

[10425t] *Text.* Compared to the original EIR 2000, the text of the EIR 2015 is over twice as long.

*EIR 2000 with 3 Annexes.* The EIR 2000 contains 33 Recitals, 47 Articles (in five Chapters), and three Annexes. The Annexes are an integral part of the Regulation and aim to facilitate its application. They serve to provide ‘insolvency practitioners’ (renamed, as in the EIR 2000 they were named ‘liquidators’) 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 nine times in the last fourteen years. The second to last revision took place on 5 June 2014. See the 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, [2014] OJ L 179/4). See also Annex C to the EIR 2015, listing the repealed EIR 2000 and the list of the successive amendments to the EIR 2000, and <http://bobwessels.nl/2014/06/2014-06-doc12-insolvency-regulations-annexes-replaced/>. And compare also the 3<sup>rd</sup> edition (2012) of this book, para. 10426a. For the 9<sup>th</sup> proposed revision of the Annexes (in September 2016), see para. 10425u below.

*EIR 2015 with 4 Annexes.* The text of the EIR 2015 contains 89 Recitals, 92 Articles (in seven Chapters) and four Annexes (Annex A lists all the national terms for insolvency proceedings falling under the scope of EIR 2015; Annex B lists all the national terms for insolvency practitioners; Annex C lists all the repealed Regulations, ie the Regulations amending the Annexes and including Regulation 1346/2000, containing the EIR 2000; and Annex D which is a table showing the correlation of the EIR 2000 and EIR 2015 articles). A transposition table of the recitals of the EIR 2000 and those of the EIR 2015 is available via <http://bobwessels.nl/2015/08/2015-08-doc1-eu-insolvency-regulation-v-recast-recitals-compared/>.

The EIR 2015 applies to 27 Member States (Denmark excluded, see recital 88 of the EIR 2015), which together count roughly 100 types of national insolvency proceedings (Annex A) and around 110 names for national insolvency office holders (Annex B).

[10425u] *Function of Annex A.* The relation between the definition of ‘insolvency proceeding’ in Article 1(1) EIR 2000 and the function of Annex A has been debated throughout the EIR 2000’s life. In the recitals to the EIR 2015 the following focus has been chosen. Recital 7: ‘Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council’ (known as Brussels Judgment Regulation or Brussels I, in its recasted version, see OJ 2012, L 351-1-32, entered into force 10 January 2015). There should be no gap between these proceedings and the proceeding covered by the Insolvency Regulation. Recital 7 to the EIR 2015 continues: ‘... Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.’ Annex A therefore has a defensive function: if a proceeding is not listed on it, this does not automatically mean that it falls under the scope of Brussels I. The recitals to the EIR 2015 continue with recital 8: ‘In order to achieve the aim of improving the efficiency and effectiveness of

insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States. ... (9) This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.' There be no mistake about it, Annex A is exclusive and decisive.

*History.* The method of operating with lists has been taken from the 1990 Istanbul Convention (mentioned in Article 85(1)(k) EIR 2015). In literature, the question had been raised as to whether using this method serves to guarantee simple applicability in practice (see, Balz (1996b) and (1996c)) or whether it arises out of a lack of confidence in the generic, abstract definition supplied in Article 1(1) EIR 2000 (see e.g. Lücke (1998)). Although under the EIR 2000 I was inclined to support the former view, it could be argued that the limited nature of the Annexes may lead to the non-applicability of the Insolvency Regulation where a specific national proceeding (a new one or a similar one with a new name) is not covered in the Annex or where a certain proceeding is considered to be of a collective nature, but due to the interpretation of Article 1(2) Brussels Judgment Regulation falls outside the scope of the Brussels Regulation (and is also not covered by the Insolvency Regulation). See on this principle of enumeration: Piekenbrock (2014b), 257.

*Options.* Hess, in: Heidelberg-Luxembourg-Vienna Report (2013), nr. 275 et seq., having found in his evaluation of the application of the EIR 2000 throughout the Member States, that the interface between the definition of insolvency proceeding in Article 1(1) EIR 2000 and Annex A needs to be improved, offers the following options:

- a. the Annex is to be deleted, which has not been regarded as a valuable option;
- b. the Annex is an informative, non-binding list visualising the Regulation's scope of application without influencing its content;
- c. the Annex is decisive, it is in nature and form an integral part of the Regulation;
- d. the Annex is to be seen as implementing decisions in the meaning of Article 291 TFEU. Member States provide information on the national laws in order to ensure the implementation of the Regulation;
- e. the Annex lists only insolvency proceedings after an assessment by an independent committee;
- f. the Annex list proceedings after adoption through a delegated act in accordance with Article 290 TFEU.

Ultimately option c has been chosen: see recital 9 (cited above) and Article 1(1), last line: 'The proceedings referred to in this paragraph are listed in Annex A'.

*No delegated act.* In the Commission's proposal of 12 December 2012, the Commission proposed a system of its empowerment to adopt delegated acts to amend Annexes in accordance with the procedure laid down in Articles 45 and 45a of this proposal (see option f above). Although these suggestions passed the EP, they came off worst by the Council, see Mucciarelli (2016a), 12; Schmidt, in:

Mankowski/Müller/J.Schmidt (2016), Art.1, nr. 34ff.

*Amendment of the Annexes.* In the former EIR 2000 an Article 45 ('Amendment of the Annexes') was included, providing that the Council, acting by qualified majority on

the initiative of one of its members or on a proposal from the Commission, may amend the Annexes. It has done so eight times. See para. 10425t, and the 3<sup>rd</sup> edition (2012) of this book, para. 10444 and para. 10930ff. Any ‘new’ national insolvency proceeding introduced in a Member State after 26 June 2017 under the present system of the EIR 2015 formally must lead to the amendment of the regulation itself, which is cumbersome and time consuming. See para. 10425v.

*Uncontrolled self-promotion.* Under the EIR 2000 the method of self-promotion by a Member State of a recently introduced insolvency proceedings in that Member State, without a proper verification test, has been criticised. In 2011, I proposed to establish an Expert group on matters of insolvency in the Union, called the ‘European Expert Committee on Insolvency’. That Committee could assist the Commission in scrutinising whether a national insolvency proceeding, suggested for listing in e.g. Annex A, was indeed such a proceeding.

See para. 10931d in the third edition of this book (2012), from which I cite (for purposes of comparing):

- ‘1. An Expert group on matters of insolvency in the Union, called the ‘European Expert Committee on Insolvency’, hereinafter referred to as ‘the Committee’, should be established.
  2. The Committee shall advise the Commission or the European parliament, at its own motion or at the request of the Commission of the European Parliament respectively, on technical and policy issues relating to insolvency practice and regulation, as well as Commission proposals in that field. In its work the Committee takes into account the system of the Insolvency Regulation and its coherence with other areas of law as well as its compatibility with the laws of the Member States.
  3. The Committee shall be composed of nine independent persons of high quality and standard. The Commission will appoint members of the Committee having due regards to experience and knowledge in insolvency and business practice and judicial or academic expertise.
  4. The Committee shall be chaired by a person to be appointed by the Commission.
  5. The Commission responsible for developing the area of freedom, security and justice, shall participate at the meetings of the Committee as an observer. He may be substituted by the Director-General of [... ...]. The European Judicial Network shall be represented as an observer.
  6. The Commission may invite experts and observers to attend meetings and to inform the Committee.
  7. The secretariat shall be provided by the Commission.
  8. The Committee shall adopt its rules of procedure, which are (near to) similar to the standard rules of procedure published by the Commission (*OJ C 38*, 6.2.2001, p. 3).’
- Article 89 (‘Committee procedure’).* Under the EIR 2015, Article 89 (‘Committee procedure’) seems to have been inspired by this suggestion. Article 89(1) EIR 2015 provides that ‘... [I]n order to ensure uniform conditions for the implementation of the Regulation’ (see recital 82) the European Commission ‘... shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.’ I just note that there seems to be no limitation to this Committee’s tasks.

With a reference to my proposal Hess, in: Heidelberg-Luxembourg-Vienna Report (2013), nr. 278, who supports the idea of a ‘residual control’ of the Annex by an expert committee. Van Zwieten, in: Bork/Van Zwieten (eds.) (2016), 1.09 et seq., provides the discussion laid down in several parliamentary documents.

[10425v] *Amendment 9 to the Annexes*. End September 2016, a Council Implementation Regulation (EU) 2016/1792 of 29 September 2016 was published, replacing Annexes A, B and C to the EIR 2000. Referring to Article 45 EIR 2000 and having regard to the proposal from the European Commission, it mentions that Slovakia and Poland, on 28 October 2014 and 4 December 2015 respectively, notified the Commission, for the purposes of Article 45 EIR 2000 of amendments to the lists set out in Annexes A, B and C to that Regulation: ‘Those amendments comply with the requirements set out in that Regulation. Since those amendments are already in force, this Regulation should therefore enter into force as soon as possible.’ Annexes A, B and C to EIR 2000 have been replaced by the text of the Annexes contained in this Council Implementation Regulation, *OJ* of 11 October 2016, L 274/35.

This amendment confirms experience of some 12 years that it generally takes 12 to 18 months to have an amendment entered into force. In the meantime, however, in September 2016 the Annexes A and B already had legal effect for over 12 months. They should be revised too. And so it happened.

*Revising the Annexes A and B to the EIR 2015*. On 30 May 2016 a proposal for a Regulation of the European Parliament and of the Council was published for ‘... replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings’ (see COM(2016) 317 final; 2016/0159 (COD)). The President of the EP and the President of the Council first explain the reasons for and the objectives of this proposal. After describing that the EIR 2015 entered into force on 26 June 2015 and that it will apply from 26 June 2017 (‘... with the exception of the part relating to the system for interconnection of national insolvency registers, which will apply from 26 June 2019’, which by the way is only partly true as the establishment of these registers itself applies from 26 June 2018, see Article 92 EIR 2015) it is explained:

‘Annex A to Regulation (EU) 2015/848 lists the insolvency proceedings referred to in point (4) of Article 2 of the Regulation. Annex B lists the insolvency practitioners referred to in point (5) of Article 2.

In December 2015 Poland notified the Commission on a substantial reform of its domestic law on restructuring, taking effect as of 1 January 2016, and requested to change the lists set out in Annexes A and B to the Regulation accordingly. According to Article 1(1), to point (4) of Article 2 and to recital (9) of the Regulation, national proceedings qualify as “insolvency proceedings” in the context of the Regulation only if they are listed in Annex A thereto. Recital (9) of the Regulation confirms this: “This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A ... National insolvency procedures not listed in Annex A should not be covered by this Regulation”. The Commission has carefully analysed the request of Poland in order to ensure compliance of the notification with the requirements of the Regulation. Regulation ((EU) 2015/848 should therefore be amended accordingly.’

*Explanatory Memorandum to the proposal*. In close to two pages the proposals’ consistency with existing policy provisions and its legal basis is explained:

‘The Commission Proposal replaces the lists for Poland in Annexes A and B to Regulation (EU) 2015/848 with new lists taking into account the information notified by that Member States. Since the Annexes are intrinsic part of the Regulation, their modification can only be achieved via the legislative amendment of the Regulation.

The Regulation is directly applicable in the Member States. It is published in the Official Journal of the European Union, therefore its contents are accessible to all interested parties.

...

The proposed instrument is a regulation.

Other means would not be adequate for the following reasons:

The Annexes to the Regulation can only be amended by a regulation to be adopted in the ordinary legislative procedure, under the legal base applied to the original Regulation. Such an amendment shall be proposed by the Commission.

Poland notified the Commission of amendments to the lists set out in the Annexes.

Accordingly, the Commission does not have any other option but to propose amendments to the Annexes to the Regulation, insofar as these amendments comply with the requirements set out in the Regulation.

...

The envisaged amendments are of a purely technical nature. They contain no substantive change to the Regulation ...

...

Furthermore, pursuant to Article 81 of the Treaty on the Functioning of the European Union, after the request of Poland to initiate the necessary legislative procedure, no choice remained available to the Commission, but to comply with this request, insofar as it fulfils the requirements set out in the Regulation. The preparatory work for the adoption of this proposal did not require any new expertise.'

The final result is Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, *OJ* 3.3.2017, L 57/29.