The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries

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1. INTRODUCTION

In this article I will combine a short note on the 'new' Insolvency Regulation, of which the text was approved mid 2015,[1] with a review of two books, written in English, which were published in the first months of 2106 discussing this text. The book of Bork and Mangano is a fully new one,[2] the book of Moss, Fletcher and Isaacs is the third edition of their well-known publication.[3] First some words about the changing European legislative landscape in matters of insolvency. The existing Insolvency Regulation (EIR),[4] in legal force since May 2002, will be repealed on the day of the entry into force of the European Union (EU) Insolvency Regulation (recast) (hereinafter 'EIR Recast'), which is 26 June 2017.[5] The legislative process commenced on the basis of Article 46 EIR, which 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 the involved (professors of the) universities as principle drafters.[6] Article 46 EIR furthermore requires that the report 'shall be accompanied if need be by a proposal for adaptation of this Regulation'. On 12 December 2012 the European Commission published its proposal.[7] It is based on said report, on discussions and consultations with a group of experts and an appraisal of the effects on existing EU policy.[8]

The 'need' for renewal was based on the European Commission's identification of five main shortcomings in the existing EIR that the 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 (that is, the centre of main interest (COMI)) of an insolvent debtor, leading to the opening of main insolvency proceedings in one Member State, has led to some difficulties and to forum shopping by relocating the COMI[9];
- opening of secondary insolvency proceedings in another Member State has been shown to disturb the efficient administration of the debtor's assets;
- there is no obligation to publicize the opening of insolvency proceedings/to lodge claims creditors need to be aware of insolvency proceedings; and
- the EIR does not deal with the insolvency of groups of companies.

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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), resulting in Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) (EIR (Recast)), OJ 2015 L 141/19.

2 Reinhard Bork & Renato Mangano, *European Cross-Border Insolvency Law* (Oxford University Press 2016). ISBN 978 0 19 872909 9, xl + 319 pp. ('Bork/Mangano').

3 Gabriel Moss, Ian F. Fletcher & Stuart Isaacs (eds.), *The EU Regulation on Insolvency Proceedings* (3d ed., Oxford University Press 2016). ISBN 978 0 19 968780 0, lvi + 684 pp. (hereinafter 'Moss et al.').

4 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1.

5 Art. 92 EIR Recast.

6 B. Hess, P. Oberhammer & T. Pfeiffer, *European Insolvency Law, The Heidelberg-Luxembourg-Vienna Report,* CH Beck, Hart, Nomos 2014, *see also* http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf.

7 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.

8 Commission Staff Working Document Impact Assessment Accompanying the document Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings, SWD(2012) 416 final ('Impact assessment 2012').

9 On one of the first cases of the CJEU (*Eurofood*), *see* Bob Wessels, The Place of the Registered Office of a Company: A Cornerstone in the Application of the EC Insolvency Regulation, 3 Eur. Comp. L. 183ff. (2006).

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2. THE INSOLVENCY REGULATION RECAST

In the two books the EIR Recast is regarded as 'an evolutionary development' based on the foundations of the EIR (Fletcher, in: Moss et al., at 1.26) as it is the result of 'modernising the existing Regulation while preserving the current balance between creditors and debtors and between universality and territoriality' (Impact assessment 2012, p. 37). This statement is unopposed by Bork/Mangano, at 1.45, though in their book's Preface, at vii, they signal three shortcomings in the EIR Recast: (i) a sometimes debatable quality of the provisions, (ii) in the new provisions new balances of interest will have to be tested, and (iii) the fairly new character of European cross-border law, created out of more established subjects, such as private international law, domestic insolvency law and company law, yet increasingly is looking for its own identity.

Evolution indeed, but the EIR Recast takes quite some innovations on board. That, I think, also follows from (the reverse of) the saying 'what you get is what you see'. The EIR contains thirty-three recitals, forty-seven 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 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. Through the years the Annexes have been revised eight times since 2002. The latest revision took place on 5 June 2014.[10] The text of the EIR Recast however is twice as long as the one from the existing EIR. It contains as much as eight-nine recitals, ninety-two articles and four annexes (Annex A lists all the national terms for insolvency proceedings; Annex B lists all the national terms for insolvency practitioners; Annex C lists all the repealed Regulations, including Regulation 1346/2000; and Annex D is a table showing the correlation of the EIR and EIR Recast articles).[11]

3. THE BOOKS COMPARED AT A FIRST GLANCE

Moss et al. notes that the structure of the book has remained essentially unchanged (Preface, vii). It provides seven chapters with thematic topics and a Chapter 8 with an article-to-article commentary, to the existing EIR (some 150 pages) and the EIR Recast (some 100 pages, including the texts of the provisions of the EIR Recast). The seven themes relate to an historical overview (Fletcher), the EIR as an EU legal instrument (Isaacs, Brent), Scope and Jurisdiction and Choice of Law rules (both Fletcher), recognition and enforcement (Moss, Bayfield, Peters), the effect of the EIR on cross-border security and quasi-security (Isaacs, Toube, Segal, Marshall), and financial institutions. The latter chapter is completely rewritten (some seventy pages) by my Dutch Leiden colleague Haentjens. The Bork/Mangano book differs in that its structure, although containing eight chapters too, is aligned with the provisions of the EIR too, however not in its figures, but on a grouping of themes. Therefore Moss et al. in Chapter 8 provides an article-by-article commentary, be it first on the EIR and then the novelties in the EIR Recast. Bork/Mangano introduces the EIR Recast themes from a more broad perspective. The treatment is preceded by a forty pages with 'a view-from-the-cathedral' of the EIR and its place in 'European insolvency law', including its sources, underlining the importance of soft law, the EIR's history, its model, rules on interpreation.

Both books aim at judges, practitioners and scholars, but the way these readers are addressed varies, as the Bork/Mangano book has the benefit of different national and legal backgrounds, where Moss et al.'s focus is rather English. The commentary of Bork/Mangano has taken the form of a theme/subtheme analysis, which do not always allow to see what the authors think on a specific provision. Chapter 8 in Moss et al., provides a more focused commentary but, where it starts with a commentrary to the EIR which then is followed by a commentary of the EIR Recast, mainly on those provisisons which have been amended or are fully new, there will be some back and forth looking for connected pages. The Bork/Mangano approach has led to short bibliographies at the end of each chapter and a Bibliography at the end of the book itself (some ten pages, with sources from some eight jurisdiction). The appendicies in Moss et al. are the existing and the 'new' Insolvency Regulation (which provides a better overview when studying) and the Virgós-Schmit Report. There is no such report for the EIR Recast, but its interpetation will be guided by eighty-nine recitals. No appendicies in the Bork/Mangano book.

Probably the European insolvency theatre should prepare for a wrangling of abbreviations. Moss et al. as well as Bork/Mangano use flashy idiom for the 1346/2000 Regulation: 'OR' (Old Regulation) or 'EIR OR' (sometime 'Original Regulation'), and for the 2015/848 Regulation: 'RR' (Recast Regulation) or EIR. I would prefer EIR (or EIR 2000) and EIR Recast (or EIR 2015).

4. SCOPE OF THE EIR RECAST

The European Commission's policy was to broaden the scope of the Regulation to include for example, pre-insolvency proceedings and hybrid proceedings, so they could benefit too from the system of automatic recognition of judgments (which has been mantained, see Article 32 EIR Recast). The EIR Recast's scope extends to as

10 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, OJ 2014 L 179/4. See my blog http://bobwessels.nl/2014/06/2014-06-doc12-insolvency-regulations-annexes-replaced/.

11 A transposition table of the Recitals of the EIR and the EIR Recast is available via http://bobwessels.nl/2015/08/2015-08-doc1-eu-insolvency-regulation-v-recast-recitals-compared/.

many 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;
- 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.

These descriptions mainly flow from the first 16 or so recitals. Recital 13 EIR Recast distinguishes between rescue proceedings and liquidation proceedings. Regarding rescue proceedings, 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 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 this 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. Under the new definition for 'collective proceedings' in Article 1(1) all these proceedings are covered. Broadly these can be grouped in three ways (Bork/Mangano, at 2.55): 'pure' insolvency proceedings, 'hybrid' proceedings, which leave existing management in place, and 'pre-insolvency' proceedings, which aim to restructure the company prior to it reaching a state of insolvency. Both books contain a detailed treatment of all the definition's elements. Interestingly, the definition says that the EIR Recast shall apply to 'public collective proceeding … which are based on laws relating to insolvency'. Recital 16 makes it clear that 'proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency'. As the English Scheme of Arrangement is based on Part 26 of the Companies Act 2006, it does not fall under the scope of the EIR Recast, although – as Moss et al., at 8.487, explain – de facto such a Scheme operates as a pre-insolvency proceeding for companies. It also leaves out proceedings based on inheritence law. In 2010 a court in Cologne has decided that the EIR was applicable to an insolvency proceeding against an inheritance ('*Nachlassinsolvenzverfahren*').[12] The decision seems to presume that these proceedings must be recognized, though I note that the proceeding mentioned (which is the heading of Article 315 *InsolvenzOrdnung;* German Insolvency Act) is not listed in Annex A. In the Netherlands bankruptcy liquidation ('*faillissement*'), listed in Annex A, has been available for proceedings against an inheritance (Articles 198–202 Netherlands Insolvency Act), but domestically the administration of such an estate has been replaced and included in a new Book 4 of the Netherlands Civil Code ('Inheritance Law') as of 1 January 2003, so these proceedings presently in the Netherlands are not regarded as insolvency proceedings, and do not fall under the scope of the EIR Recast. The formulation of the definition allows that sly governments can manipulate the EIR Recast's application by arranging that a specific proceeding will or will not fall under its scope.

The proceedings referred to are all listed in Annex A (see explicitly Article 1(1) last line EIR Recast). How does the definition of Article 1(1) align with this explicite provision? Both publications respond in the same vain: once placed on the Annex A, such a proceeding cannot be challenged with the argument that one or more of the elements in the definition of Article 1(1) are not fulfilled. Only procceedings listed in Annex A are under the scope of the EIR Recast. Article 1(1) may act as a guideline as to which proceedings can be admitted to Annex A (Bork/Mangano, at 2.51; Moss et al., at 8.475). The definition therefore may help to include the German *Nachlassungsverfahren* for those who defend that all specific insolvency prodeecings a national insolvency law contains should be listed in Annex A, for the purposes of clarity and certainty for non-nationals (practitioners; courts).

12 AG Cologne 12 Nov. 2010, ZIP 2011, 631ff; NZI 2011, 159ff.

The system of amending Annex A is not mirrorring the vast changes taking place in the insolvency laws of many Member States. Contrary to what the Commission proposed (to change Annex A with the instrument of a delegated act) the system chosen is to amend the Regulation itself. Only looking at the time that may cost (apart from political squabbling), it is the worst choice that could have been made.

In my view the treatment of Article 1 in Moss et al. is the more logical one: first explain all the definitions' elements, then the meaning of the Annex. In Bork/Mangano, it is the other way around, although its advantage is that it also covers insights from proceedings of some seven other Member States.[13]

5. INTERNATIONAL JURISDICTION

The rules on international jurisdiction, based on a debtor's COMI, resulted in many court cases and legal debate. The definition of COMI in the EIR Recast nearly literaly follows the very large description provided in the *Interedil* case.[14] The EIR Recast therefore codifies the formulation provided by of the Court of Justice. The jurisdiction rules have been further specified, including the possibility of a judicial review (Articles 4 and 5 EIR Recast). The presumptions have been formulated in a much stronger manner, neutralizing for a certain period any actual shift. 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 three 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 three 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 six months prior to the request for the opening of insolvency proceedings (Article 3(1), line 3 and 4 EIR Recast). 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). For this theme I slightly favour Bork/Mangano's treatment, which is detailed, commenting on all CJEU cases, with a broader reference to literature.

6. SECONDARY PROCEEDINGS

Both publications do not touch upon the question why *Interedil*'s definition of establisment has not been promoted to a definition in the EIR Recast. Article 2(10) EIR Recast now provides that 'establishment' means 'any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets'. In comparison to Article 2 (h) EIR the suspect period has been inserted and the word 'assets' – rightly – has replaced 'goods'. In *Interedil*, however, the Court of Justice of the EU decided that the term establishment must be interpreted as 'requiring the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity.' To me the latter definition seems more narrow than the one in Article 2(10), although I would like to follow the Courts interpretation. A secondary proceeding has turned out to be a freak concept anyway. It can only be a winding-up proceeding and it must act as an ancillary proceeding, functionally assisting the main insolvency proceeding. The concept could have worked better if Member States would have created a national proceeding according to the 'secondary' characteristics of the EIR, but in stead, Member State's existing winding-up proceedings were designated in Annex B, listing secondary proceedings. Under the EIR Recast this has all changed. 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 (secondary proceedings are not listed in an Annex anymore), (ii) by providing that a court may refuse to open secondary proceedings if this is not necessary to protect the interests of local creditors, and (iii) by improving cooperation between main and secondary proceedings through 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 EIR Recast sets out two specific situations in which the court seized with a request to open secondary proceedings should be able, at the request of the insolvency practitioner in main proceedings, to postpone or refuse the opening of such proceedings: (i) the insolvency practitioner in main proceedings can give an undertaking to

13 The remark (Bork/Mangano, at 2.70) that the Dutch *schuldsaneringsregeling* is outside the scope of the EIR Recast is only true for the proceeding in the meaning of Art. 287a Netherlands Bankruptcy Act, which allows a natural person to request the court to force a creditor to cooperate with an extrajudicial debt repayment arrangement offered by the debtor. *Schuldsaneringsregeling natuurlijke personen* as such, in the meaning of collective proceeding, is listed in Annex A.

14 CJEU Case C-396/09 (*Interedil*).

local creditors in which they are promised that they will be treated as if secondary proceedings had been opened (Article 36 EIR Recast),[15] and (ii) the court temporarily stays the opening of secondary proceedings (Article 38 EIR Recast). A few words on this 'undertaking'.

Article 36 ('Right to give an undertaking in order to avoid secondary insolvency proceedings') lays down what has become know as 'synthetic' secondary proceeding: treating foreign creditors (that may play out the joker card of requesting the opening of secondary proceedings and so disrupt a beneficial rescue of a business) as if secondary proceedings had been opened (which generally gives them a higher local law priority). Article 36 with 11 paragraphs containing no less than 800 words (!) obviously reflects a long struggle. Paragraph 1 reads that in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realization, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. Both publications agree that such an undertaking must be regarded as an unilateral promise, not as an offer (and therefore in its effect dependent on the acceptance of these creditors). Who these creditors are is unknown as secondary proceedings, the legal trap to get them known, are not opened. Both publications also leave much to be debated although in Moss et al., at. 8.654 some more queries have been addressed. The practical aspects any insolvency practitioners will face in future however are not covered. To give an example: the last line of Article 36(1) provides: 'The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realize such assets'. These requirements may justify that in cross-border insolvency practice the tool that Article 36 supplies is dead on its arrival. Factual assumptions as to what? How to assess the value? How to know about the existence of these assets in the other Member State? What is the relevant time for assessing these values? How to find out about any options? The undertaking requires approval of the known local creditors (see Article 36(6)). The meaning of 'known' (by the debtor's foreing management?) and of 'local creditors' is not unproblematic (Bork/Mangano, at 7.39). Can such an undertaking be made conditional (for example, the condition that local creditors do not request opening of secondary proceedings)? Moss et al., at 8.664 do doubt it. The idea that the possibility of enhancing the net value of all assets available for distributions in the main proceedings (and the synthetic 'as if' proceeding) could be guaranteed (to warrant the idea of creditor protection) seems to suggest that the content of the undertaking also includes as a minimum requirement that local creditors will be treated no worse than creditors in the main proceedings. Or should the minimum be connected to what local creditors would have received if indeed secondary proceedings had been opened? (Bork/Mangono, at 7.39, say: that seems 'likely'). If so, it seems quite a troublesome guesswork. What would be the minimum time period for getting the creditors' approval? Does the insolvency practitioner during this period has the power to revoke the undertaking? It seems that (Article 33 EIR, now) Article 46 EIR Recast, which gives the IP in the main proceedings the authority to request for a stay of 'the process of the realisation of the assets', provides a less combursome and more controled way of leading to a similar result.

7. INFORMATION AND PUBLICATION

In both publications the difficulties for the last fourteen years of having inadequate information based of insolvency registers which can be searched electronically are underlined. The EIR Recast provides for the establishment and interconnection of insolvency registers (Articles 24 and 25 EIR Recast), determines that the costs of establing 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). In Bork/Mangano, at 6.76, this item is covered more broadly against the background of larger developments of transnational interconnection via registers.

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 the court of which opens such proceedings. Representation by a lawyer or another legal professional shall not be mandatory for the lodging of claims[16]; 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 thirty days following publication in the insolvency register of the state where proceedings had been opened (Article 55(6) EIR Recast).

The topic of preservation measures has not changed substantialy, see Article 52 EIR Recast. Moss et al., at 8.725 refer to the treatment of Article 38 EIR. Bork/Mangano, at 5.28, deal with preventive measures when commenting Article 32 (the provision regarding recognition of other insolvency-related decisions, the present Article 25 EIR). Both books lack a Table of Legislation, which makes Bork/Mangano's treatment of Article 52 EIR Recast not easy to find.

15 See on the legal nature of such an undertaking B. 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*, 9 Brook. J. Corp. Fin. & Com. L. 63ff. (2014).

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

8. CROSS-BORDER COMMUNICATION AND COOPERATION

The duties to communicate and to cooperate in pending insolvency proceedings are extended under the EIR Recast. In addition to the existing duties between 'liquidators' (insolvency practitioners) (Article 41 EIR Recast [replacing the present Article 31 EIR]), these duties are introduced in relations between courts and between insolvency practitioners and courts (Article 42 and 43 EIR Recast). Both publications refer to efforts made by academics, judges and practitioners having developed non-binding guidances for cross-border communication and cooperation between courts.[17] 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.[18] Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in these proceedings. The various insolvency practitioners and the courts involved are therefore 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). The topic of communication and cooperation receives a more full treatment in Bork/Mangano, at 6.02ff.

9. GROUPS OF COMPANIES

Since some twenty years the need to treat an international enterprise group a one unit, to minimize costs and loss of time, and to maximize the groups value is looking for a legislative answer. Here, the EIR Recast contains a novelty, in that groups of companies are addressed. See the new Chapter V: 'Insolvency proceedings of members of a group of companies', with over twenty articles (Articles 56 to 78 EIR Recast).

In the EU, over the course of over twenty years, 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: 'group of companies' means a parent undertaking and all its subsidiary undertakings (Article 2(1)(13) EIR Recast), and 'parent undertaking' means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU shall be deemed to be a parent undertaking (Article 2(1)(14) EIR Recast. The EIR Recast therefore has two phenomenons termed 'undertaking'. Experts in company law will expect a broad treatment of those jigsaw group-elements, such as 'control', or 'directly or indirectly'. Having read Chapter 8 in Moss et al. (containing some twenty-two pages, including the text of all twenty-two provisons) my preference is for the other book. Bork/Mangano, at 8.01ff, provides (although also in some 20+ pages) a broad introduction into the terms, definitions, approaches and methodology of 'groups'. The foundations of insolvency law have prevailed in the EIR Recast: each member of the group (or probably each 'subsidiary undertaking') is treated separately: one company, one insolvency, one estate. 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 to 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 subsections 2.1 ('Procedure') (Articles 61 to 70 EIR Recast) and 2.2 ('General provisions') (Articles 71 to 77 EIR Recast), providing for a new actor in the insolvency arena, an impartial group coordinator.

17 A project funded by the European Commission and International Insolvency Institute (III), jointly conducted by the Leiden Law School and the Nottingham Law School, *see* B. Wessels ed., *EU Cross-Border Insolvency Court-to-Court Cooperation Principles*, in *European and International Insolvency Law Studies* 1 (The Hague: Eleven International Publishing 2015). *See also* B. Wessels, *EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases*, 6 Intl. Insolv. L. Rev. 145ff. (2015), and B. Wessels, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases*, in M.L. Graf-Schlicker, H. Prütting, W. Uhlenbruck (eds.), *Festschrift fur Heinz Vallender zum 65. Geburtstag*, 775ff. (M.L. Graf-Schlicker, H. Prütting, W. Uhlenbruck eds., RWS Verlag Kommunicationsforum GmbH 2015).

18 *See* B. Wessels, *Cross-Border Insolvency Agreements: What are They and are They Here to Stay?*, in *Overeenkomsten en insolventie*, Serie Onderneming en Recht 72, 359ff. (N.E.D. Faber, J.J. van Hees, N.S.G. Vermunt eds., Deventer: Kluwer 2012); M. Maltese, *Court-to Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems*, a paper submitted in 2013 to the International Insolvency Institute in 2103, *see* http://iiiglobal.org/images/pdfs/maltese_michele submission.pdf.

Until now, in the academic literature these provisions have had a mixed reception..[19]

10 TO CONCLUDE

Article 90 in Chapter VII ('Transitional and final provisions') of the EIR Recast introduces a review clause for the text of the EIR Recast (after five years) and provides as a basic rule (Article 92 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. That date is 26 June 2017.

In the meanwhile, the European sound will not be silent. No later than 1 January 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the cross-border issues in the area of directors' liability and disqualifications. This is provided in Article 90(3) EIR Recast. As far as I know such a study has not been published yet. No later than 27 June 2020 the Committee shall submit to the same three organs a study on the issue of abusive forum shopping,[20] and no later than 27 June 2022 a report on the application of the group coordination proceedings, accompanied where necessary by a proposal for adaptation of the EIR Recast (Article 90(4) and 90(2) EIR Recast respectively). It's not only cross-border insolvency in Europe anymore. Both books reviewed here make short inroads to the Commission's policy to harmonize an appropriate restructuring and insolvency framework.[21] Such a framework also should address matters to encourage cross-border investments in the context of the Commission's policy to create in the long run in the EU a Capital Markets Union.[22]

Apart from these exiting developments, it obvious that legal practice (insolvency practitioners, accountants, judges, academics) will have to prepare for the renewed rules in European cross-border restructuring and insolvency law.[23] Written by well-known experts in the field, both books offer a clear and comprehensive overview of what is to be expected. Each in their own form and style, they present a timely and very welcome addition to the slowly growing body of EU cross-border insolvency law literature concerning the EIR Recast.

19 *See* I. Mevorach, *The New Proposed Regime for EU Corporate Groups in Insolvency: A Critical Note*, 6 Corp. Rescue Insolv. 89ff. (2013); S. Madaus, *Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation*, 6 Intl. Insolv. L. Rev. 235ff. (2015); Alessandro Merlini, *Reorganisation and Liquidation of Groups of Companies: Creditors' Protection vs. Going Concern Maximisation, the European Dilemma, or simply a Misunderstanding in the light of the new EU Insolvency Regulation No. 2015/848*, 7 Intl. Insolv. L. Rev. 119ff (2016).

20 *See* A. Adl Rudbordeh, *Forum Shopping in Insolvency Law. From the European Insolvency Regulation to Its Recast* (Amersfoort: Celsus Juridische Uitgeverij 2016).

21 A consultation is open until mid June 2016, *see* http://bobwessels.nl/2016/03/2016-03-doc13-consultation-on-harmonisation-insolvency-laws/.

22 http://bobwessels.nl/2015/10/2015-10-doc9-insolvency-frameworks-should-encourage-cross-border-investment/.

23 In general, the EIR recast has been welcomed, *see* for instance R. Amey, *Reform to the European Insolvency Regulation*, Corp. Rescue Insolv. 205ff. (2015); H. Vallender, *Europaparlament gibt den Weg frei für eine neue Europäische Insolvenzverordnung*, *Zeitschrift für Wirtschaftsrecht (ZIP)* 1513ff. (2015); M. Weiss, *Bridge over Troubled Water: The Revised Insolvency Regulation*, 24 Intl. Insolv. Rev. 192ff. (2015).