

Recast

European Insolvency Regulation

An Introductory Analysis

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[February 2015]



Introduction: Context


- Article 46 Reports

"No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation."

12-12-2012: Proposal for a Regulation amending EIR [COM(2012) 744]
Explanatory Memorandum, 13 recitals + 51 amendments
Includes:
- Report on the application [Com(2012) 743]
- Impact Assessment [SWD2012) 416final]
http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm

2013-2014 discussions with EP and Council

December 2014 Recast of EIR
<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015414%202014%20ADD%201>
www.bobwessels.nl, weblog 2014-12-doc4




Explanatory memorandum

- Two general objectives:
 1. While the Insolvency Regulation is generally considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union, the consultation of stakeholders and legal and empirical studies commissioned by the Commission revealed a range of problems in the application of the Regulation in practice. Moreover, the Regulation does not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties.




Explanatory memorandum

- 2. The overall objective of the revision of the Insolvency Regulation is to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises. This objective links in with the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy. The revision of the Regulation will contribute to ensuring a smooth development and the survival of businesses, as stated in the Small Business Act [COM2008]394]3. The revision is also one of the key actions listed in the Single Market Act II
http://ec.europa.eu/internal_market/smact/index_en.htm



5 main shortcomings:

1. Scope
2. Jurisdiction
3. Secondary proc.
4. Publicity of proc. & lodging of claims
5. Groups of companies



Counter 'Five main shortcomings'

The elements of the proposed reform of the Insolvency Regulation can be summarised as follows:

- **Scope:** The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition
- **Jurisdiction:** The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction

Counter 'Five main shortcomings' (cont'd)

- **Secondary proceedings:** the proposal provides for a more efficient administration of insolvency proceedings by enabling the court (i) to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, (ii) by abolishing the requirement that secondary proceedings must be winding-up proceedings and (iii) by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;
- **Publicity of proceedings and lodging of claims:** The proposal requires MSs (i) to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and (ii) provides for the interconnection of national insolvency registers. It also (iii) introduces standard forms for the lodging of claims;
- **Groups of companies:** The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the IPs and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the IPs involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

Today's Agenda

Key points in Recast EIR

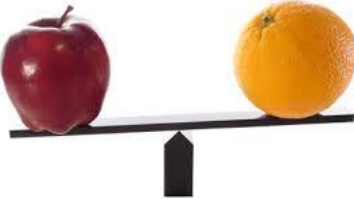
- Compare EIR v Recast
- Scope
- Jurisdiction
- Applicable law
- Secondary proceedings
- Information and publication
- Lodging claims
- Cross-border cooperation
- Groups of companies
- Leftovers + Next steps



Materials

- www.bobwessels.nl
 - Copy of ppt-slides
 - Follow weblog
- www.tri-leiden.eu
 - Business rescue in insolvency law
<http://www.europeanlawinstitute.eu/>
 - Out-of-court turnaround

Compare EIR v Recast




Compare

<ul style="list-style-type: none">• 33 recitals• 'Purposive interpretation' Virgós/Schmit 1996 Report• 47 Articles• 3 Annexes• A: all insolvency proc.• B: winding-up proc.• C: all 'liquidators'	<ul style="list-style-type: none">• 83 recitals• Ditto – no Report• 91 Articles• 4 Annexes• A: ditto (Art. 2(5) Recast)• B: all IPs (Art. 2(6) Recast)• C: repealed Regs, including 1346/2000• D: Correlation table Articles EIR and Recast
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Transposition table
Recitals EIR and Recast
See blog 2015-02-doc5

Scope

- Scope of the current EIR
- Problems:
 - Definition Art. 1(1) EIR
 - Annexes: function and role of MSs



Scope (cont'd)

EIR is applicable to proceedings (Art. 1(1)):

- 1. That are “collective”: all creditors concerned may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded
- 2. Based on “the debtors insolvency” and not on other grounds
 - the insolvency-test itself is rooted in the legislation of the lex concursus
- 3. The proceedings must entail the *total or partial divestment* of the debtor, and
- 4. The appointment of a ‘liquidator’

CJEU: listed in Annex A

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Scope (cont'd)

The scope of the Recast extends to 8 (!) proceedings (Rec. 10):

1. which promote the rescue of economically viable but distressed businesses and give a second chance to entrepreneurs
2. which provide for the restructuring of a debtor at a stage where there is only a likelihood of insolvency
3. which leave the debtor fully or partially in control of his assets and affairs
4. which provide for a debt discharge or a debt adjustment of consumers and self-employed persons
 - by reducing the amount to be paid by the debtor, or
 - by extending the payment period granted to him


Appointment of an IP?
Rec. 10: These proceedings do not necessarily entail the appointment of an IP, but fall under the scope if they take place under the control or supervision of a court: ‘In this context, the term “control” should include situations where the court only intervenes on appeal by a creditor or other interested parties’

Introduction of Debtor in Possession (DIP) proceedings




Scope (cont'd)

- 5. 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
 - Such procedures should not be detrimental to the general body of creditors and should be preliminary to other procedures covered by the scope of this Regulation if no agreement on a restructuring plan can be reached (Rec. 11)
- 6. 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
 - So no 'confidential' insolvency proceedings (Rec. 12)





Scope (cont'd)

- 7. that, under the law of some MSs, 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.
 - Except for being labelled as "interim", these proceedings should meet all other requisites of this Regulation (Rec. 14)
- 8. 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
 - 'Threat': The time horizon relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases where the debtor is faced with non-financial difficulties threatening his going concern and, in the medium term, his liquidity. This might be the case, for example, if the debtor has lost a contract which is of key importance to him (Rec. 16)




Other requirements?
(appointed liquidator/divestment of debtor)





Scope (cont'd)


- Collective proceedings? Rec. 13 distinguishes:
Rescue
The collective proceedings which are covered by the scope of application of this Regulation should include all or a substantial proportion 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.
Proceedings which do not include all the debtor's creditors should be proceedings aimed at rescuing the debtor.
Liquidation
The 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.



Scope (cont'd)

Based on debtor's insolvency?

- Rec. 15: 'This Regulation should apply to proceedings which are based on a law relating to insolvency.'
 - However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on a law relating to insolvency
 - Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provisions for payment to creditors




Scope: Annex A decisive

- 'The proceedings referred to in this paragraph are listed in Annex A' (Art. 1(1) last line Recast)

Jurisdiction

- COMI retained
 - Companies: Art. 3(1) Recast and recital 29 follows current text and case law of CJEU
 - Individuals: Art. 3(1) Recast amended
- Examination and specification of jurisdiction
 Art. 4 Recast / Recital 26 and 27
- Judicial review
 Art. 5 Recast / Recital 33
- Jurisdiction for related actions
 (actions which derive directly from the insolvency proceedings and are closely linked to them):
 Art. 6 Recast / Recital 34
 (follows CJEU case law)



Jurisdiction re companies

- Art. 1(1) Recast: The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main proceedings"). The centre of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties
- (includes text of Recital 13 EIR)

Presumption
 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.

Jurisdiction re individuals

- Art. 3(1), 3rd and 4th line distinguish:
Professionals
 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
- Individuals*
 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.

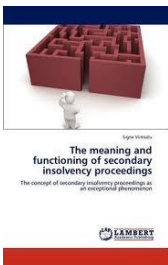
Applicable law

- Only minor amendments
 - Art. 13 Recast: if no secondary proc have been opened court retains jurisdiction to approve termination of employment contract
 - Art. 15 EIR: law suits pending include arbitral proceedings
 - Art. 5, 7 and 13 EIR remain unchanged
 - 'This Regulation makes several provisions for a court to order a stay of opening proceedings or a stay of enforcement proceedings. Any such stay should not affect the rights in rem of creditors or third parties' (Rec. 65) / Art. 20(2) Recast



Secondary proceedings

- More efficient administration of insolvency proceedings by
 - abolishing winding-up requirement
 - court may refuse opening of secondary proceedings if this is not necessary to protect the interests of local creditors;
 - improving cooperation between main and secondary proceedings: extending the cooperation requirements to the courts involved and to IPs and courts

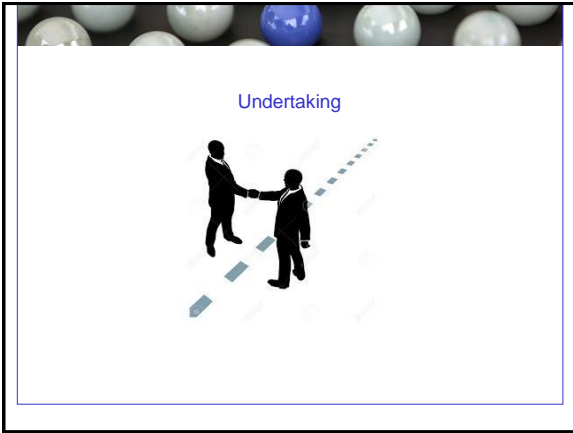


Refusal or postponement of opening secondary proceedings

Rec. 40: Secondary proceedings may also hamper the efficient administration of the insolvency estate. Therefore, this 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:

- IP in main proceedings has the possibility to give an undertaking to local creditors that they will be treated as if secondary proceedings had been opened

[- Court temporarily stays the opening of secondary proceedings]



Art. 36 ('Right to give an undertaking in order to avoid secondary proceedings')

- Art. 36 Recast, with 10 paragraphs

Art. 36(1): In order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceedings may give a unilateral undertaking ("the undertaking") in respect of the assets located in the Member State in which secondary proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary proceedings were opened in that Member State

- Synthetic / virtual / as if - proceedings

The undertaking shall specify the factual assumptions on which it is based, in particular with respect to the value of the assets located in the Member State concerned and the options available to realise such assets

Art. 36 Undertaking (cont'd)

Art. 36 Recast

2. the law applicable to the distribution of proceeds, ranking of creditors' claims and the rights of creditors is 'secondary state' law
3. language
4. form requirements
5. the undertaking is to be approved by the 'known local creditors' according to rules on qualified majority and voting that apply for the adoption of restructuring plans under 'secondary law'
6. the undertaking given and approved shall be binding on the estate
Strong position local creditors
7. IP shall inform local creditors about the intended distributions prior to distributing the assets and proceeds referred to in paragraph 1. If the information does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge such distribution before the courts of the MS in which main proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law.

Art. 36 Undertaking (cont'd) – position of local creditors

8. Local creditors may apply to the courts of the MS in which main proceedings have been opened in order to require the IP in the main proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the MS of the opening of main proceedings

9. Local creditors may also apply to the courts of the MS in which secondary proceedings would have been opened in order to require the court to take provisional or protective measures to ensure compliance by the IP with the terms of the undertaking.

10. The IP shall be liable for any damage caused to local creditors as a consequence of his non-compliance with the obligations and requirements set out in this Article.

Postponing secondary proceedings



Postponing secondary proceedings: court temporarily stays their opening

- Rec. 43: In addition, this Regulation should provide for the possibility that the court temporarily stays the opening of secondary proceedings, when a temporary moratorium of individual enforcement proceedings has been granted in the main proceedings, in order to preserve the efficiency of such moratorium.
 - The court should be able to grant the temporary stay (no longer than 3 months (Art. 38(2)^{2nd} line)) if it is satisfied that suitable measures are in place to protect the interest of local creditors. In that case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them
 - In order to ensure an effective protection of local interests, the IP of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened (Art. 36-40 Recast)

Opening secondary proceedings


Art. 38 ('Decision to open secondary proceedings')

1. The court seized of a request to open secondary proceedings shall immediately give notice to the IP or the DIP in the main proceedings and give him an opportunity to be heard on the request.

2. Where the insolvency practitioner in the main proceedings has given an undertaking in accordance with Article 36, the court referred to in paragraph 1 shall at the request of the insolvency practitioner not open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

Information and publication

- Establishment and interconnection of insolvency registers (Art. 24 and 25 Recast)
- Interconnection cost for EU (Art. 26 Recast)
- Info into the system of interconnection (Art. 27 Recast)
- Publication in another MS of opening decision and appointment (Art. 28 Recast)
- Registration in public registers of another MS (Art. 29 Recast)
- Costs of Art. 28 and Art. 29 are costs incurred in the proceedings (Art. 30 Recast)




Lodging claims


Art. 53 Recast – 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. Representation by a lawyer or another legal professional shall not be mandatory for the lodging of claims.’

Duty to inform creditors via standard notice form (Art. 54(3) Recast)

Lodging via standard claims form (Art. 55 Recast)


Minimum period for foreign creditors: 30 days following publication in insolvency register of state of opening (Art. 55(6) Recast)






Cross-border Communication and Cooperation


- Renewed recital 20 (Rec. 45 Recast)
- Two new recitals (Rec. 46 and 47 Recast)
- Renewed Art. 31 (Art. 41 Recast)
CoCo between IPs
- New Art. 42 Recast
CoCo between courts
- New Art. 43 Recast
CoCo between liquidators and courts





Norms for cooperation?

- Rec. 45 Recast: '... In their cooperation, IPs 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 UNCITRAL.'




CoCo between IPs

Art. 41 ('Cooperation and communication between insolvency practitioners')

1. The IP in the main proceedings and the IP or IPs in secondary proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols.

2. In implementing the cooperation set out in paragraph 1, the IPs shall:

- (a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;
- (b) explore the possibility of restructuring the debtor and, where such possibility exists, coordinate the elaboration and implementation of a restructuring plan;
- (c) coordinate the administration of the realisation or use of the debtor's assets and affairs; the IP in the secondary proceedings shall give the IP in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.




Article 42 (recast) CoCo between courts

Cooperation and communication between courts

1. In order to facilitate the coordination of main and territorial or secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that this is not incompatible with the rules applicable to them


2. In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information



Article 42 (recast) CoCo between courts

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern

- (a) coordination in the appointment of the insolvency practitioners;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) coordination of the conduct of hearings;
- (e) coordination in the approval of protocols, where necessary.



CoCo and groups

Rec. 46: 'In view of such cooperation, IPs 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 ...'

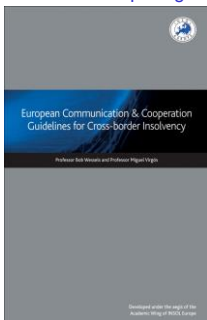
- Rec 49: 'Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in these proceedings. The various IP and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. Cooperation between the IPs 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.

Shaping and Modeling 'Cooperation'?

Rec. 45, last line:
'In their cooperation, IPs 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 INCITRAL'



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Crucial role of court



EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles'), including EU Cross-Border Insolvency Court-to-Court Communications Guidelines ('EU JudgeCo Guidelines')

Co-funded by the Civil Justice Programme of the European Union and by the International Insolvency Institute




Prof. Bob Wessels and Jan Adriaanse Prof. Paul Omar


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Outcomes

- EU JudgeCo Principles & EU JudgeCo Guidelines (Febr. 2015)
- In addition to R&A group (40+ experts) discussion/input from appr. 50 judges (JudgeCo trainings) and 150 judges (other events)
- 26 EU Cross-Border Insolvency Court-to-Court Cooperation Principles
- 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines
- Small booklet with black letter text
- Report + Commentary
- 'web-forum'
- www.bobwessels.nl, weblog / www.tri-leiden.eu

Groups of companies






Groups of companies

Chapter V 'Insolvency proceedings of members of a group of companies' (Arts. 56-78 Recast)

Art. 2(1)(12) and (13) Recast: definitions for 'groups of companies' and 'parent undertaking'

Ch V Section 1 ('Cooperation and communication') – Art. 56-60 Recast
Ch V Section 2 ('Coordination'), with 2.1 ('Procedure') (Arts. 61-70) and 2.2 ('General provisions') (Arts. 71-77), providing for an impartial '(group)' coordinator

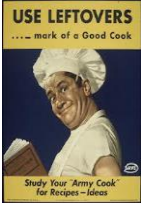
No rules for a uniform European rescue plan




Leftovers


Ch. VI ('Data-protection') (Arts. 78-83)
Ch. VII ('Transitional and final provisions') (Arts. 84-91)

- Art. 86: Info on national and Union insolvency law
- Art. 89: review clause: 5 years
- Art. 91(1): Entry into force: 20th day following date of publication in O.J.
- Art. 91(2): It shall apply 24 months after entry into force, but:
 - 12 months for Art. 86
 - 36 months for Art. 24(1) Establishment national insolvency registers
 - 48 for Art. 25 (Interconnection of registers)





Thank you for your attention!



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The information within these slides does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.

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