JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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I. Chapter 1: Judicial Co-Operation and Economic Recovery in Europe (JCOERE) Report 2: Introduction

1.1 Introduction

The JCOERE Project is focussed on the concept of co-operation[1] between courts and between courts and practitioners across Member States of the European Union. The specific subject matter of the JCOERE Project concerns the obligations imposed by the European Insolvency Regulation (Recast)[2] on courts in European Member States to co-operate in cross-border insolvency matters. Additional obligations are placed on insolvency practitioners to co-operate. Furthermore, in light of new initiatives in the area of corporate restructuring[3] the JCOERE Project focussed on this important policy initiative and hypothesised that the nature of the rules typically involved in preventive restructuring frameworks might present further obstacles to co-operation between courts. These rules were both substantive and procedural in nature. Because the JCOERE Project focussed on co-operation and communication obligations contained in the European Insolvency Regulation (Recast) it was appropriate to choose a type of insolvency process covered by this Regulation.[4] However, many of the issues raised in this part of the Project and described in this second Report are equally applicable to a broader range of initiatives concerning judicial and court-to-court co-operation in the European Union. This broader issue is fundamental to continued European integration. Where an obligation is imposed on courts to co-operate, the obvious question is whether there is a specific obligation imposed on members of the judiciary specifically to co-operate. This

[1] Throughout this report, it should be noted that the spelling of co-operate (cooperate) and co-operation (cooperation) will alternate. This is because they are used interchangeably within the documentation and literature that we have used and referred to throughout the Report. For example, Chapter 2 utilises 'cooperate', as that is the spelling found in the EIR Recast. The JCOERE Project itself, by contrast and as articulated above, has 'co-operation' in its title. This is also the case for words such as co-ordinate (coordinate) and co-ordination (coordination).

[2] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast]. See a full discussion of the EIR Recast in Chapter 2.

[3] European Commission, 'Recommendation of 12 March 2014 on a new approach to business failure and insolvency' [2014] OJ L 74/65, COM (2014) 1500 final.

[4] As we examined how Member States approached preventive restructuring in their domestic frameworks both prior to and in anticipation of implementation of the Preventive Restructuring Directive 1023/2019 it became apparent that some domestic legislative processes aimed at corporate rescue were already covered by the European Insolvency Regulation (Annex A) whilst others were not. This in effect means that some preventive restructuring frameworks in Member States will benefit from co-operation obligations in the Regulation, others will not. It is also important to note that the Preventive Restructuring Directive itself allows Member States the choice of whether or not to include the implementing process in Annex A of the Regulation. See Recital 13 and 14 of the PRD. See further Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Prevent Restructuring Directive and the Recast European Insolvency Regulation' *Eurofenix* (Autumn 2019) 22.

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question is answered affirmatively by some commentators but this report takes the view in Chapters 3 and 5 that this is an open-ended issue.

1.2 The European Project and Judicial Co-operation

At the time of writing, the issue of corporate and business insolvency and rescue has unfortunately become acute due to the COVID 19 pandemic. The broader public health and economic threats have yet again raised high level issues concerning the nature of the European project. As President Emmanuelle Macron has observed, the debate focusses on whether the European Union is simply a market project or a political project[5] and has stated *inter alia* that: 'If the European Union is to succeed as a political project sustained and continued attention must be paid to issues of co-operation and co-ordination in legal spheres.'

1.3 A European Judiciary

While Chapter 4 of this Report considers matters relating to legal and judicial culture in detail, this section will briefly consider the question of whether there is a distinctive European legal tradition or culture. Whether this exists or not or has more potential for development, this is nevertheless the context in which co-operation obligations will operate. Effective court-to-court co-operation is dependent upon aligned legal principles and values, such as the rule of law and judicial independence. The importance of these factors is evident in the emphasis placed upon them in the EU's criteria for accession.

As is commonly known, the European Union sets out membership criteria for each accession state, which are contained in the 1992 Treaty of Maastricht (Article 49).[6] A subsequent declaration was made in June 1993 by the European Council in Copenhagen[7] which led to the denomination of these more detailed criteria as the 'Copenhagen criteria.' The criteria address three areas that form the basis of negotiations with a particular candidate state, namely the political, economic and legislative areas. These areas are used to guide accession states towards EU membership. The legislative criteria focus on what are called 'rule of law' issues that are in turn governed by the Rule of Law Framework.[8] The Framework was introduced by the European Commission in March 2014 and has three stages, namely a Commission Rule of Law Assessment, a Commission Rule of Law Opinion and a Commission Rule of Law Amendment.[9] The official view is that the entire process is based on a continuous

[5] Roula Khalaf, 'Transcript, Emmanuel Macron: 'We are at a moment of truth' (English)', *Financial Times* (Paris, April 14th, 2020) <https://www.ft.com/content/317b4f61-672e-4c4b-b816-71e0ff63cab2> [Last accessed April 30th, 2020].

[6] Council Treaty of Maastricht on European Union [1992] OJ C 191/1, Article 49. See further accession criteria explained at: European Commission, 'Conditions for Membership' (06 December 2016) <https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en> [Last Accessed April 27th, 2020].

[7] European Council, 'Conclusions of the Presidency, European Council in Copenhagen, 21 and 22 June 1993' (1993) <https://www.consilium.europa.eu/media/21225/72921.pdf>. [Last Accessed 27 April 2020].

[8] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final. Venice Commission of the Council of Europe, 'Rule of Law Checklist', CDL-AD (2016)007.

[9] This is explained in a graphic attached to the European Commission Press Release regarding the position of Poland below.

dialogue between the Commission and the Member State concerned, with the Commission keeping the European Parliament and Council informed.

1.3.1 Enforcing the Copenhagen criteria

When agreed in 1993, there was no mechanism for ensuring that any country that was already an EU Member State was compliant with these criteria. However, arrangements have now been put in place to police compliance, following the 'sanctions' imposed against the Austrian government of Wolfgang Schüssel in early 2000 by the other 14 Member States' governments.[10] This process can end with the invocation of Article 7(1) of the TEU, which was threatened in relation to Poland some years later.

More recently the Commission took action in 2016 and 2017 against Poland in relation to the treatment of members of the judiciary. In its statement on the 26th July 2017, it stated that the reform of the judiciary in Poland 'amplifies the systemic threat to the rule of law in Poland already identified in the rule of law procedure started by the Commission in January 2016'. The Commission went on to request that the Polish authorities address the identified problems within a month of this decision and particularly requested the Polish authorities 'not to take any measure to dismiss or force the retirement of Supreme Court judges'. The Commission stated that it was ready to implement 'the Article 7(1) procedure'[11] – a formal warning by the EU that can be issued by four fifths of the Member States in the Council of Ministers.

At the time, a specific connection was made between this issue, the rule of law generally, and the importance of an independent judiciary as an essential precondition for EU membership. The statement of the Commission President Jean Claude Juncker at the time emphasised that a system that included the ability of a state to dismiss judges at will could not operate in the EU, noting that: 'Independent courts are the basis of mutual trust between our Member States and our judicial systems.'[12] In other words, a commonly created judiciary is essential to mutual trust between Member States and obviously to detailed court-to-court co-operation. Vice President Franz Timmermans set out the issue even more explicitly, describing that the courts of each Member State, in this case the courts of Poland, are expected to provide an effective remedy in case of violations of EU law, in which case they act as the 'judges of the Union.'[13] This statement sets up an interesting situation whereby Member States have their own independent system for appointing judges, but once appointed judges and courts become in some way judges of the European Union.

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[10] See further, *Schüssel v Austria*, Ap no. 42409/98 (ECHR 21 February 2002). See also European Parliament, 'Motion for a Resolution on the Political Situation in Austria' (2 February 2000) B5-0101/2000.

[11] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Article 7(1). [Hereinafter TEU]. Article 7.1 of the Treaty on European Union provides for the Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Article 2 of the Treaty (see Annex II). The Commission can trigger this process by a reasoned proposal.

[12] Press Release (n 12).

[13] *Ibid.*

1.3.2 The Tampere Council

The vision for further integration of the European Union was underpinned by the holding of the Special Council meeting in 1999 in Tampere, Finland, which addressed the need to create a 'European Area of Justice'. Amongst the milestones articulated by the Council, the following statement was made regarding the mutual recognition of judicial decisions at Article 33:

> Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.[14]

The Tampere Council provided a platform for the development of mutual recognition of judgements and consequent co-operation between judicial and administrative authorities in Europe. Many areas of law ranging from criminal to family to commercial law are now subject to specific rules regarding co-operation between Member State courts.[15]

1.4 Co-operation, Trust, Recognition, and Harmonisation

The idea of co-operation is recognised as being underpinned by concepts such as trust in, and recognition of, Member State legal systems, in addition to the more complex and ambitious pursuit of a harmonisation agenda.[16] Because of the complexity of doctrinal issues, harmonisation is not as easily achieved as other elements to co-operation. This is highlighted by the work with Member State country reports gathered during the first stage of the doctrinal research of this Project. Combining all four elements co-operation, trust, recognition, and harmonisation will lead to integration of the European Union, but no assumptions are made in this Project as to the optimal levels of integration. When the JCOERE Project focussed on preventive restructuring frameworks in Report 1 it became apparent that there were strong underlying differences regarding policy and implementation of rescue processes for corporations and businesses in Europe. Report 1 the of the JCOERE Project demonstrated that there were significant differences between policy makers and thought influencers (academics) across the European Union on the theory of preventive restructuring. In surveying 11 jurisdictions within the EU, benchmarked against the newly passed Preventive Restructuring Directive,[17] it was clear that there was also significant variation in existing processes. Furthermore, the PRD itself allows for continued variation within Member States;

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[14] European Council, 'Conclusions of the Presidency, European Council in Tampere, 15 and 16 October 1999,' (1999) <https://www.europarl.europa.eu/summits/tam_en.htm#c?textMode=on> [Last Accessed 27th April, 2020].

[15] See for example European Commission, 'Compendium of European Union legislation on judicial cooperation in civil and commercial matters (2018 Edition)', (European Commission, 19 July 2019).

[16] This is also addressed in the context of the text of the European Insolvency Regulation in Chapter 2.

[17] Council Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter Preventive Restructuring Directive or PRD].

these range from what this Project has termed 'robust restructuring processes', exemplified by the use in practice of the English Scheme of Arrangement processes and the Irish Examinership process (based on the US Chapter 11 process), to much less aggressive restructuring.[18] The EIR Recast recognises the reality of 'widely differing substantive laws' in the insolvency laws of Member States.[19] At the same time however, the EIR Recast also expresses the aspiration that harmonisation projects will successively bring domestic frameworks together, thereby underpinning the elements necessary for further co-operation. Nevertheless, as we have seen in Report 1, the PRD expressly supports widely differing variations in Member State legislative frameworks with the provision of a range of choices allowing for significant variations in types of restructuring processes.

1.4.1 Co-operation and the EIR Recast 2015

Whilst Chapter 2 of this Report will outline the terms of the EIR Recast in relation to co-operation obligations, Chapter 5 will explore some case law on how these may operate. However, in the context of this Chapter it is worth emphasising how the obligations imposed by the EIR Recast are based on Article 81 TFEU regarding judicial co-operation in civil matters with cross-border implications.[20] Furthermore, this specific obligation is based on the even broader principle of sincere co-operation outlined in Article 4(3) TEU.[21]

Despite these observations and indeed European aspirations, our empirical observation is that court-to-court co-operation is a matter with which members of the European judiciary are not very familiar. Even though we certainly found that there was a general understanding of recognition provisions incorporated in the Regulation and in the EIR Recast, there was much less experience, if any, of co-operation during the hearing of a case, or indeed expectation that such an issue would arise.[22] However, the specific co-operation obligations are relatively new, having been introduced in the EIR Recast, which although passed in 2015 only began to apply on 26 June 2017 (in accordance with Article 92) and so it is possible that discussion and consideration of these issues will become more common over time.[23]

1.5 JCOERE Project Summary to Date

Before considering the nature and development of judicial and court co-operation in the European Union, this section will summarise the research of the JCOERE Project to date. As noted above, this concerns the development of the theory and law with respect to preventive

[18] See Chapter 3 below for further categorisation of the Member States surveyed.
[19] EIR Recast, Recital 21.
[20] See further Renato Mangano, Bob Wessels, Reinhard Dammann, 'Secondary Insolvency Proceedings (Art 34-52), in Reinhard Bork and Kristin van Zwieten (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).
[21] See the discussion by Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings, Articles 40 – 44', in Moritz Bninkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).
[22] Discussion at the INSOL Judicial Wing, INSOL European Annual Congress, held in Copenhagen, September 26th, 2019. See further Chapter 8 of this Report.
[23] Interestingly some commentators assumed that there was an implied obligation to co-operate under the general schema of recognition and enforcement in the original 2000 Insolvency Regulation. See Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), at para 8.402. See also the cases that are discussed in Chapter 5 of this report.

restructuring and rescue within the European Union. In our first Report, we described the debate within the Member States regarding the concepts, which are fundamental to restructuring. These concepts were explained in an academic context in Chapter 4 of our first Report, relying heavily on commentary from US academics familiar with Chapter 11[24] type restructuring processes. Our first Report demonstrated the heated nature of the debate, which is taking place in European academic circles triggered by the passing of the PRD.

Second, we concluded that the academic debate has clearly influenced the development of the PRD itself, given that the Commission-DG Justice established and consulted with a range of academic commentators in the Commission Group of Experts on restructuring and insolvency law (E03362). In addition, the first JCOERE Report reflected on pre-existing preventive restructuring frameworks in various Member States, including for example Ireland's Examinership, the Italian debt restructuring processes, and the French *sauvegarde*. The various iterations of the PRD as described in Chapter 5 of the first JCOERE Report underline this. The contribution of various academic projects including the CODIRE[25] project to the development of the PRD is also important.

Third, in picking some controversial provisions in preventive restructuring we pursued the hypothesis that court-to-court co-operation would be challenged by the very nature of restructuring. We saw that the intellectual liveliness of the academic debate was both an influence in terms of continued divergence but also reflective of quite divergent approaches to restructuring leading up to, and following, the passing of the PRD. Some of this divergence also arises from the challenge of matching quite diverse legal systems with a harmonising piece of legislation. It was clear that even where terminology is concerned there are misunderstandings, which we highlighted in Chapter 2 of the first Report.

In addition, as we surveyed different state responses to restructuring, it became clear that disagreement and lack of clarity was not only limited to terminology but also existed in relation to key concepts.[26] Key concepts included what is termed 'the threshold question', namely the question of which companies (those which were tending towards insolvency and / or those which were insolvent but not formally declared to be) could avail of a restructuring process; the application of a stay or moratorium to other creditors; the treatment of creditors throughout the process in relation to pre-existing priority;[27] and approval processes. We concluded that following the implementation of the PRD, divergence would persist even in

[24] Title 11 of the US Federal Code concerns Bankruptcy Law. Chapter 11 of Title 11 concerns the restructuring process known by the same name. For detail on Chapter 11 of the US Federal Bankruptcy Code see: US Courts, 'Chapter 11 – Bankruptcy Basics' (*United States Courts)* <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [Accessed April 1st, 2020].

[25] Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus, Ignacio Tirado (CODIRE Project), *Best practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer, 2018).

[26] See Renato Mangano, on legal certainty being a key element underpinning co-operation: 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 *IIR* 314.

[27] For a discussion on APR V RPR, see Irene Lynch Fannon, ''An Irish Perspective on the Cram-down provisions in the Preventive Restructuring Directive 1023/2019 EU, Guest Editorial' (2019) 27(3) *International Insolvency Review* 1; Stephen Lubben, "The Overstated Absolute Priority Rule" (20 March 2015), available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581639>; Riz Mokal, "The New Relative Priority Rule" (paper presented at the International Insolvency Institute, 17 June 2019, slide 4). This point was repeated by Mokal at the INSOL Europe Academic Forum, Copenhagen 25th and 26th September, 2019). See further Chapter 4 of this Report.

relation to these most basic concepts, aggravated in this context by the extensive scope within the PRD for differential implementation of its provisions.

Fourth, the peculiar interplay between the EIR Recast and the PRD and other restructuring processes raises a range of questions for the potential for mutual recognition under the EIR Recast, let alone co-operation, upon which we will expand in this Report.

1.6 Framework of the Second Report

Chapter 2 considers the evolution of the EIR Recast with particular emphasis on co-operation and co-ordination obligations imposed on both courts and insolvency practitioners.[28] Our focus is on corporate rescue. The EIR Recast addresses obligations to co-operate in relation to insolvency processes affecting a single debtor, in our case a single corporate entity, but goes on to describe similar obligations in relation to corporate groups.[29] In Chapter 3 the Report will return to our survey of the Member States; first, to place substantive differences in the broader context of judicial and court co-operation and second, to describe what we broadly define as procedural rules that present obstacles to court-to-court co-operation. This Chapter will be supported by information gathered in the second half of Part III of the JCOERE Questionnaire, which was distributed during the first phase of our research. Accordingly, in Chapter 3 we will combine our assessment of the level of disagreement regarding key concepts and substantive rules with our discussion of procedural rules to indicate the potential challenges to co-operation.

1.6.1 Engaging with the European Judiciary

During the JCOERE Project we have been fortunate enough to have access to the Judicial Wing of INSOL Europe. We first met the Judicial Wing at the INSOL Europe Annual Conference in Athens, Greece in 2018 where an initial presentation of the Project was made and greeted with considerable interest from members of the judiciary who were present. The presentation covered both the expected enactment of the PRD (which was passed the following June in 2019) and the idea of court-to-court cooperation and the consequent obligations to co-operate imposed by the EIR Recast 848/2015. At that time, the members of the Judicial Wing were extremely interested in engaging with the Project. In fact, the concept of judicial co-operation in insolvency processes was also the subject of a presentation by members of the judiciary at the main INSOL Europe Congress held in the following days in Athens. At that point, the judicial members on the panel expressed some reservations about the burden of being obliged to co-operate in cross-border insolvency cases.[30] Practical difficulties were also discussed, including language barriers and knowledge of Member State processes. In addition,

[28] EIR Recast, Recital 20 and Articles 41-44.
[29] *idem*, Recitals 53, 54 and 61 and Articles 56-61.
[30] See proceedings of the INSOL Europe Annual Congress, Athens, 2019. INSOL Europe, 'Past Events: INSOL Europe Annual Congress 2018: Athens, Greece' (INSOL Europe 2018) < https://www.insol-europe.org/events/past_events/0/start_date/asc/2018> [Last Accessed April 27th 2020].

in terms of protocols facilitating co-operation, a matter which is the subject of Chapter 6 of this Report, the participating members of the judiciary expressed a preference for developing co-operation protocols on a case by case basis,[31] views which are also reflected in the responses to the Judicial Survey discussed in Chapter 8 of this Report.

At the second meeting in which JCOERE presented its findings to the INSOL Europe Judicial Wing, this time at the INSOL Europe Annual Congress in Copenhagen, the JCOERE Project was well advanced. At a special meeting the progress of the JCOERE Project presented a case study based on an Irish Examinership case.[32] At this meeting the views of the members present were that once the process was covered in Annex A of the EIR Recast there would indeed be co-operation. However, practical barriers to co-operation were raised, in particular, the difficulty of accessing information on other Member State's domestic processes. In some jurisdictions for example, judges were directed to specific, approved sources of information, whereas in other jurisdictions this process was considerably more open-ended. As it happens, one of the final tasks of this Project is to create a database of cases for members of the judiciary to access. In addition, language and equivalence of legal terms and concepts was also considered an issue.

In the latter part of the Project a judicial survey was distributed, which sought information regarding knowledge of processes and responses to obligations to co-operate and calls for co-operation. In particular, the survey queried the information on awareness of existing protocols on co-operation. All of this is discussed in both Chapters 6 and 8 of this Report.

The JCOERE project has been invited to present its findings at a virtual meeting of the INSOL Judicial Wing in September and presented an open panel to the Society of Legal Scholars (held virtually this year) on differences in judicial reasoning in European courts. Finally, all going well the JCOERE project will conduct its final event live in Dublin in November 2020.

1.6.2 Common and Civil Law cultures

During the Project we also became aware of continuing differences between jurisdictions regarding the judicial function, broadly described. Lawyers from a common law tradition place great emphasis on the role of the judicial branch in interpreting legislation. It has always been part of the accepted tension within the European Union that there was some difference between common law countries within the EU[33] and civil law countries (which represent the majority of Member States) on the scope of judicial discretion, although this difference was not considered to be generally significant. To our surprise, however, this difference emerged in discussions surrounding the PRD, pre-existing domestic restructuring processes and the role

[31] This seems to reflect experience of actual cases as described in Chapters 3, 5 and 7 of this Report.
[32] These documents are available on the JCOERE website <www.ucc.ie/en/jcoere> and in Annex I of this Report.
[33] England and Wales, Northern Ireland within the UK (excluding Scotland) are traditionally described as common law countries. England and Wales being a particularly dominant jurisdiction insofar as corporate rescue was concerned during the recession from 2007-2012/13. Similarly, the Republic of Ireland is a common law jurisdiction with a written Constitution. Cyprus is a third common law jurisdiction within the EU and Malta a final jurisdiction whose laws have roots in common law and civil law combined.

of the courts. Civil lawyers expressed distrust of the role of courts as described by their common law colleagues as arbiters of technical evidence regarding the viability of an enterprise,[34] described the development of tests and application of fairness in domestic restructuring frameworks as being 'random'[35] where common lawyers described a case by case development of these tests. In one conference a commentator described the role of the US courts as 'capricious' in interpreting the terms of Chapter 11.[36] We consider these ongoing differences arising from legal culture in Chapter 4 of this Report.

1.6.3 Differences in qualifications and training

In addition, the creation of a European judiciary, a phrase that has emerged in European policy documents, is quite a challenging project given differences in training, practical backgrounds, and cultures. We return to these ideas in Chapter 4. In the meantime, it is worth noting that the EU continues to monitor judicial functions generally within the EU as a whole, issuing documents such as the EU Justice Scoreboard for public consideration. In preliminary remarks in the 2019 edition of this document, Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality states that:

> We all should share the same objective of improving our European judiciary, as without independent and efficient justice systems, there can be no rule of law, no trust from citizens, and no business and investment-friendly environment.[37]

1.6.4 Independence

The independence of the judiciary is one of the key concepts addressed in the Justice Scoreboard. Interestingly, scores in relation to the perceived independence of the judiciary amongst companies illustrate that Ireland and the Netherlands (both with proactive rescue processes) score highly,[38] the UK a little less so. Cyprus as a common law country scored well below these figures.[39]

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[34] Tomáš Richter, 'Negotiating a restructuring plan: confirmation, cross-class cram-down and valuation' (Paper presented at ERA Conference, Trier, 7 November 2019).

[35] Discussions at YANIL arising from the delivery by Aoife Finnerty (JCOERE) of a paper on the Irish Examinership Process entitled 'Preventive Restructuring – Is Ireland a leader in the EU?' (YANIL Conference, Copenhagen, 24 September 2019).

[36] Observations by Nicolaes Tollenaar at the ERA Conference in Trier, November 2019. Nicolaes WA Tollenaar, 'The concept of a restructuring – the underlying economic and legal principles' (Paper presented at ERA Conference, Trier, 7 November 2019).

[37] See for example European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. This is the 7th edition of this document.

[38] *ibid* at p. 45. In Ireland 30% rated judicial independence as very good with 70% as fairly good. In the UK these figures were 20% and 60% approximately. The Netherlands the figures were 25% and 73% approximately. Other common law countries such as Cyprus scored lower with 12% and just over 50% scoring very good and fairly good perception of judicial independence.

[39] This is also interesting as Cyprus introduced a rescue procedure which is similar to Ireland's examinership process which has been judged a failure. See further Kayode Akintola and Sofia Ellina, 'The Use and Abuse of Corporate Insolvency Rescue Procedures: A Contextual Evaluation of the United Kingdom and Cyprus' in Jennifer L. L. Gant (ed), *Party Autonomy and Third Party Protection in Insolvency Law* (INSOL Europe 2019) 137-154. See generally Michael Peel, 'Moscow on the Med: Cyprus and its Russians' *Financial Times* (Limassol and Nicosia, May 15th, 2020), and see further Council of Europe, *Anti-money Laundering and Counter-terrorist Financing Measures in Cyprus, Fifth Round Mutual Evaluation Report December 2019* Moneyval (2019) 27.

1.7 The Judiciary and Cross-border Insolvency Co-operation

As the Project continued, and our engagement with members of the judiciary and the practising communities increased, more interesting questions arose. For the main part, these focussed on the presence of any formal types of co-operation, the frequency of these issues arising in reality, and how the issue of co-operation or otherwise was pre-empted in a number of different ways. These developments will lead to a consideration of the obligations themselves in the body of this Report and whether there is actually any need for the imposition of formal obligations, such as those present in the EIR Recast. Chapter 5 of this Report highlights some of these issues through a discussion of case law which, in turn, describes real commercial situations where these issues have arisen. As we progressed in our research, we realised the nature of co-operation in EU insolvency matters remains unclear. It seems that a lot of assumptions have been made regarding this matter, which will be explored further as case law develops into the future. That said we are conscious of the fact that the EIR Recast (with its enhanced co-operation obligations) is a relatively new piece of legislation, dating back only 3 years from the time of the beginning of the project in 2018 and so perhaps it is too early to say what its real effects are, or indeed how these enhanced obligations to co-operate will be interpreted over time, particularly in the even newer context of a pan European preventive restructuring framework.

1.8 Co-Operation Guidelines, Examples, and Experience

In keeping with our original research agenda (as indicated to the EU Commission DG Justice) we will also consider awareness of, and the application of, existing best practice guidelines for co-operation in cross-border insolvency cases. Chapter 6 will provide an account of these current existing guidelines on co-operation in cross-border insolvency cases, particularly those applicable in the European sphere. Chapter 6 will also explore how co-operation is envisaged under the UNCITRAL Model Law, which includes provisions on co-operation that are similar to the EIR Recast. Chapters 5 and 8 of this Report will include information on judicial awareness and use of these guidelines gleaned from our engagement with members of the European judiciary through the Judicial Wing of INSOL Europe.[40]

Chapter 7 will then give an insight into how the United States, as a federalised jurisdiction similar in some respects to the structure of the EU, deals with interstate insolvencies, particularly with regard to forum determination and cross-border case coordination. The latter of these two aspects will mainly explore how coordination occurs often through bespoke protocols created on a case-by-case basis.

The final substantive chapter of this Report, Chapter 8, will present our findings of a survey distributed among three judicial focus groups in English, Italian, and Romanian. The purpose of this survey was to determine the experience of members of the European judiciary with

[40] Materials of relevance, which were presented at these meetings, are attached in an Annex to this Report.

both court-to-court co-operation in cross-border cases and their awareness and utilisation of the guidelines discussed in Chapter 6.[41] The final Chapter will then offer our conclusions and reflections on the content of this Report.

1.9 Chapter 2: Transition

The next Chapter will give an exposition of the European Insolvency Regulation (Recast) 848/2015 applicable from 26 June 2017[42] developing from the original European Insolvency Regulation 1346/2000.[43] It provides an explanation of the policy and regulatory framework within which the obligation placed on courts to co-operate arises. In particular, it will focus on the evolution of the co-operation obligations under both versions of the EIR, including how the EU views the meaning of judicial co-operation and what kinds of actions are expected or recommended in this area. These obligations will be examined in terms of both the recitals and the articles within which they are seated and how they developed between the two Regulations, along with a close analysis of the same provisions for corporate groups.

[41] A copy of this survey distributed through domestic networks of our partner researchers UNIFI, who accessed an Italian network of insolvency judges, UTM who accessed those in the Romanian Magistracy having experience in hearing insolvency cases, and Ireland and through the Judicial Wing of INSOL Europe is attached in an Annex II to this Report.
[42] EIR Recast, art 92.
[43] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1.