

The EU Regulation on Insolvency Proceedings (Recast)

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After two and a half years of consultation and negotiation, the European Council and the European Parliament have reached an agreement on the text of the ‘new’ Insolvency Regulation.¹ The existing Insolvency Regulation (EC) No 1346/2000 (‘EIR’), in legal force since May 2002, will be repealed on the day of the entry into force of the EU Insolvency Regulation (recast) (‘EIR Recast’), which is 26 June 2017, see Article 92 EIR (‘Entry into force’).² The legislative process started on the basis of Article 46 EIR, that obliges the European Commission to present to the European Parliament, the Council and the Economic and Social Committee ‘... a report on the application of this Regulation’. This report is commonly referred to as the Heidelberg-Luxembourg-Vienna Report, a title which reflects to involved (professors of the) universities as principle drafters.³ Article 46 EIR furthermore requires that the report ‘... shall be accompanied if need be by a proposal for adaptation of this Regulation.’ The European Commission’s proposal of 12 December 2012⁴ is based on said report, on discussions and consultations with a group of experts and an appraisal of the effects on existing EU policy.⁵ The ‘need’ for renewal was based on the European Commission’s identification of five main shortcomings in the EIR that her proposal aims to address:

- The EIR excludes pre-insolvency proceedings, hybrid proceedings, and certain personal insolvency proceedings;
- The application of the ground rule of international jurisdiction of a court (ie the center of main interest (or: COMI)) of an insolvent debtor has led to some difficulties and to forum shopping by relocating COMI;
- Opening of secondary proceedings has shown to disturb efficient administration of the debtor’s assets;
- There is no obligation to publicise the opening of insolvency proceedings, for lodging of claims creditors need to be aware of an insolvency proceeding; and
- The EIR does not deal with the insolvency of groups of companies.

In this note I briefly explain how these shortcomings have been adressed.

¹ European Parliament legislative resolution of 20 May 2015 on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council on insolvency proceedings (recast) (16636/5/2014 – C8-0090/2015 – [2012/0360\(COD\)](#)) (Ordinary legislative procedure: second reading).

² Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast), see O.J. L 141/19 of 5 June 2015. See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2015:141:FULL&from=RO>. Further: EIR (Recast).

³ Available via http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf. Separately published as: Burckhart Hess, Paul Oberhammer and Thomas Pfeiffer, *European Insolvency Law, The Heidelberg-Luxembourg-Vienna Report*, C.H. Beck – Hart – Nomos 2014.

⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC), No. 1346/2000 on Insolvency Proceedings, COM(2012) 744 final. From the abundant literature regarding the EIR I refer to Christoph G. Paulus, *Europäische Insolvenzverordnung. Kommentar*, Frankfurt am Main: Verlag Recht und Wirtschaft, 4th ed., 2013, and Bob Wessels, *International Insolvency Law*, Deventer: Kluwer, 3rd. ed., 2012, Chapter IV.

⁵ Named Impact assessment, see http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf

EIR Recast: a redoubled size

The existing Insolvency Regulation contains 33 recitals, 47 Articles (in 5 Chapters), and three Annexes which form an integral part of the EIR. The aim of the Annexes is to facilitate the application of the European Insolvency Regulation. They serve to provide liquidators (in the Recast renamed as ‘insolvency practitioners’) and courts with a simple method of consulting the Annexes to verify whether the EIR is applicable to specific insolvency proceedings. The Annexes have been revised around eight times in the last thirteen years. The latest revision took place on 5 June 2014.⁶ The text of the EIR Recast however is twice as large. It contains 89 recitals, 92 Articles and four Annexes (A: listing all the national names of insolvency proceedings; B: all national names of insolvency practitioners; C: listing all repealed Regulations, including Regulation 1346/2000, and D: a correlation table of the Articles of the EIR and those of the EIR Recast).⁷

Scope: eight types of proceedings

As to the EIR Recast’s scope, it extends to as much as eight (!) (pre-)insolvency proceedings, namely proceedings:

- which promote the rescue of economically viable but distressed businesses and give a second chance to entrepreneurs;
- which provide for the restructuring of a debtor at a stage where there is only a likelihood of insolvency;
- which leave the debtor fully or partially in control of his assets and affairs;
- which provide for a debt discharge or a debt adjustment of consumers and self-employed persons (i) by reducing the amount to be paid by the debtor, or (ii) by extending the payment period granted to him;
- which grant a temporary moratorium on enforcement actions brought by individual creditors where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business;
- which are subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the possibility to challenge the jurisdiction of the court which has opened the proceedings;
- that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis, and
- which are triggered by situations in which the debtor faces non-financial difficulties, provided however, that these difficulties give rise to a real and serious threat to the debtor’s actual or future ability to pay his debts as they fall due.

Recital 13 EIR Recast distinguishes between rescue proceedings and liquidation proceedings. Regarding rescue, the collective proceedings which are covered by the scope of application of the Recast include ‘... all or a significant part’ of the creditors to whom the debtor owes ‘... all or a substantial proportion of his outstanding debts’ provided that the claims of those creditors

⁶ Containing consolidated versions of the Annexes incorporating its latest amendments (Council Implementing Regulation (EC) No 663/2014 of 5 June 2014 replacing Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings (O.J. L 179 of 19 June 2014, p. 4). See <http://bobwessels.nl/2014/06/2014-06-doc12-insolvency-regulations-annexes-replaced/>

⁷ A transposition table of the recitals of the EIR and the EIR Recast is available via: www.bobwessels.nl, blog under 2015-08-doc1.

who are not involved in such proceedings remain unaffected. This should also include proceedings which involve only the financial creditors of the debtor. The term ‘collective’ therefore has its own specific meaning. However, proceedings which do not include all the debtor’s creditors should be proceedings aimed at rescuing the debtor. For liquidation proceedings it is stated in the recital that proceedings that lead to a definitive cessation of the debtor’s activities or the liquidation of his assets should include all the debtor’s creditors. Moreover, the fact that some insolvency proceedings for natural persons exclude specific categories of claims, such as maintenance claims, from the possibility of a debt-discharge should not mean that such proceedings are not collective. The proceedings referred to are all listed in Annex A (Article 1(1) last line EIR Recast).

International jurisdiction

Rules on international jurisdiction, based on a debtor’s COMI, are further specified, including the possibility of a judicial review (Articles 4 and 5 EIR Recast), whilst jurisdiction for insolvency related actions (actions which derive directly from the insolvency proceedings and are closely linked to them) is now included in the text (Article 6 EIR Recast). The presumptions have been formulated much stronger. In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings. With regard to jurisdiction concerning an individual, the EIR Recast distinguishes between professionals and individuals/consumers, with different ‘suspect periods’. In the case of an individual exercising an independent business or professional activity, the COMI shall be presumed to be that individual’s principal place of business in the absence of proof to the contrary. This presumption shall only apply if the individual’s principal place of business has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings. In the case of any other individual, the COMI shall be presumed to be the place of the individual’s habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within a period of 6 months prior to the request for the opening of insolvency proceedings (Article 3(1), 3rd and 4th line EIR Recast).

Secondary Proceedings

The EIR Recast aims for a more efficient administration of insolvency proceedings in the following ways: (i) by abolishing the winding-up requirement for secondary proceedings, (ii) by the provision that a court may refuse opening of secondary proceedings if this is not necessary to protect the interests of local creditors, and (iii) by improving cooperation between main and secondary proceedings though extending the present cooperation requirements between ‘liquidators’ (Article 31 EIR) to the courts involved and to insolvency practitioners and courts. Where secondary proceedings also may hamper the efficient administration of the insolvency estate, the amended text of the European Insolvency Regulation sets out two specific situations in which the court seized with a request to open secondary proceedings should be able, on request of the insolvency practitioner in main proceedings, to postpone or refuse the opening of such proceedings: (i) the insolvency practitioner in main proceedings has the possibility to give an undertaking to local creditors that they will be treated as if secondary

proceedings had been opened⁸, and (ii) the court temporarily stays the opening of secondary proceedings (Articles 36 and 38 EIR Recast).

Information and Publication

The EIR Recast provides for the establishment and interconnection of insolvency registers (Articles 24 and 25 EIR Recast), determines that the costs of establishing and interconnecting these registers are to be financed by the EU (Article 26 EIR Recast), provides rules for access to the information via the system of interconnection (Article 27 Recast), and for the publication in another Member States of a decision opening an insolvency proceeding and the decision appointing the insolvency practitioner (Article 28 EIR Recast). Article 53 EIR Recast provides that any creditor may lodge claims in the insolvency proceedings by any means of communication, which are accepted by the law of the State of opening of such proceedings. Representation by a lawyer or another legal professional shall not be mandatory for the lodging of claims⁹, lodging by a creditor should go via a standard claims form (Article 55 EIR Recast) and the minimum period for lodging by foreign creditors is 30 days following publication in insolvency register of state of opening (Article 55(6) EIR Recast).

Cross-Border Communication and Cooperation

The duties to communicate and to cooperate in pending insolvency proceedings are extended. In addition to the existing duties between ‘liquidators’ (insolvency practitioners) (Article 41 Recast (replacing the present Article 31 EIR Recast)), these duties are introduced in relations between courts and between insolvency practitioners and courts (Article 42 and 43 EIR Recast).¹⁰ Renewed recital 20 of the EIR, now recital 48 EIR Recast introduces soft law guidance to these duties: ‘... [i]n their cooperation, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law, and in particular relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).’

In view of such cooperation, insolvency practitioners and courts may enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor, or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings.¹¹ Where insolvency proceedings have been opened for several companies of the

⁸ See on the legal nature of such an undertaking Bob Wessels, ‘Contracting Out of Secondary Insolvency Proceedings: The Main Liquidator’s Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation’, in: 9 Brooklyn Journal of Corporate, Financial & Commercial Law, Fall 2014, number 1, pp. 63-110.

⁹ The duty to inform creditors will go through a standard notice form, see Article 54(3) EIR Recast.

¹⁰ The Leiden Law School and the Nottingham Law School have developed non-binding guidances for cross-border communication and cooperation between courts, see B. Wessels (Ed.), EU Cross-border Insolvency Court-to-Court Cooperation Principles, European and International Insolvency Law Studies 1, The Hague: Eleven International Publishing 2015. See also Bob Wessels, ‘EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases’, in: 6 International Insolvency Law Review 2015/2, pp. 145-160, and Bob Wessels, ‘Cooperation and sharing of information between courts and insolvency practitioners in cross-border insolvency cases’, in: *Festschrift für Heinz Vallender zum 65. Geburtstag*, Köln: RWS Verlag Kommunikationsforum GmbH, 2015, pp. 775-792.

¹¹ See Bob Wessels, ‘Cross-border insolvency agreements: what are they and are they here to stay?’, in: N.E.D.

same group, there should be proper cooperation between the actors involved in these proceedings. The various insolvency practitioners and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. Cooperation between the insolvency practitioners should never go against the interests of the creditors in each of the proceedings and such cooperation should be aimed at finding a solution that would leverage synergies across the group (Recitals 49 and 52 EIR Recast).

Groups of Companies

Finally, the EIR Recast contains a novelty, in that groups of companies are addressed, see a new Chapter V: ‘Insolvency proceedings of members of a group of companies’, with over 20 articles (Articles 56-78 EIR Recast). European company law has not led to any tangible result in the area of corporate groups, so European insolvency law should function as a wake-up call for company law specialists. Article 2 EIR Recast provides definitions for ‘groups of companies’ and ‘parent undertaking’ (Article 2(1)(12) and (13) EIR Recast). With a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, the EIR Recast introduces procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member’s separate legal personality (Recital 54 EIR Recast). See Chapter V, Section 1 (‘Cooperation and communication’) (Articles 56-60 EIR Recast). These rules do not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them (Recital 53 EIR Recast). The new Chapter V follows with a Section 2 (‘Coordination’), with subsection 2.1 (‘Procedure’) (Articles 61-70 EIR Recast) and 2.2 (‘General provisions’) (Articles 71-77 EIR Recast), providing for an impartial ‘(group)’ coordinator. In literature, these provisions have had a mixed receipt.¹²

Transitional and Final Provisions

Chapter VII (‘Transitional and final provisions’) introduces in Article 89 a review clause for the text of the EIR Recast (after 5 years) and provides as a basic rule (Article 91(1) EIR Recast), that the entry into force will be on the 20th day following the date of publication of the text (in all national languages of the Member States in the Official Journal (O.J.)). That date is 26 June 2017. Its obvious that legal practice (insolvency practitioners, turnaround managers, accountants, judges, academics) will have a demanding challenge to prepare for the new chapter in the development of European insolvency law.¹³

Faber, J.J. van Hees, N.S.G.J. Vermunt, *Overeenkomsten en insolventie*, Serie Onderneming en Recht 72, Deventer: Kluwer 2012, pp. 359-384; Michele Maltese, ‘Court-to Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems’, 2013, available via http://iiiglobal.org/images/pdfs/maltese_michele%20submission.pdf

¹² See Irit Mevorach, ‘The new proposed regime for EU corporate groups in insolvency: a critical note’, in: 6 *Corporate Rescue and Insolvency* 2013, 89ff.; Stephan Madaus, ‘Insolvency proceedings for corporate groups under the new Insolvency Regulation’, in: 6 *International Insolvency Law Review* 3/2015, 235ff.

¹³ The 2012 proposals were regarded as modest changes, see Horst Eidenmuller, ‘A New Framework for Business

Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond', in: (2013) 20 Maastricht Journal of European and Comparative Law 133, 150. In general the recast has been welcomed, see Robert Amey, 'Reform to the European Insolvency Regulation', in: Corporate rescue & Insolvency 2015, 205ff; Heinz Vallender, '*Europaparlament gibt den Weg frei für eine neue Europäische Insolvenzverordnung*', in: Zeitschrift für Wirtschaftsrecht (ZIP) 2015, 1513ff; M. Weiss, 'Bridge over Troubled Water : The Revised Insolvency Regulation', in: International Insolvency Review 2015 (forthcoming).