient to ensure the immediate and effective implementation of the Commission's recovery decisions. The application of certain provisions of national bankruptcy laws may frustrate the effect of recovery decisions by allowing the company to operate despite the absence of full recovery, thus allowing the distortion of competition to continue. Based on its experience in dealing with cases of recovery from insolvent beneficiaries, the Commission considers that there is a need to define the obligations of Member States at the different steps of bankruptcy proceedings.
 64. The Member State should immediately register its claims in the bankruptcy proceedings. According to the ECJ case law, recovery will be done according to national bankruptcy rules. The recovery debt will thus be refunded by virtue of the status given to it by national law.
 65. In the past, there have been cases in which the insolvency administrator refused to register a recovery claim in the bankruptcy proceedings, and this because of the form of the illegal and incompatible aid granted (for example when the aid had been granted in the form of a capital injection). The Commission considers that this situation is problematic, especially if such a refusal would deprive the authorities responsible for the execution of the recovery decision of any means to ensure that due account is taken of the Community interest in the course of the insolvency proceedings. Therefore the Commission considers that the Member State should dispute the refusal by the insolvency administrator to register its claims.
 66. To ensure the immediate and effective implementation of the Commission's recovery decision, the Commission is of the view that the authorities responsible for the execution of the recovery decision should also appeal any decision by the insolvency administrator or the insolvency court to allow a continuation of the insolvent beneficiary's activity beyond the time limits set in the recovery decision. Likewise, national courts, when faced with such a request, should take the Community interest fully into account, and more in particular the need to ensure that the execution of the Commission's decision is immediate and that the distortion of competition caused by the

unlawful and incompatible aid is ended as soon as possible. The Commission considers that they should therefore not allow for a continuation of an insolvent beneficiary's activity in the absence of full recovery.

67. In the case where a continuation plan is proposed to the creditors' committee implying a continuation of the activity of the beneficiary, the national authorities responsible for the execution of the recovery decision can only support this plan if it ensures that the aid is repaid in full within the time limits foreseen in the Commission's recovery decision. In particular, the Member State cannot waive part of its recovery claim, nor can it accept any other solution that would not result in the immediate ending of the activity of the beneficiary. In the absence of a full and immediate repayment of the unlawful and incompatible aid, the authorities responsible for the execution of the recovery decision should take all measures available to oppose the adoption of a continuation plan and should insist on the ending of the activity of the beneficiary within the time limit set in the recovery decision.
68. In the case of liquidation, and as long as the aid has not been fully recovered, the Member State should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision. To achieve a 'correct transfer of assets,' the Member State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets. This may be the case if the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. In such a case, the recovery order needs to be extended to that third party.¹⁸

The degree to which the ECJ has pursued its goal of 'cleaning away' the distortive effects of unlawful State aid is expressed in the clarity of this section, particularly in paragraph 61. Accordingly, a liquidation of the beneficiary can be seen as an acceptable option to recovery.¹⁹ This finding is underlined by the subsequent paragraphs – 62 through 68 – which oblige the Member States to do everything they can in the course of an insolvency proceeding (following the rules of the respective national law) to accelerate the proceeding and to promote the debtor's liquidation. Moreover, a Member State shall oppose any form of the debtor's business continuation – even in the hands of a third party acquirer – as long as a full recovery of the aid has not yet been achieved. It is particularly at this point where the clash occurs between the intent and goal of European

¹⁸ *Notice from the Commission: Towards an Effective Implementation of Commission Decisions Ordering Member States to Recover Unlawful and Incompatible State Aid* [2007] OJ C-272, 0004–0017 [Commission Notice].

¹⁹ Case C-52/84 (n 16).

competition law and that of insolvency law. Therefore, we now turn to this part of the law.

Insolvency law

It has already been mentioned earlier that modern insolvency law, after centuries or even millennia of liquidation – first of the debtor’s person²⁰ and then of his assets – has added only recently a new method of satisfying creditors: namely by rescuing the debtor.²¹ However, it is rarely the case that a mere economic insight changes attitudes and behaviour. What is needed additionally is to overcome the deep-rooted biases that are connected with the traditional attitudes. With respect to insolvency law, such fundamental bias is its particular stigma.²²

To the degree that insight or explanation helps to overcome such deep-rooted sentiments, it might be helpful to delve a bit deeper into the properties of modern insolvency law and to unveil the implications of the recent changes in this field. As indicated earlier, it is a consequence of the tertiary economic sector that creditors of debtors working in this area are more than ever before dependent on the debtor’s support in order to realize his estate’s value. The ‘moneyfication’ – that is, the transition from asset to money – of this sector’s most valuable goods is harder to perform than is the case with movables, immovables, or receivables. The sale of a debtor’s car or real estate needs almost no active involvement of the debtor, whereas the sale of the debtor’s goodwill or know-how is hardly doable without his participation – his charisma is not sellable at all. Nevertheless, in order to make these values profitable for the creditors, it is (or, at least for the time being, appears to be) indispensable to get the debtor back on a successful business track.

This necessity was first recognized by the US Bankruptcy Code in 1978.²³ Its famous Chapter 11 proceeding marks the beginning of a new era in which insolvency law turned away from its exclusive concentration on liquidation and opened itself to the alternative rescue option for the debtor. To be sure, this innovation did not arise from a vacuum – it had certain models in the mid-nineteenth-century legislation of the United States (dealing with railway companies)²⁴ or, to a

²⁰ The most famous example is the Twelve Table legislation from early Roman Republican times (450 BC). *Tertiis nudinis partis secanto* (after the third market day, they shall cut him into pieces).

²¹ For a brief historical overview, see C Paulus, ‘Ein Kaleidoskop der Geschichte des Insolvenzrechts’ (2009) 64 *Juristenzeitung* 1148, 1151 ff. For the United States, see B Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard University Press 2002) 255; T Sullivan, E Warren and J Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Oxford University Press 1989); T Sullivan, E Warren and J Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press 2000).

²² Cf Paulus (n 21) 1148, 1149 ff.

²³ US Bankruptcy Code, 11 USC.

²⁴ Cf, for instance, D Baird and T Jackson, *Cases, Problems and Materials on Bankruptcy* (4th ed, Little Brown and Company 1985) Chapter 12, 947; S Riesenfeld, *Cases and Materials on Creditors’ Remedies and Debtors’ Protection* (3rd ed, West Publishing 1979) 768 ff.

certain degree, even in an Augustean legislation²⁵ from around the beginning of the Christian era (dealing with the *cessio bonorum*).²⁶ These models, as well as their copies, have in common that the prize for having exclusively a liquidation option is too high either for society as a whole or for the creditors in general.

Chapter 11 allows a debtor company, without being (1) forced to demonstrate its own insolvency – that is, the incapability to satisfy its creditors fully on their claims as they become due – and without being (2) replaced by an administrator, to enter what is sometimes called a ‘protective umbrella’ and what brings with it a so-called ‘automatic stay.’ This is an essential feature of almost all existing insolvency proceedings worldwide – namely, that creditors are prohibited after the commencement of the proceeding to pursue their own interests on an individual basis. This selfishness is replaced instead with a mutuality – the *par condicio creditorum*. Accordingly, what is at stake is no longer the individual satisfaction of a particular creditor but, rather, the fair and equal treatment of the creditors.

Stemming originally from the liquidation proceeding, certain instrumentalities can also be used within a rescue proceeding. As a result of their particular importance in the present context, it might suffice to mention just two – namely, to assume or reject certain contracts and to avoid certain pre-commencement transactions. Not only have almost all US air carriers made use of the Chapter 11 proceeding, particularly to escape burdensome contracts with the unions (and, thereby, to gain competitive advantages over other air carriers), but such methods are also commonly employed to annul previously contracted bargains by means of the *actio Pauliana*, which is applicable only when and if an insolvency proceeding has been commenced.

Copies of Chapter 11 can be found nowadays in almost all European insolvency-related legislation. The United Kingdom has its Companies’ Voluntary Arrangement (CVA); France has the Procédure de Sauvegarde; Germany has included a copy in sections 217 ff of its Insolvency Ordinance (Planverfahren); and Italy also has a copy as do Spain and Greece. The Netherlands are said to be including a variation of it in its new long-awaited legislative act. It is fair to conclude, thus, that this movement is not just a temporary mode of fashion but, rather, an expression of real need.

This need has been expressed on a European level only recently. Advocate General Juliane Kokott, for instance, emphasized, in her opinion in the case of *Bank Handlowy w Warszawie SA and PPHU v Christiapol sp*,²⁷ that the Council Regulation (EC) 1346/2000 on insolvency proceedings (EIR) should be amended to make it more rescue friendly.²⁸ The recent presentation of such potential

²⁵ Cf Paulus (n 21) 1151 ff.

²⁶ W Pakter, ‘Roman Bankruptcy’ in M Stolleis, *Die Bedeutung der Wörter: Studien zur europäischen Rechtsgeschichte: Festschrift für Sten Gagnér* (Geburtstag 1991) 327 ff; M Kaser and K Hackl, *Das römische Zivilprozessrecht* (2nd ed, CH Beck 1996) 405, para 61. See also I Kroppenber, *Die Insolvenz im klassischen römischen Recht* (Bohlaus 2001) 310, esp n 99.

²⁷ Case C 116/11 *Bank Handlowy w Warszawie SA and PPHU v Christiapol sp* [2012] ECR para 53 ff, esp 55; cf *Neue Zeitschrift für Insolvenzrecht* (CH Beck 2012) 553 ff.

²⁸ Council Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L-160.

amendments by the European Commission lists at the very beginning the necessary shift from the EIR's present liquidation orientation to a future reorganization openness.²⁹ And, finally, with respect to citizen and business mobility, the European Commission in its recently proclaimed Single Market Act II 2012 states:

[F]ree movement across borders is at the very basis of a single market and one of the foundations of the European Union. Practical and legal barriers to the mobility of citizens, business activities and investment funding still persist however. With the Single Market Act II, the Commission is therefore proposing to:

- (i) develop the EURES portal into a fully-fledged cross-border job placement and recruitment tool
- (ii) introduce provisions to mobilise long-term investment funds for private companies and long-term projects
- (iii) modernise insolvency proceedings, starting with cross-border cases, and contribute to an environment that offers second chances to failing entrepreneurs.³⁰

The last-mentioned 'second chance' is the decisive catchword in the present context since it indicates the rescue option. In other words, the European Commission deems it important enough to address this insolvency legislation-related goal as one of the central pillars for the enhancement of the single market. It is hard to think of a more striking proof for how quintessential the rescue option is.

However, the preceding remarks will have already conveyed a feeling for where certain interferences with competition law might be located. Since when and if an insolvency proceeding is no longer exclusively the last part of a company's shutting down procedure, but – quite to the contrary – possibly a step towards the re-emergence of a previously fragile company as a now competitive and well-adjusted market participant, it must have some impact on competition law. Insolvency law is no longer an insulated area committed exclusively to the orderly 'burial' of a company from which there is no escape for the insolvent debtor. Rather, the rescue option provides a way back to the area of competitiveness and becomes, thus, part of the tool box for enterprises acting successfully on the market.

Extending insolvency law into the period when there is not yet a need for dissolution of the company brings this field of law into context with many other areas – suffice it to mention capital market law (secondary markets, for instance, have changed, and are still changing, insolvency practice tremendously), corporate governance (it is noteworthy that huge sections of present day Corporate Governance Codes contain commands to govern an enterprise in a

²⁹ Cf Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) 1346/2000 on insolvency proceedings, 12 December 2012.

³⁰ Single Market Act II, press release, EUROPA, <http://europa.eu/rapid/press-release_IP-12-1054_en.htm> accessed 14 January 2012.

way to prevent previous crises³¹), labour law, and so on. Insolvency law, thus, overlaps almost completely with company law to the degree that it deals with enterprises in financial difficulties.³² However, above all, this modern insolvency law is now neighbouring directly with competition law, and it has the potential to distort market fairness and, thus, to interfere with the latter law. The best examples are the earlier-mentioned ‘flights’ into Chapter 11 proceedings by the US air carriers.

Even if in those cases competition law remedies were not used, they do demonstrate the potential for possible violations. They can even reach into the not yet fully evolved insolvency law of enterprise groups.³³ If a legislator would allow a type of comprehensive proceeding for the entirety of the group, when and only if one group member is insolvent, the group as a whole could make use of the insolvency law advantages. It would just have to find one special vehicle whose special purpose would be to go bankrupt and, thus, to allow all other group members to escape – at least temporarily – the reach of their creditors and to gain, thereby, a competitive advantage over others.

Possible compromises

The preceding discussion should have made clear that competition law (in its European application) is ignoring most of insolvency law’s modern goals as insolvency law, in turn, is increasingly threatening to interfere with competition law’s intentions. It should additionally have become clear from what has been said that both approaches and purposes are justifiable and that both are absolutely indispensable for a functioning market economy. Therefore, a possible solution of the described clash of doctrines can certainly not be found in a simple allegation of one area’s preponderance over the other. What is needed, instead, is a finer tuning than just a black-or-white solution.

Accordingly, insolvency law in its modern shape has to constantly be aware of its impact on the rules of fair competition. Any of the ‘advantages’ that can be used in a Chapter 11 type of proceeding need to be screened regarding their compatibility with competition law. This effort includes not just the earlier mentioned possibility of rejecting certain burdensome contracts or retroactively annulling previous transactions.³⁴ Depending on the shape of the specific insolvency law, the advantages begin with the blocking of any creditor action through the automatic stay of an insolvency proceeding and covers the eased termination

³¹ See Rokas (n 2) 34 ff.

³² Cf C Paulus, *Konturen eines modernen Insolvenzrechts: Überlappungen mit dem Gesellschaftsrecht* (Der Betrieb 2008) 2523 ff.

³³ Cf C Paulus, *Wege zu einem Konzerninsolvenzrecht*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR 2010) 270 ff.

³⁴ Just as one (out of many possible chosen) examples, see section 169bis of the Italian Insolvency Statute, which has been changed recently by the Decree Law on Urgent Measures for the Country’s Growth, Doc 83/2012.

of labour contracts and might end with the alleviated requirements for a sale of the enterprise or parts of it as well as for an exchange of owners and creditors by means of a debt-equity swap. To be sure, unlike in the United States where the stigma of insolvency has been successfully pushed back in wide areas of the economy, this flaw is still quite powerful in much of Europe.³⁵ This is probably the single most important reason why up to now there has not been much abuse of these advantages. Nevertheless, a close inspection will become more and more necessary, to the degree that in Europe insolvency law will eventually be recognized as an acceptable business method to get ahead of one's competitors.

Competition law, on the other hand, should re-think its rigidity and the way it ignores – or, better, impedes – all efforts to a company's rescue. Its strategy resembles a crusade's campaigns of vengeance and is diametrically opposed to insolvency's modern approach. To justify this somewhat out-dated attitude using reference to ECJ decisions stems from times in which the ECJ had not yet decided on original insolvency matters – the EIR entered into force in mid-2002, the first judgment was rendered in January 2006.³⁶ Accordingly, this justification is also somewhat out-dated as can be seen from the ECJ's decision in *Bank Handlowy*.³⁷ In this case, the ECJ obliged the judges who were deciding on secondary proceedings (thereby reacting to AG Kokott's earlier-mentioned remarks) to comply with restructuring efforts of the main insolvency proceeding:

Para. 63: The answer to the third question is therefore that Article 27 of the Regulation must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

Whereas, prior to this point, the rescue option has not really been the focus of the ECJ, the Court now recognizes the need for joined efforts to achieve a protective goal. Given the acknowledgment of this new approach, the Competition Directorate General in Brussels might also want to reconsider its understanding of State aid recovery. Whereas it seems to be perfectly understandable to pursue the *mala fide* recipient of unlawful subsidies in all strictness, the same rigour is much less understandable – particularly in sight of the earlier-mentioned broad common understanding of the need for a second chance through insolvency law – in cases of *bona fide* recipients or of *bona fide* purchasers. Their failure lies in the fact that they have not controlled the lawfulness of the granting of the State aid and the circumstances under which the seller has received the support respectively. In order to strive for a uniform body of law, European institutions are well

³⁵ Cf (n 21).

³⁶ Case C-1/04 *Suzanne Staubitz-Schreiber* [2006] ECR I-701. Cf *Commission Notice* (n 18) para 60.

³⁷ Cf *Zeitschrift für Wirtschaftsrecht* (ZIP 2012) 2403 ff.

advised to eliminate the degree of possible inherent contradictions. Each one of them is a violation of a citizen's justified expectation towards a coherent legal order. Therefore, it is to be hoped that the clash of legal doctrines described in this Article will alarm those in charge of its elimination and will initiate at least a debate about the validity of the presented observations.