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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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II. Chapter 2: Court-to-court and Judicial Co-Operation[1] in the European Union

2.1 Introduction to Chapter 2

In Chapter 3 of Report 1, we considered the evolution of the European Insolvency Regulation[2] and the subsequent EIR Recast (848/2015)[3] from various conventions and negotiations taking place since the 1960s, which exemplify the movement toward further integration of the European Union. During those early decades, but particularly during the period immediately preceding the adoption of the EIR Recast, the discussion between universalism and territorialism, which had taken place in the United States academy, sparked the interests of some academics on this side of the Atlantic.[4] However, no EU policy documents proactively engage with this theoretical debate[5] and it is clear that the incrementalist approach[6] was adopted in the European Union, thereby avoiding a binary classification of approaches to issues of recognition and cooperation.

This Chapter will trace the evolution of the EIR Recast and, in particular, the evolution of the cooperation obligations. In doing so, it will consider how the EU addresses what is meant by judicial cooperation and what kinds of action are envisaged. Section 2.2 is broken into three parts. First, it begins with a discussion of the EIR and considers its historical background and some of the factors that prompted its introduction. The next section progresses to considering the specific cooperation obligations for individual debtors found in the EIR and discusses the changes to these requirements introduced by the Recast. The third part of section 2.2 considers the changes made to the EIR Recast during the inter-institutional negotiations and highlights some of key differences between what the Commission proposed and what was eventually passed. Section 2.3 considers the relationship between the EIR, the EIR Recast and the regulation of groups of companies. It is split into three parts: the first considers

[1] The remainder of this chapter will adopt the spelling cooperation, so that is the spelling in the EIR and the EIR Recast.
[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1. [Hereinafter EIR].
[3] 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].
[4] See for example Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) J Legal Studies 325; 'US Exceptionalism and UK Localism: Cross-Border Insolvency Law in Comparative Perspective' (2016) 36 Legal Stud 136; Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int Insolv Rev 246.
[5] See for example Emilie Ghio, 'Cross-border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2018) 29(12) ICCLR 713.
[6] A phrase adopted by Emilie Ghio in the European context from American insolvency academic, John Pottow. See John Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45(4) Va J Int'l L 935.

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cooperation obligations for groups of companies; the second discusses the regulation of proceedings for groups of companies; and the third looks at the differences between the Commission Proposal for the EIR Recast and what was finally agreed, giving some context to the divergent views of the institutions.[7]

2.2 The European Insolvency Regulation and the Obligation to Cooperate

2.2.1 Introduction to the EIR and its Recast

Amongst others, Reinhard Bork, Paul Omar and Kristin van Zwieten trace the history of the EIR back to the 1970 draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings,[8] wherein those drafting the Convention recognised that insolvency proceedings in one State had to produce effects in other States in order to be in any way effective.[9] As appears to be common in relation to insolvency matters – and indeed other matters subject to regulation – within the EU, it was concluded that the unification of domestic laws would be too time-consuming and laborious. Instead, the drafters chose to adopt a procedural framework based upon on the concept that one proceeding opened in one Member State would have effect across the EU (or EEC, as it was then). Despite a long negotiation period, a subsequent draft convention and an EC Council Working Party review in the 1980s, consensus on the matter could not be reached, resulting in the endeavour being shelved.[10] The idea was revived in the 1990s and resulted in the 1995 Convention on Insolvency Proceedings, which envisaged *inter alia* the operation of main and secondary proceedings and the interaction and coordination of the two. The 1995 Convention was not ratified by the United Kingdom; thus, it was not ratified by all Member States as was required. Interestingly, Denmark, which opted out of the EIR and by extension the Recast in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, signed the 1995 Convention.[11] In 1999, the Convention text of the Convention returned in the form of a Council Regulation, namely the Council Regulation on insolvency proceedings (1346/2000) or

[7] Proposal for a Regulation of the European Parliament and of the Council COM744 final of 12 December 2012 amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (2012) 2012/0360 (COD).

[8] European Economic Community 'Preliminary Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings' COM (1970) 3.327/1/XIV/70-E, art 2: 'The proceedings specified in this Convention, when instituted in one of the Contracting States, shall have full legal effect in the other Contracting States and shall be a bar to the institution of any other such proceedings in those States.'

[9] Kristin van Zwieten 'Introduction' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016) (para 15). For other discussions, see Paul Omar 'Genesis of the European Initiative in Insolvency Law' (2003) 12 Int. Insolv. Rev. 147. Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int. Insolv. Rev. 246, 251. See also JCOERE Report 1, section 3.2 'History and Development of European Insolvency Coordination'. For a fuller historical overview, see also Chapter 3 of Report 1 of the JCOERE Project.

[10] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings of 3 May 1996', EC Council Document 6500/96, 7. In the early 1990s, the 'Istanbul Convention' was presented by the Council of Europe, as distinct from the Council of the European Union or the European Council. It differed from the previous attempts at a convention in that it would permit multiple insolvency proceedings related to a single debtor to be opened across states, instead, regulating aspects of such proceedings. It too, was unsuccessful, however, Paul Omar argues that it may have provided a 'fresh impetus' to the EU to pursue a convention; Paul J Omar, *European Insolvency Law* (Ashgate 2004) 73. See also Kristin van Zwieten 'Introduction' in R Bork and K van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

[11] See Report 1 of the JCOERE Project and in the JCOERE Country Report on Denmark for further information on Denmark and the EIR and Recast <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiondenmark/>.

the 'EIR'. Its purpose, as far as preceding conventions and bilateral agreements were concerned, was clear: it was to replace such agreements from the point at which it entered into force.[12] In general, it has been viewed as not only achieving its central aim of coordinating insolvency proceedings in Europe but also as constituting an important step toward judicial cooperation within the European Union.[13]

The review of the EIR and its subsequent overhaul, which took place in 2015, was mandated by the Regulation itself. Article 46 mandated the Commission to report on the application of the EIR to the Parliament, Council and the EESC within a specified timeline. If necessary, the Commission report was to be accompanied by a proposal for the modification of the EIR.[14] Generally, the aim of this review and modification of the EIR was considered to be an exercise in filling 'perceived gaps in the original instrument' rather than a tearing down and rebuilding of the EIR, perhaps reflecting the idea that the EIR was generally viewed to be fit for purpose.[15] As was the case with the introduction of the Preventive Restructuring Directive, the overall stated objective of the revision of the EIR was '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'.[16] The Commission itself noted in the Proposal for the Recast that the EIR was 'functioning well in general' but that it was desirable to improve upon the application of certain provisions 'in order to enhance the effective administration of cross-border insolvency proceedings'.[17]

2.2.2 EIR & EIR Recast: Cooperation obligations

The principle of cooperation is not exclusive to the EIR or its Recast; rather as Reinhard Bork has pointed out, it has 'its foundations in the European law principle of EU Member States assisting one another', for example in Article 4(3) of the TEU.[18] A considerable difference between the EIR and the EIR Recast was the addition of new and stronger cooperation obligations, which Renato Mangano contends is consistent with both 'a commonly shared idea that private international law is based on cooperation' and 'an established tradition of common law courts and practitioners dealing with cross-border cases'. This theme of the relationship between cooperation and the rules of private international law will be considered

[12] EIR, art 44. Examples of the agreements that were replaced were the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979 and the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977 (EIR, art 44 (e)(g)).
[13] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 16.
[14] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1, art 46.
[15] Kristin van Zwieten 'Introduction' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016). See also Gerard McCormack 'Reforming The European Insolvency Regulation: A Legal And Policy Perspective' (2014) 10 Journal of Private International Law 41 and Francisco Garcimartín 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' available at <http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.
[16] Proposal for a Regulation of the European Parliament and of the Council COM744 final of 12 December 2012 amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (2012) 2012/0360 (COD), 3.
[17] ibid 12.
[18] Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int. Insolv. Rev. 246, 259. See also the judgment in the Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.* ECLI:EU:C:2012:739, where the relationship between Article 4(3) of the TEU and cooperation in insolvency matters was acknowledged. See also chapter 3 of this Report for a discussion of article 81 of the TEFU (judicial cooperation in civil matters with cross-border implications) as a potential basis for the (increased) cooperation requirements in the regulation.

in more detail in Chapter 5.[19] In the EIR, there was a duty to cooperate, but this was confined to cooperation between liquidators. Article 31(1) of the EIR stated:

> Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

Article 31(2) stated:

> Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate.

Furthermore, Article 31(3) of the EIR required that the liquidator in the main proceedings be given an early opportunity by the liquidator in the secondary proceedings to submit proposals on the liquidation or use of the assets in the secondary proceedings. The intention behind these articles was clear: to require communication and cooperation in order to coordinate multiple proceedings thereby increasing efficiency and clarity and decreasing cost. The cooperation requirements in the EIR were not without their issues, however. First, the cooperation requirements only specified liquidators. Although the cooperation requirements in the EIR were interpreted more broadly by some courts[20] and despite many Member States having domestic legislation requiring cooperation between national courts and the foreign insolvency court presiding over the main proceedings.[21] It still remained that only liquidators were explicitly bound to cooperate. Accordingly, the co-operation provisions in the EIR Recast were drafted, in part, to solve this issue.

Second, it could be suggested that there are issues of clarity, particularly with the applicable recital, Recital 20. Bernard Santen, for example, argues that 'neither the recitals nor the articles provide[d] insight into the application of 'cooperation' or 'coordination'.[22] He goes on to query if there was actually any difference between the two or if they are '(largely) identical concepts'.[23] While his argument that 'no insight' is provided could be considered a little harsh

[19] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 315.
[20] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o* ECLI:EU:C:2012:739: '[T]he principle of sincere cooperation laid down in Art 4(3) TEU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, as observed in paragraphs 45 and 60 of this judgment, aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings.'
[21] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 199.
[22] Bernard Santen 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231.
[23] *ibid*.

– Recital 20 of the EIR does give explanations of how coordination[24] and cooperation[25] can be achieved – it is perhaps fair to say that the language employed lacked precision. For example, the explanation of cooperation provided by Recital 20 could be construed as meaning 'communication', as it refers to 'exchanging a sufficient amount of information'.[26] 'Coordination' is primarily explained as being achieved through cooperation,[27] which is in turn explained as above, as potentially meaning communication ('exchanging a sufficient amount of information'). Furthermore, Renato Mangano contends that the lack of specific provisions expressly allowing liquidators to conclude agreements and protocols meant that in civil law jurisdictions, at least, there was evidence of liquidators being hesitant to enter into such arrangements and no evidence of cooperation between courts.[28] In other words, the absence of certainty resulted in an reluctance towards cooperating.[29] The Recast, as will be demonstrated below, goes some way to ameliorating perceived issues of clarity.

The EIR Recast specified two *types* of cooperation and coordination. First, it added a requirement for cooperation and coordination between courts,[30] something that was viewed as preferable to leaving such cooperation 'to the realm of implication and inference'.[31] Plainly, as Gerard McCormack asserts, this is because courts may interpret the existence and extent of such a requirement differently were it not specifically provided for in the Regulation. Arguably, this potential for difference in inference would be particularly acute within the common and civil law divide; it might be remembered that Renato Mangano contends that a major difference between common law and civil law courts was the 'established tradition' of the former dealing with cross-border cases and cooperating therein.[32] This importance of the difference in legal cultures and traditions will be discussed in more detail in Chapter 4 of this Report.

If an insolvency or restructuring proceeding is included in Annex A of the EIR Recast:

> (…)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 a request to open insolvency proceedings is pending, or which has opened such

[24] 'In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time.' Coordination is also explained as being achieved by cooperating.
[25] '[I]n particular by exchanging a sufficient amount of information'.
[26] EIR, Recital 20.
[27] 'Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely …'; EIR, recital 20.
[28] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.
[29] *ibid*.
[30] As will be discussed in more detail in Chapter 3, in view of article 2(6)(ii) of the EIR Recast, 'court' can also be interpreted to refer to 'administrative authority' or more broadly, a body legally empowered to open insolvency proceedings.
[31] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41, 54.
[32] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 315.

proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings.[33]

The only exception to this requirement is where cooperation would be incompatible with the rules applicable to the proceedings in question, an exception which one could argue defers appropriately to the domestic courts and national rules. While it may be unlikely that there would be provisions contained within a domestic framework that would explicitly prohibit cooperation, arguably a jurisdiction with such a framework would do as the Dutch have and create it with the intention that it to be outside the EIR. Examples of national rules comprised of rules of both a substantive and procedural nature that may have the result of impeding cooperation will be discussed in more detail in Chapter 3 of this Report. The remainder of Article 42 expands on and further explains how this duty to cooperate may be fulfilled.[34]

Second, the EIR Recast added a requirement for cooperation between insolvency practitioners and courts. Article 43(1) requires that an insolvency practitioner in main insolvency proceedings cooperate and communicate with any court that has opened secondary proceedings, or which has a request to do so. The same requirement applies to an insolvency practitioner in territorial or secondary insolvency proceedings *vis-à-vis* the court of main jurisdiction. Finally, it also mandates that an insolvency practitioner in territorial or secondary insolvency proceedings cooperates and communicates with a court that has also opened territorial or secondary insolvency proceedings, or one which has a request to do so. Article 43(2) then refers to the means of cooperation laid out in Article 42(2) and (3).

In addition, the EIR Recast amended the original Article 31 duty to cooperate – now Article 41 – which was outlined above. The primary change from the EIR was the inclusion of an additional means of how the cooperation should occur via article 41(2)(b), namely that the insolvency practitioners shall 'explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan'.[35] Naturally, in light of the PRD being passed in 2019, an interface between these two legal instruments exists, which will be discussed in more detail in Chapter 5.[36] Other aspects of the article were refined, or reworded without substantial change; for example, the second sentence of the original Article 31[37] became:

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[33] EIR Recast, art 41(1).

[34] EIR Recast, art 42(2): 'In implementing the cooperation set out in paragraph 1, the courts … 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.'
EIR Recast, art 42(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.'

[35] EIR Recast, art 41(2)(b).

[36] Aspects of this interface were also touched upon in Chapter 4 of Report 1 of the JCOERE Project. See also Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus Org L Rev 615.

[37] 'They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.'

> [A]s 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.[38]

The requirement in Article 31(3) that the liquidator in the main proceedings be given an early opportunity by the liquidator in the secondary proceedings to propose the liquidation or use of the assets (secondary proceedings) saw minor changes. It became a requirement to 'coordinate the administration of the realisation or use of the debtor's assets and affairs', which when explained, in practical terms, broadly meant the same as the old article 31(3).[39]

The recitals applicable to cooperation also saw significant changes between the EIR and the Recast. Two new recitals were added, Recitals 49 and 50, presumably with the intention of expanding on the ideas of cooperation, communication and coordination within insolvency proceedings. Recital 49 applies to cooperation between insolvency practitioners and the court, emphasising the view that their entry into agreements and protocols with a view to facilitating 'cross-border cooperation' of multiple cross-border proceedings concerning the same debtor (or members of the same group of companies) should be permitted. The Commission explained the inclusion of explicit reference to agreements and protocols in the Recast as a means of acknowledging their practical importance and promoting their use.[40] It explains that such arrangements may (i) take a variety of forms, in other words be written or oral; (ii) may vary in scope, ranging from generic to specific; and interestingly may (iii) cover parties taking or refraining from taking certain steps or actions. Recital 50 pertains to court-to-court cooperation, providing that cooperation and coordination in that instance may be achieved by the appointment of a single insolvency practitioner for multiple insolvency proceedings concerning the same debtor or for different members of a group of companies.[41]

[38] EIR Recast, art 41(2)(a).
[39] EIR Recast, art 41(2)(c): 'coordinate the administration of the realisation or use of the debtor's assets and affairs; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.'
[40] Proposal, 9; Just for clarity, it is worth noting that the Proposal did not originally contain a recital referring to agreements and protocols. The reference was only included in article 31 (now article 48).
[41] The caveat is that such an appointment must be compatible 'with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner'. See EIR Recast, recital 50.

2.2.3 The evolution of the EIR Recast: European Union Institutions[42]

It is worth noting that the Proposal for the EIR Recast did not sail through the various EU institutions; rather, it went through considerable EU negotiations before being passed, a process which took two and a half years, two European Parliament readings, four Council debates and inter-institutional negotiations (trilogue), amongst other input. With that said, much of the debate centred elsewhere and not around the issues, articles, and recitals directly relevant to cooperation; however, there were some changes of note. As discussed in the previous section, the review of the EIR and resulting changes were mandated by the Regulation itself.

Before examining the specific amendments made to proposed recitals and articles, it is worth bearing one overarching change in mind: across the Regulation, there was a change in terminology from 'liquidator' to 'insolvency practitioner', reflecting the fact that perhaps an update in terminology was needed from the EIR and indeed, from the proposal for its reform. Arguably, this change in terminology was desirable in order to reflect the shift in scope that took place between the EIR and the Recast; a focus on insolvency procedures in the former to encompassing restructuring and pre-insolvency procedures in the latter. A related possibility is that it was not envisaged that rescue processes would be included in the EIR when it was originally drafted, particularly given the wording of Article 1, which states: 'This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.' Yet, across the procedures contained in Annex A are frameworks that do not require a 'liquidator' and instead utilise a different professional; thus, 'insolvency practitioner' is certainly a more appropriate term for these professionals. For example, the Irish Examinership procedures uses an 'examiner', who is an insolvency practitioner; liquidation, which requires a liquidator, is a separate procedure entirely. While a liquidator is an insolvency practitioner in Ireland, the corollary is not always the case, as a liquidator is just one of the roles that can be held by an insolvency practitioner. There are a number of other procedures in Annex A, both in the EIR and the Recast, that do not necessarily have 'liquidators', such as the Italian *concordato preventivo*, the French *Sauvegarde,*[43] and the Dutch *surséance van betaling*.[44] Thus, Article 2 of the Commission Proposal was amended and rather than defining 'liquidator',[45] as had been the case in the Proposal, the EIR Recast defines an 'insolvency practitioner'.[46] Practically, the change may have been minimal, as 'liquidators'

[42] This section discusses the changes to the cooperation obligations in the EIR Recast.
[43] And its variations; Sauvegarde accélérée, and Sauvegarde financière accélérée,
[44] The public procedure under the WHOA, which is intended to be included in Annex A, is another example. For further information on the procedures in France, Ireland, Italy and the Netherlands, amongst others, see JCOERE Report 1, Chapters 6-8.
[45] Defined by the Proposal as: '(i) any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C; (ii) in a case which does not involve the appointment of, or the transfer of the debtor's powers to, a liquidator, the debtor in possession.' Commission Proposal (COM) 744 final for a Regulation of the European Parliament and of the Council COM744 final of 12 December 2012 amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [2012] 2012/0360 (COD) [Hereinafter 'Commission Proposal for the EIR Recast'] art 2(b).
[46] An '"insolvency practitioner" means any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs. The persons and bodies referred to in the first subparagraph are listed in Annex B'; EIR Recast, art 2(5).

in the EIR were understood in line with a prescribed list of professionals (Annex C) that clearly included a range of insolvency practitioners other than liquidators. For example, it included the Irish examiner and *commissario* (Italy) and when recast, included the *administrateur judiciaire* and *mandataire judiciaire* (France), amongst others.[47] The question does, however, legitimately arise as to why certain procedures were included in the EIR, which did not appear to fit comfortably, or at all, in the scope of the regulation as outlined in Article 1.

Aside from the change in terminology proposed by both the Council and the Parliament, the changes to recitals and articles relevant to this research emanated principally from the Council. Arguably, the amendments to the recitals were relatively minor, appearing to be more for the sake of clarity rather than substantive change. For example, the Commission Proposal for Recital 48[48], which stated that main and secondary insolvency proceedings could *only* contribute to 'the effective realisation of the total assets' if proceedings were 'coordinated', was expanded and softened a little:[49]

> Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings.[50]

Recital 48 then goes on to define 'proper cooperation' in a similar manner to how 'coordinated' was defined in the Proposal, namely as the insolvency practitioners and courts 'cooperating closely' by exchanging 'sufficient … information'.[51] Finally, as was articulated above, the references to 'liquidator' were removed and replaced with 'insolvency practitioner'.[52]

Interestingly, neither recital 49 nor 50 were included in the Commission Proposal and thus, were added during the inter-institutional negotiation process. Even though the Commission referred to agreements and protocols in the relevant article, perhaps the addition of recital 49 was to further emphasise an important status for such arrangements in order to eliminate the reluctance of practitioners in civil law countries to their use, which was identified as an issue by Renato Mangano.[53]

As articulated previously, the primary articles pertaining to cooperation in the EIR Recast are articles 41 – 43. Before discussing the amendments to those articles, it is interesting to note that article 44, which prohibits courts from charging costs to each other for cooperation and

[47] For the full list of professionals included coming within the meaning of 'liquidator', see EIR, Annex C and for 'insolvency practitioner', see EIR Recast, Annex C.
[48] Recital 20 from the Proposal was renumbered recital 48 in the final EIR Recast.
[49] Commission Proposal for the EIR Recast, Recital 20.
[50] EIR Recast, Recital 48.
[51] ibid.
[52] This was the only change suggested by the European Parliament, though it suggested use of the term 'insolvency representative' rather than the agreed term 'insolvency practitioner'.
[53] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.

communication, was neither a standalone article in the Commission Proposal nor was the requirement written with the same specificity. The Commission had required that cooperation be 'free of charge' as part of article 31a (now article 42).[54] Arguably, this amendment goes a long way towards eliminating any confusion as to the intention of the article, which one could describe as a prohibition on one court from charging another in a different Member State for the *privilege* of cooperation.

As explained above, the function of article 41 is to lay out the provisions that govern cooperation between insolvency practitioners. The only amendment to article 41 was the insertion of subsection 3, which extends the cooperation requirements contained in the first two paragraphs to 'situations where … the debtor remains in possession of its assets'. Perhaps it could be argued that this change is another reflection of the regulation moving scope from predominantly insolvency and liquidation to also encompassing pre-insolvency and rescue.

The change made to article 42(1) appears to be relatively minor; it was amended to add the requirement that the appointment of the independent person or body acting on its instructions must not be incompatible with the rules applicable to them. Across articles 42 and 43, 'territorial proceedings' were added to the list of proceedings concerning the same debtor that should be coordinated where possible. Finally, article 42(3) was amended to include 'coordination in the appointment of the insolvency practitioners' as a means of implementing the court-to-court cooperation requirement;[55] the others being communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; coordination of the conduct of hearings and coordination in the approval of protocols.[56] Arguably, this addition demonstrates consistency with the new recital 50.[57]

The primary amendment to article 43(1) was an extension of the obligation of insolvency practitioners in territorial or secondary insolvency proceedings to cooperate and communicate with courts, which had opened or had a request to open other territorial or secondary insolvency proceedings. In the Commission Proposal the obligation only explicitly applied to the insolvency practitioner in the main proceeding vis-à-vis the court with a secondary proceeding (request) or the insolvency practitioner in the secondary proceeding vis-à-vis the court with main proceedings. Naturally, the omission may have resulted in the insolvency practitioner involved in secondary or territorial proceedings having no obligation

[54] Article 31a(2) originally read: 2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.
[55] EIR Recast, art 42(3)(a).
[56] EIR Recast, art 42(3)(b)-(e); 'where necessary' was added to art 42(3)(e).
[57] 'Similarly, the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. In that context, they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner.'

to cooperate with a court in another Member State also involved in a secondary or territorial proceeding.

2.3 EIR & EIR Recast: Cooperation Obligations and the Regulation of Groups of Companies

2.3.1 EIR & EIR Recast: Cooperation obligations for groups of Companies

As described in the introduction, a significant issue with the EIR appeared to be connected to its effectiveness where groups of companies were concerned; the primary issue being that 'coordination' in the EIR was not explicitly and effectively regulated for groups of companies. Thus, where the previous section (2.2) outlined and discussed the changes to cooperation and coordination requirements for single debtors, this section will discuss the EIR and the Recast, its articles and recitals, with groups of companies as the focus. In its Proposal for the EIR Recast, the Commission acknowledged that almost half of respondents that took part in the public consultation process viewed the EIR as failing to work efficiently for insolvencies consisting of members of a multinational group of companies.[58] Furthermore, it was noted that the lack of regulation was diminishing 'the prospects of successful restructuring of group[s] [of companies] as a whole' resulting instead in their break-up.[59] In spite of this clear sentiment expressed by the Commission, its Proposal for amending the EIR did not contain express provisions on coordinated group proceedings, arguably a notable omission. As will be discussed in section 2.3.3, the framework for group coordinated proceedings was added during the inter-institutional negotiation of the Recast.

Perhaps it goes without saying that the types of insolvency proceedings that most need effective coordination, efficiency and organisation are those concerning large groups of companies with potentially intricate structures, as evidenced by complex and challenging cases such as *Eurofood*.[60] *Eurofood* concerned the resolution of a dispute over the COMI of Eurofood IFSC, a subsidiary of the Italian parent company, Parmalat SpA. This case will be discussed in more detail in Chapter 5, however, cases such as this illustrate, albeit it briefly in this Chapter, the challenges that arose from the lack of regulation of groups of companies in the EIR and highlight 'bitter clashes between courts and insolvency practitioners belonging to different jurisdictions'.[61] In spite of the legislative void where groups were concerned, there was some evidence that certain domestic courts overcame the lack of regulation by adopting an 'integrated economic unit' approach.[62] This refers to the practice of considering the affairs of the group of companies as a whole, which in turn can lead to a finding that related companies have their COMI in the same state despite being incorporated elsewhere.[63] With

[58] Commission Proposal for the EIR Recast, 5.
[59] Commission Proposal for the EIR Recast, 3.
[60] C-341/04 [2006] ECR I-3813.
[61] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 318.
[62] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41, 55.
[63] *ibid*. See also *Re MPOTEC Gmbh* [2006] BCC 681.

that said, however, differences in inferences still posed a problem as this use of the integrated economic unit approach was not universal, thereby leading to potential discrepancies in how different group proceedings could be treated. Furthermore, on foot of *Eurofood*, the CJEU seemed not to interpret the issue the way some of the domestic courts had.[64] Accordingly, and in line with the stated intention of the Commission to create a 'specific legal framework to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach'; the Regulation was amended to expressly apply to groups of companies to attempt to avoid disputes concerning them from arising.[65]

The first step in achieving the aim of express regulation of groups of companies, the opening gambit as it were, was to create new recitals to make a clear statement as to the intention of the Recast over and above merely referring to 'groups of companies' in other recitals.[66] Recital 51 made an unequivocal statement about the purpose of the Recast regarding groups of companies, wherein it was stated that the EIR Recast should ensure efficient administration of the insolvency proceedings of those companies forming part of a group. Recital 52 provides that there should be 'proper cooperation' between participants – courts and insolvency practitioners – involved in group insolvency proceedings in the same way as is required in the case of a single debtor. Recital 54 introduced the concept of the coordinated group proceedings, for which procedural rules were to be introduced by the Recast, with recitals 55-59 providing more detail on their operation. Interestingly, despite the noted advantages of coordinated group proceedings, recital 56 provides an 'out' in the interest of preserving their 'voluntary nature'; it states that insolvency practitioners involved in coordinated proceedings 'should be able to object to their participation'.[67] Thus, whilst the Recast certainly encourages coordination, it does not make it obligatory, perhaps, once again, leaving the door open to the potential for inconsistencies across the EU for the sake of compromise.

To reinforce the intentions expressed by the recitals, the EIR was amended to add articles regulating groups of companies. Chapter V of the EIR Recast, which is entitled 'Insolvency Proceedings of Members of a Group of Companies' is divided into two sections. Section 1, entitled 'Cooperation and Communication', regulates cooperation between courts, insolvency practitioners and courts and insolvency practitioners for groups of companies in a manner similar to the way articles 41-43 did for single debtors. The insolvency practitioners are obliged to cooperate; such cooperation can be achieved *inter alia* by communicating relevant information as soon as possible and where possible in the circumstances, coordinating the creation and implementation of a restructuring plan.[68] Additionally for practitioners in proceedings concerning a group, additional powers may be granted to insolvency practitioners appointed in one of the proceedings by (some of) the others in order to coordinate the administration and supervision of the affairs of the group members and to

[64] Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-03813.
[65] Commission Proposal for the EIR Recast, 59.
[66] For example, the revised recital 6, recitals 49-50.
[67] This is supported by article 64 of the EIR Recast, which will be discussed in more detail in the coming paragraphs.
[68] EIR Recast, articles 41 and 56.

coordinate restructuring efforts, both of which are desirable if feasible per articles 56(2)(b)(c). The courts are obliged to cooperate in proceedings concerning groups of companies 'to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings'. Aside from the addition of 'appropriateness' as a *test* or standard, the articles concerning court-to-court cooperation for single debtors and groups are virtually identical. Finally, insolvency practitioners and courts are obliged to cooperate, again to the extent that such cooperation is appropriate to achieving the aims of effective management of the proceedings. Interestingly, in proceedings concerning groups, the insolvency practitioner is empowered to request information concerning the proceedings of other member of the group from the relevant court, again provided that the request is appropriate to achieving its aims.[69] One could question the necessity of such a provision if the cooperation mandated under article 56 was being achieved.

2.3.2: EIR & EIR Recast: The regulation of proceedings for groups of Companies

Section 2 of Chapter V of the EIR Recast regulates the concept of 'coordinated group proceedings' referred to in recitals 54-59. Article 61 states that coordination proceedings may – as distinct from 'must' or 'shall' – be requested before any applicable court[70] by any insolvency practitioner appointed to a member of the group. Therefore, such articles create a framework for opening coordinated proceedings, rather than making such proceedings mandatory. Article 61 goes on to regulate the contents and form of the request to open coordinated group proceedings; first, it must comply with the applicable national law.[71] Second, it must be accompanied by details of the proposed 'group coordinator',[72] an estimate of and proposed division of costs[73] and a list of the appointed insolvency practitioners and where relevant, the courts and competent authorities.[74] Third, an outline of the proposed group coordination must also be included with specific reference to how the coordination fulfils the article 63(1) criteria.[75]

Article 63(1), in turn, details the conditions that should be satisfied by the request for the opening of coordinated proceedings, namely its appropriateness to facilitate the effective administration of the group insolvency proceedings;[76] the absence of a likelihood that any creditor expected to participate in the proceedings will be financially disadvantaged by such participation[77] and that the group coordinator meets the eligibility criteria to be appointed

[69] EIR Recast, art 58(b).
[70] 'Applicable court' refers to 'any court having jurisdiction over the insolvency proceedings of a member of the group' (EIR Recast, art 61(1)).
[71] EIR Recast, art 61(2): 'The request referred to in paragraph 1 shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.'
[72] EIR Recast, art 61(3)(a): 'a proposal as to the person to be nominated as the group coordinator ('the coordinator'), details of his or her eligibility pursuant to Article 71, details of his or her qualifications and his or her written agreement to act as coordinator'.
[73] EIR Recast, art 61(3)(d).
[74] EIR Recast, art 61(3)(c).
[75] EIR Recast, art 61(3)(b).
[76] EIR Recast, art 63(1)(a).
[77] EIR Recast, art 63(1)(b).

per article 71.[78] Once the required time of 30 days, as specified by article 64(2), has elapsed and the court is satisfied that the conditions laid out in article 63(1) are met, then the court may grant the request.[79] This results in the court appointing a coordinator, deciding an outline of the coordination and deciding on the estimation and division of costs.[80]

Article 64 allows for any appointed insolvency practitioner to object to the inclusion of its part of the group in the coordinated proceedings or to object to the proposed coordinator within a 30-day period.[81] Critically, this objection is determinative and results in the relevant part of the group being excluded from coordinated proceedings.[82] Furthermore, there appears to be no guidance or limitations on the reasoning behind such an objection. Thus, it may be possible for insolvency practitioners to object on the basis that they do not wish to relinquish any of the value of the proceeding to their business – 'to keep the business' so to speak – perhaps providing scope for an objection to be lodged on grounds that directly concern neither the debtor nor its creditors.[83] This concern is not exclusive to the EU. A similar point will be made in Chapter 7 (section 7.3) in relation to participation in centralised coordination for insolvency practitioners in the United States. Perhaps, more honourably, the reticence to be involved in coordinated proceedings may be as a result of the view that local interests – creditors and the debtor – can be better served by an uncoordinated approach. Even still, however, the lack of a requirement for the insolvency practitioner to provide a justification for requesting exclusion from the group coordinated proceedings arguably undermines its effectiveness and exposes it to the potential for abuse.

There is also a specific cooperation requirement pertaining to group coordinated proceedings. Similar to the previously discussed cooperation obligations within insolvency proceedings, article 74 requires the appointed insolvency practitioners and the coordinator to cooperate with each other provided that such cooperation is not incompatible with the rules governing the proceeding.[84] This requirement specifically obliges the appointed insolvency practitioners to communicate information that may be needed by the coordinator to perform his or her role.[85]

The changes to the EIR brought about by its Recast, though generally viewed as positive, are not without criticism. Horst Eidenmuller, for example, comments that the EIR Recast – or

[78] EIR Recast, art 63(1)(c). These eligibility criteria are: 1. 'The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner.' 2. 'The coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.' (EIR Recast, art 71).
[79] EIR Recast, art 68(1).
[80] EIR Recast, art 68(1)(a)-(c).
[81] EIR Recast, art 64(1) & (2).
[82] EIR Recast, art 65(1).
[83] Renato Mangano argues something similar in relation to choice of jurisdiction in insolvency matters: 'In fact, if each court and insolvency practitioner can individually establish which law should apply to and which court should be competent in each cross-border legal relationship and which judgments of which other Member States are to be recognised, each court and each insolvency practitioner have an incentive to act opportunistically and to pursue the interest of those parties that are located in their own jurisdiction, that is, to overprotect local debtors, local creditors, local employees, local company directors, etc.' Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 *IIR* 314, 319.
[84] EIR Recast, art 74(1).
[85] EIR Recast, art 74(2).

Proposal for the EIR Recast as it was at the time – 'falls short' when it comes to manging group insolvencies, i.e. the coordinated group proceedings approach.[86] A much better administration of group insolvencies, he argues, would be achieved by consolidating the procedures, as opposed to the entity-by-entity approach used by the EIR and its Recast.[87] Whether Eidenmuller is correct is perhaps irrelevant to an extent. Perhaps consolidated proceedings would work better, however, without both the flexibility of implementation and the retention of some control by Member States offered by the Regulation and other similar instruments, agreement on their introduction and subsequent amendment would be extremely challenging, if not impossible, to reach within the EU. Thus, while he may have a point, perhaps it is fair to say that his argument is more about the compromises and concessions almost endemic in intra-institutional negotiations and less about a failure to choose the best available option. Or perhaps, as Gerard McCormack argues succinctly, such policy choices 'reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward'.[88]

2.3.3 The evolution of Chapter V: European Union Institutions

As was articulated in the opening of section 2.3, a notable omission from the Proposal was a clear framework on coordinated group proceedings. Although the Commission noted the lack of effectiveness of the EIR where groups of companies were concerned, it did not propose a model of coordinated proceedings; instead, the Commission additions to the EIR were predominantly the articles that eventually made up Chapter V, Section 1 – articles 56-60 – which saw some minor changes during the negotiation process. For example, the primary change to article 57, which pertains to cooperation between courts in proceedings concerning groups of companies, was the addition of 'coordination in the appointment of insolvency practitioners' to the means by which the courts could communicate. Arguably, this amendment was somewhat unsurprising given that a similar change was made to article 42, as discussed previously. While other parts of article 57 were revised, the amendments were of little significance as they neither altered its overall meaning or intention.[89] The same can be said to the changes made to articles 56 and 58.

The addition of the articles pertaining to group coordinated proceedings was the most considerable change during the intra-institutional negotiations. The addition was advanced by the Parliament in the first instance; the report by the Committee on Legal Affairs proposed six new articles that, when reformulated during the negotiation process, became Section 2 of

[86] 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht J Eur & Comp L 133, 148.

[87] *ibid*. He explains 'procedural consolidation' as one insolvency court being 'designated in charge of the multiple (main) insolvency proceedings over the assets of multiple debtors within the group setting' and one insolvency practitioner being appointed with respect to the multiple proceedings. The powers of insolvency practitioners in group proceedings are laid out in article 60.

[88] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41.

[89] For example, the provision allowing the appointment of an independent person or body to act on the instructions of a court in order to facilitate cooperation, which is in both the final text of the EIR and the Commission Proposal had the caveat 'provided that this is not incompatible with the rules applicable to them' added by the Parliament; European Parliament Committee on Legal Affairs 'Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' (2013) A7-0481/2013 COM(2012)0744 – C7-0413/2012 – 2012/0360(COD).

Chapter V. Interestingly, the Parliament and Commission appeared to be at odds regarding the approach that should be taken to remedy the issues with the EIR where groups of companies were concerned. In the explanatory statement accompanying its report, the Parliament stated that the Commission '[was] not following the recommendations of Parliament but [focusing] on enhancing the coordination and communication of different insolvency proceedings'.[90] This was a contrast to what the Parliament had requested from the Commission, namely a 'flexible proposal for the regulation on the insolvency of groups'.[91] Through the additions it proposed, the Parliament viewed itself as 'formulating a more ambitious solution on insolvency of groups of companies', something which it viewed as a compromised between its position and that of the Commission.[92] It appears that this compromise was desirable all round, as the final text from the Council also contained the provisions pertaining to group coordinated proceedings.[93]

2.4 Conclusion and Transition

This Chapter has traced the evolution of the EIR between its 2000 version and its Recast with a particular focus on the emergence of the cooperation obligations contained in the Recast. While the EIR Recast is sometimes viewed as lacking in the provision of specific instructions on how cooperation should occur, it also acknowledges that courts and practitioners may create protocols to assist in this task, examples of which are discussed in greater detail in Chapters 6 and 7 (section 7.3). That said, there remains criticism that the EIR Recast has not gone far enough, as discussed in section 2.3.2 of this Chapter.[94] Given the value-laden characteristics of insolvency and restructuring, it remains a difficult area of law to harmonise due to the jurisdiction specific policy arguments that often conflict in where the greatest emphasis should lie in the rationale underpinning the mechanisms to resolve financial distress.

The next Chapter 3 will summarise the JCOERE Project's findings from Report 1 on substantive principles in restructuring (preventive or otherwise) mechanisms within the framework of the Preventive Restructuring Directive that it was determined may present obstacles to cooperation when they are implemented by the Member States. It adopts a taxonomic categorisation of Member States in terms of their observed approach to preventive restructuring in terms of underlying policy and implementation of the PRD. It will also provide pertinent observations on the relationship between harmonisation and cooperation within the paradigm of cross-border insolvency. Finally, Chapter 3 will provide a summary of the JCOERE Project's findings in relation to procedural obstacles to court-to-court cooperation,

[90] European Parliament Committee on Legal Affairs 'Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' (2013) A7-0481/2013 COM(2012)0744 – C7-0413/2012 – 2012/0360(COD) 48.
[91] *ibid*.
[92] *ibid*.
[93] Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) dated 12 March 2015 2012/0360 (COD).
[94] Horst Eidenmuller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht J Eur & Comp L 133, 148.

including those revealed in the responses to the JCOERE Questionnaire noting that most of the responses to the JCOERE Questionnaire have been discussed in detail in Chapters 6-8 of Report 1.