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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III. Chapter 3: Potential Obstacles to Court-to-court Co-operation in Preventive Restructuring Cases

3.1 Introduction

The JCOERE Project began with the hypothesis that differences between Member States on policy and legal principles, including both substantive and procedural rules, might be particularly acute in the context of preventive restructuring. Such differences can present obstacles to court-to-court co-operation, practitioner-to-practitioner co-operation and practitioner-to-court co-operation. The next subsection (3.1.1) will describe the policy objectives behind preventive restructuring. In section 3.2, we provide a summary of our findings from Report 1 on variations in substantive law principles arising from pre-existing restructuring frameworks in member states and which are generated by the range of options contained in the Preventive Restructuring Directive (1023/2019)[1]. As we continued with our research, including a survey of chosen Member States and participation in various colloquia and conferences, our hypothesis was proven to hold true. We found significant differences in approaches to preventive restructuring in Member States. We have categorised these differing approaches in an original taxonomy which is described in this chapter. The categorisation of Member States adopted in this Chapter and described in section 3.3 relied on the identification of fundamental differences in policies and approach to preventive restructuring generally, which will affect the implementation of the PRD. This Chapter will continue in section 3.4 with observations on the relationship between harmonisation and co-operation. The EIR Recast[2] acknowledges the tension between harmonisation, or lack thereof, and co-operation or indeed disruptions to the potential for co-operation. For example, it countenances the opening of competing or secondary proceedings where:

> [T]he differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the

[1] Council Directive (EU) 2019/1023 of 26 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 amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter PRD or Preventive Restructuring Directive].
[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].

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opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires.[3]

The findings in relation to procedural obstacles to court-to-court co-operation revealed in the responses to the JCOERE Questionnaire will then be discussed and analysed in section 3.5, along with other observations relating to the institutions (administrative or judicial) that hear cross-border cases and the difficulties that differences here may cause to co-operation and mutual trust (3.6). A number of additional potential obstacles will then be discussed in the last few sections, including a summary of the views of members of the judiciary expressed to researchers during the JCOERE Project. This last section complements the findings of the Judicial Survey in Chapter 8.

3.1.1 A summary of policy objectives relating to preventive restructuring

Chapter 5 of Report 1 describes the evolution of the Preventive Restructuring Directive 1023/2019 passed in June 2019. In reflection of this work, this section summarises key substantive concepts as they evolved. The principle policy document underlying the Preventive Restructuring Directive is the European Commission Recommendation: *A New Approach to Business Failure* (2014).[4] Of importance was the idea of improving the efficiency of insolvency laws to support economic recovery across the EU.[5] We have discussed this at length in Report 1, but it is worth reminding ourselves of the specific policy objectives outlined in the 2014 Recommendation, which ultimately led to the PRD. These included:

a. Maximising value to the economy as a whole through the protection or benefit of those (these could be individuals or other businesses) connected with businesses at risk of insolvency. Individuals could include other businesses as creditors, employees of these businesses and owners of businesses.
b. Saving jobs.
c. The provision of a 'second chance' to ordinary individual sole traders…or entrepreneurs. At the time bankruptcy laws in many Member States including Ireland and Germany were really restrictive as compared with the frameworks in other jurisdictions, for example, England and Wales.[6]
d. The recovery of non-performing financial loans. Although not at the forefront of policy concerns in 2014, by the time the Preventive Restructuring Directive was passed in June 2019, another key concern was that restructuring process would allow specifically for the restructuring of corporate debt to the benefit of the banking sector and the support of the capital markets union. This was a policy issue that was more clearly

[3] *idem,* Recital 40.
[4] For a discussion of the other policy documents relevant to the PRD, see JCOERE Report 1, Chapter 5, which gives an account of the history of the PRD chronologically.
[5] The policy objective was to 'ensure that viable enterprises in financial difficulties…have access to national insolvency frameworks, which enable them to restructure at an early stage with a view to preventing their insolvency…'. European Commission, Recommendation COM (2014) 1500 of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L 74/65.
[6] Irene Lynch Fannon, 'Bankruptcy Tourism in the UK: Why and How?' (2013) 26(6) Insolvency Intelligence 85.

articulated later in the day, very near to the adoption of the Directive and particularly afterwards. It was reiterated by Commission officials at various meetings following the passing of the Directive. For example, in June 2019 the importance of addressing the restructuring of non-performing loans was described by Salla Saastomonien.[7] A key related issue articulated by the Commission representatives was what they perceived to be 'the significant variance' between Member States regarding attitudes to corporate restructuring and the actual legal frameworks involved. This is borne out by our research in Report 1. The view of the Commission was that these variances in turn led to a reluctance on the part of businesses to expand across the European Union, either by virtue of the increased costs or uncertainty as to their level of exposure in other Member States, and very different recovery rates for creditors.

e. A particular focus on SMEs reflecting sectoral concerns with providing a 'second chance' for entrepreneurs as described above. Discussion of costs of existing restructuring processes was of particular importance and reflected the experience of practitioners in many countries. The idea that a rescue process should be available to the SME sector was and is of concern to many but whether this is in reality a true reflection of the possibilities of such processes is a key and seemingly irresolvable question.[8]

In its Recommendation, the Commission highlighted the following substantive elements which were considered to be desirable for a harmonised approach and which were eventually reflected in the PRD:

- Flexibility of procedures, namely limiting the need for **court formalities** to where they are necessary and proportionate;[9]
- Provision for **a stay** of individual enforcement actions;[10]
- Protection of the interests of **dissenting creditors**, namely that the court should reject any restructuring plan that would likely reduce the rights of dissenting creditors below what they could reasonably expect to receive, were the debtor's business not restructured. This is indeed where the genesis of the priority debate began;[11]

[7] This point was made by Director Saastomonien at the European Insolvency & Restructuring Conference, held in Brussels, 27th and 28th June 2019. The key message was the concern to prevent the build-up of non-performing loans, thereby freeing up capital reserved to address non-performing loans- which amounted to between 167-520 billion euro - across the European Union. Salla Saastamoinen, Director for Civil and Commercial Justice, DG Justice. EIRC Meeting June 27th.

[8] It was felt that this particular aim would help to combat the 'social stigma' and legal consequences of an on-going inability to pay off debts. Part IV of the Recommendation concerns 'second chance' provisions; the Commission recommended that entrepreneurs should be fully discharged of their debts within three years from either the date on which implementation of a payment plan began or the date on which the court approved the opening of bankruptcy proceedings (Section 30). Per Section 32, however, it was indicated that Member States were entitled to introduce more stringent provisions in certain circumstances, for example to discourage entrepreneurs who have acted in bad faith or failed to adhere to a repayment plan, or to safeguard the livelihood of the entrepreneur by allowing him / her to keep certain assets.

[9] PRD, art 4(6).

[10] PRD, art 6.

[11] PRD, art 11. For a discussion of 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.

- Provision for 'second chance' that will allow for a full discharge of debt after a specified period of time – these are more applicable to entrepreneurs (bankrupts);
- That the preventive restructuring process should depend on a **debtor in possession** model;[12]
- That even though there was a recognition of the need to protect dissenting creditors, the preventive restructuring framework would also include the possibility for **cram-down** provisions. Thus, a tension was established from the outset between the idea of protecting dissenting creditors and the characteristics of a robust restructuring framework. In turn this led to the divergence amongst Member States, which is categorised in the following section;[13] and
- Protection for new and interim financing. [14]

This summary informed the areas where we felt it was necessary to interrogate the approach of individual Member States, which we have done in our JCOERE Questionnaire.[15] Even at this time, Commission policy documents emphasised the goal of harmonisation of these complex principles across Member States, stating:

> [T]he creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment.[16]

The development of the Preventive Restructuring Directive from these policy beginnings through various iterations and debates in the European legislative process demonstrates how the substantive rules that are considered to be core to restructuring emerged and became part of the PRD. The following section of this Chapter summarises our findings regarding differences on substantive legal principles, which we consider will prevent co-operation. As the Commission has acknowledged, harmonisation is important and without it, the chances for co-operation diminish.

3.2 Obstacles Arising from Substantive Law: Findings from JCOERE Project Report 1

The following is a brief summary of the findings of JCOERE Report 1. The JCOERE Questionnaire focussed on key rules central to preventive restructuring to assess both current rules and planned implementation. These key rules included the following principles:

- The imposition of a stay, which in the PRD is envisaged as being up to 4 months normally with a possible extension to 12 months.

[12] PRD, art 5.
[13] PRD, art 11.
[14] PRD, art 17.
[15] See JCOERE Report 1, Chapters 6, 7 & 8: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/>.
[16] European Commission, Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency' (Staff Working Document) SWD (2014) 61 final 1. [Hereinafter Impact Assessment of Recommendation].

- The creation of a majority rule principle, which is often described as an intra-class cram-down.
- The optional creation of legal structures allowing for a cross-class cram-down, where dissenting creditors may be brought into the restructuring plan (with court approval).
- The best interests of creditors test which allows the creditors to expect a dividend from the restructuring, which is at least as good as what they can expect in alternative scenarios. This would mean that in the money creditors would be treated at least as well as in alternative scenarios.

As we proceeded in the analysis of the contributing Member States responses to our JCOERE Questionnaire and participated in debates at various multi-national conferences and fora, we realised the depth of differences between legal cultures, policy approaches and preferred outcomes across the Member States.

3.2.1 The Member States contributing to the JCOERE Questionnaire and why

The Project began with Member States which we knew to have 'robust restructuring processes'. These included Ireland and the UK (but in reality, England and Wales). In the former, the Examinership process[17], modelled on Chapter 11 of the US Bankruptcy Code had operated for 30 years and in the UK, the English Scheme of Arrangement[18] had achieved some notoriety as a rescue device for large distressed companies during the recent Great Recession. What is interesting is that the Irish model was not well known in Europe, but the UK framework was extremely well known. A key difference, which we think might explain this discrepancy, is that the former was covered by the EIR Recast[19] and therefore subject to COMI[20] requirements, whereas the latter was not. As discussed in Chapter 3 of JCOERE Report 1, this allowed companies to avail of the English court system once English legal tests regarding jurisdiction were satisfied.[21] In addition, the English courts exercise fairly flexible rules regarding jurisdiction, which are not replicated elsewhere.[22]

As outlined in Report 1, our partner countries included one major European country with a civil law code, namely Italy to which we added France and Spain, and a former Eastern bloc country, Romania to which we added Poland. Following on from that, we added Germany and Austria, where we suspected approaches to preventive restructuring differed from the countries we had included in our survey to that point. We added the Netherlands because of innovations introduced there in anticipation of the PRD and finally, we added Denmark in light

[17] See Companies Act 2014, Chapter 2 to Chapter 5.
[18] Companies Act 2006, Part 26. See also Jennifer Payne, *Scheme of Arrangement: Theory Structure and Operation* (CUP, 2014).
[19] Annex A, EIR Recast.
[20] EIR Recast, Recitals 23, 25, 27, 28, 30, 31, 33 and Articles 2(9)(viii), 2(11), 3(1), 3(2) and 3(4)(a).
[21] Please see JCOERE Report 1 Chapter 3 Section 3.5 for a detailed discussion on the flexibility of the English Scheme jurisdiction: <https://www.ucc.ie/en/jcoere/research/ report1/report1chapter/report1chapter3/> See also this Report, Chapter 7 section 7.4.
[22] ibid.

of its continuing engagement with the EU despite treaty protocols described below in section 3.3.7.

3.2.2 The contributors and their roles

In terms of garnering information on these countries, we relied on a range of contributors and additional sources where any doubts arose. Of course, the danger is that a particular representative or commentator, whether practitioner or academic, is not entirely representative of the 'official' position and so we engaged in specific questions regarding substantive legal rules. These were separated out from observations regarding projections of legal initiatives or assessments of the policy debate. However, we found that the differences in legal approaches were often reflected in differences in policy and opinion. Even within jurisdictions we found differences in the characteristics of the commentary. To that end academics, for example, were often less pragmatic regarding the role of courts in adjudicating matters relevant to insolvency.[23] Differences also arose regarding the willingness of judges to cede jurisdiction where the EIR Recast might apply, even in the face of dramatic rules such as a stay, whereas practitioners were less content with the loss of jurisdictional reach, for reasons that are discussed below.[24]

3.3 The Classification of States – Our Perspective

As indicated, it is not proposed to go through the various different approaches to the elements of a preventive restructuring framework displayed by Member States and the various legal players within those states. Instead we have adopted a classification of Member States that is reflective of the JCOERE Project findings from Report 1.[25] This classification is original and is presented as part of our research. It is not intended to be the final arbiter of the approach of Member States to corporate restructuring, but is simply designed to provide a comparative perspective on Member States in the context of corporate restructuring.[26]

[23] These points were made by Nicolaes W A Tollenaar and Tomáš Richter, at the ERA Conference, held in Trier, 7th and 8th November, 2019.
[24] Discussed in more detail in para 3.10 of this Chapter.
[25] These findings are available on our website – JCOERE Consortium, Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (December 2019) < https://www.ucc.ie/en/jcoere/research/report1/> [Last Accessed June 25th 2020].
[26] Many commentators have presented the view that the Member States which are most likely to attract corporate restructuring business are the Netherlands and possibly Ireland. The UK is also regarded as continuing to attract restructuring business in Europe despite Brexit. From a practitioners' perspective this is often presented as a competition for legal business whereas not all of the judiciary are as keen to add to the burden of their court work. For example, a note issued by Dentons Solicitors, 'English Creditors and the new Dutch Scheme of Arrangement - A Two Horse Race?' (June 16 2020) < https://www.dentons.com/en/insights/articles/2020/june/16/whoa-english-creditors-and-the-new-dutch-scheme-of-arrangement-a-two-horse-race>; from Ireland: Deloitte, 'Business Restructuring Solutions: Solutions to help get your business back to growth' < https://www2.deloitte.com/ie/en/pages/finance/solutions/restructuring-services.html>; An international perspective provided from London: Global Restructuring Review, 'International Debt Restructuring: Can other Jurisdictions compete with London and New York? <https://www.shlegal.com/docs/default-source/news-insights-documents/11_16-grr-roundtable.pdf?sfvrsn=b58b165b_0> [All accessed June 17, 2020].

3.3.1 Member States with robust restructuring processes: The Common Law countries

It was clear from the beginning of our research that the common law countries within the EU have adopted what is described in this Chapter as 'a robust' approach to corporate rescue. It is difficult to know why this is the case; there is no reason inherent in the nature of the common law as a generator of legal rules compared with the civil law, which would suggest that one system is more favourable to the creation of rules which impose a stay, or protection for dissenting creditors and other characteristics typical of a robust restructuring process. There is the possibility of more influence from the US and the perceived importance of Chapter 11 of Title XI of the US Bankruptcy Code because of the commonality of systems. However, we have arrived at the interim conclusion that the explanation rests with a 'commonality of legal culture', specifically a culture that places the role of the judiciary at the centre of legal development; this, we believe, is different from civil law countries. A further part of this hypothesis is that restructuring is somewhat dependent on judicial responsiveness and that there is more potential for this in common law countries.[27] These ideas are discussed further in Chapters 4 and 7.

That said we are a bit wary of the common law - civil law divide as providing the only explanation, as we suspect this might be too simplistic. As described below, there are also variations among civil law countries, which makes the mostly dualistic approach under the legal origins theory too simplistic to explain the variety of differences among the EU Member States.[28]

Within the common law countries of the EU, there are also problems associated with the differences between Schemes of Arrangement and Examinerships. The latter is included in the EIR Recast while the former is not, as it is a process derived from Company Law and is therefore excluded.[29] This has not been detrimental to its use by a variety of foreign companies seeking to restructure in the UK. Rather, the flexibility of the 'sufficient connection test' as opposed to COMI has made it possible to extend availability of the process far more broadly than might have been possible had the procedure been subject to COMI. It is still unclear how Brexit will affect the use of the process by European companies as it will not be

[27] The importance of the English Scheme of Arrangement post the recent financial crisis cannot be denied. The development of Schemes of Arrangement is discussed fully in Jennifer Payne, *Scheme of Arrangment: Theory Structure and Operation* (CUP, 2014). Many European companies were restructured under this process. The following cases are examples: *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) and *Re Rodenstock GmbH,* [2011] EWHC 1104 (Ch). In addition, English courts are flexible regarding jurisdictional issues. In the first instance English law provides that A scheme can be between 'a company' and its creditors. This includes any company which is liable to be wound up under the Insolvency Act 1986. This can include solvent or insolvent 'foreign' companies. The test of whether an English court accepts jurisdiction rests on the following questions where a positive answer to any question is sufficient. First the presence of assets in the jurisdiction but this is not absolutely necessary. Second whether there are parties who might benefit from a process and finally whether there are one or more persons will receive assets are subject to court's jurisdiction. In *Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole* [2012] EWHC 164 (Ch) and *Re Rodenstock GmbH,* [2011] EWHC 1104 (Ch), the English court found that the fact that English law governed all creditor arrangements was sufficient. See further, Jenifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563, 571: 'There is much to be said for the view that where the creditors have chosen English law, allowing a scheme of arrangement to compromise or transfer the creditors' debt is entirely appropriate.'

[28] Chapter 4, Section 4.3.1 refers to a number of commentators who have criticised this simple dualistic approach.

[29] Irish Companies Act 2014, Part 9 and English and Welsh Companies Act 2006, Part 26.

affected by the disapplication of the EIR Recast. However, the recognition of judgements under the EU Judgements Regulation (Council Regulation (EC) No. 44/2001)[30] had supported the general effectiveness of English Schemes of Arrangement and whilst some doubt has been cast over this approach in recent decisions of both the English courts and the CJEU, this has been relied upon by English practitioners. Of interest is the fact that whilst both Schemes of Arrangement with very similar characteristics to the English model are available in Ireland, the Examinership process has been the preferred approach over many years.

3.3.2 Civil Law countries with pre-existing rescue processes

The French *sauvegarde* procedures include a number of different variations, which have been described in Report 1.[31] These have been in place for some time since the 1980s. They are included in the EIR Recast and plans are afoot to amend the existing legal framework to take account of the PRD. The question remains, however, whether any of the existing frameworks in France are fully compliant with the implementation of the PRD. It is interesting that France resists the cross-class cram-down which, although important in terms of a robust restructuring framework, is not a necessary part of implementation.

3.3.3 Civil Law countries responding to the financial crisis

Italy

There are three types of restructuring processes available in Italy and of these, the *concordato preventivo* is covered by the EIR Recast. The *concordato preventivo*[32] includes an optional stay and a cross-class cram-down and is subject to court confirmation. The other two procedures as described by our contributors, seem to be more administrative in nature. These are different types of *accordi di ristrutturazione dei debiti* (purely consensual or binding on a minority of dissenting creditors) that envisage an out-of-court phase consisting of negotiation and reaching an agreement with creditors with a view to rescuing the company. These are subject to court confirmation. To an outsider, the range of options is confusing and therefore problematic. The issue of the formal co-operation obligations which arise is determined by two questions; the first is whether the process is covered by the EIR Recast. As two out of three of the procedures are not covered by the EIR Recast, therefore the issue of whether a formal obligation to co-operate does not arise. A second issue is that two out of the three procedures are out-of-court procedures. If these processes involve administrative authorities, it should not be assumed that co-operation obligations do not apply; in fact, such obligations could apply, as they have equal relevance to courts and administrative authorities, a point that will be discussed in more detail in section 3.3.6. In any event, it is possible that some sort of co-operation would occur. That said, as we discuss in Chapter 4 section 4.3.2, legal certainty

[30] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[31] La Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises (Law No. 2005-845 of July 26th, 2005 for the Safeguard of Companies).
[32] Codice della crisi d'impresa e dell'insolvenza (CCI), art 84, para 3.

and foreseeability are fundamental to judicial co-operation and where individual Member States present a variety of preventive restructuring procedures, some of which are included in the EIR Recast and some of which are not, further uncertainty will arise in relation to both issues of recognition and co-operation. In fact, the variety that we now see emerging raises the question as to whether there should have been more harmonisation in the PRD once it was near finalisation, with less scope of implementation for individual Member States.[33]

Spain

Spain is somewhat similar to Italy with a range of options for restructuring. These provisions include a stay and the possibility of including dissenting creditors where a majority approves the compromise plan in a particular class. However, at present Spain has no procedure that includes a cross-class cram-down as such. Again, as with France, it is not necessary to introduce cross-class cram-down as part of the implementation of the PRD and so we can see that there is a growing lack of harmonisation between the Member States.

3.3.4 Innovator countries

The Netherlands has introduced the WHOA legislation in anticipation of the passing of the PRD.[34] Interestingly, as the first version of the WHOA was progressing through the Dutch parliament, existing Dutch legislation under which a pre-pack restructuring process is possible was challenged on behalf of employees of Estro. Its business was restructured and sold to a new company, Smallsteps, with all employees being made redundant and some offered new contracts. The Dutch pre-pack is available under what was considered a liquidation procedure (*faillissement)*, which is why it was believed that the rules requiring the transfer of employment contracts[35] would not apply in their case, as such rules apply only in procedures that are not with a view to the liquidation of the company. The CJEU found that despite the identifying features of the procedure under which the pre-pack was created being liquidation, because the business would continue to operate, the requirements to transfer employment contracts would also apply. This took away an important characteristic upon which the perceived competitiveness of the Dutch pre-pack relied: avoiding the highly protective Dutch employment regulations by being able to dismiss employees prior to the purchase of the employing company under a pre-pack. As a result, the WHOA went back to the proverbial drawing board, ostensibly to deal with what was viewed as a disadvantage to its competitiveness as a result of the CJEU's finding in *Estro/Smallsteps*, among other things.[36]

[33] See further JCOERE Consortium, Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (JCOERE Project, 2019) < https://www.ucc.ie/en/jcoere/research/report1/>.

[34] *Wet homologatie onderhands akkoord* (Act on the Confirmation of Extrajudicial Restructuring Plans) (WHOA).

[35] As required by the Acquired Rights Directive: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82.

[36] Case C-126/16 *First Steps Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] ECLI:EU:C:2017:489. The CJEU response supported the envisaged possibilities for rescue in the PRD but also stated that employees must be protected. There is now a specific

3.3.5 Newer accession states

Both Poland and Romania have taken the commitment to corporate rescue on board. There are elements of the Italian experience in the Romanian legislation. Polish legislation is advanced and developed and at present, includes four different possibilities. However, there are plans to further develop the processes in keeping with the option for robust restructuring processes.

3.3.6 The Resisters

Germany

Effectively, there is no *preventive* restructuring framework available in Germany but the description of German insolvency procedures to this effect seems to rely on the dividing line of declared insolvency. In effect, there is no rescue process available before a declared insolvency but following a declaration of insolvency, the legislative framework does provide for a restructuring process. Once the debtor files for insolvency under the *Insolvenzverfahren,*[37] the restructuring or rescue process is available (*Insolvenzplan*). The *Insolvenzverfahren* is included in the EIR Recast. German law allows for a restructuring plan to be approved despite the objections of an entire class, so this would indicate that cross-class cram-down is permitted weighed against criteria applied by the court.[38]

The apparent preference for relying on the insolvency threshold as a gateway to a restructuring process is also influenced by a continued theoretical resistance to pre-insolvency restructuring, which is described in Chapter 4 of JCOERE Report 1.[39]

Austria

The Austrian *Unternehmensreorganistionsgesetz* (URG) seems to be a very 'light touch' restructuring process that appears quite similar to the English (and Irish) Scheme of Arrangement insofar as it is essentially a restructuring process, which can be used for a solvent restructuring or a restructuring where the company is likely to become insolvent. Despite some similarities between this system and the English Scheme of Arrangement, there is also no requirement for court confirmation of the scheme under the URG, which is a clear difference. Furthermore, there is no cross-class cram-down. In effect, this would represent a bare minimum in terms of the requirements of the PRD.

provision in Article 13 designed to protect workers. The different political response is interesting in contrast to the differing approach to worker welfare in the common law countries.

[37] *Insolvenzverfahren,* the unitary insolvency procedure under *Die Insolvenzordnung* (The Insolvency Statute or InsO).

[38] See further the description of the German process in Section 3.2 of the report by Stefania Bariatti and Robert Van Galen, *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices* TENDER NO. JUST/2012/JCIV/CT/0194/A4, (INSOL Europe 2014). In this document the German process is described as potentially occurring once the notice of insolvency is published.

[39] JCOERE Report 1, Chapter 4, section 4.4 discusses the theoretical debate around pre-insolvency and preventive restructuring, available here: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter4/>.

In Germany and Austria there seems to be little appetite for a robust restructuring process at policy level. Germany had a more robust restructuring process on the books previously (the *Vergleichsordnung*), which we are told was not often used. There is resistance to the wholesale rewriting of existing contracts, which tends to characterise restructuring agreements. Austria has the same response, which is interesting as we have been informed that, as a centre for cross-border insolvency, Austria might experience more of these kinds of cases than others. Our Austrian contributor pointed out that the Austrian process, the URG is hardly every used. It is unclear why this is the case.

3.3.7 Outliers

Denmark

Of key importance in considering the position of Denmark are Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. Denmark is not obliged to comply with further provisions regarding Title 5 of Part 3 of the TFEU. Therefore, the Danish legislative framework, as it currently stands, is not covered by the EIR Recast per Recital 88. Nevertheless, Denmark intends to implement the provisions of the PRD. Reflecting the German approach, the Danish legislative framework provides for a restructuring plan but only after a formal declaration of insolvency has been made. Thus, a new process will be introduced following the terms of the PRD.

3.4 Harmonisation and Co-operation

As described above, there is general acknowledgement that co-operation is reliant on significant degrees of harmonisation. This is acknowledged by the European Commission and is also evidenced in practice, with the most obvious example emanating from our comparison with the United States in Chapter 7 where a federal arrangement of states operates under a federal bankruptcy code. In this latter context, as we show in Chapter 7, issues relating to the choice of forum become muted and less complex. It should be noted that despite this marked difference between the EU and the US in the context of insolvency law, it is not the case that all significant areas of law are harmonised across the US, the most obvious examples being tax law and employment laws.[40] Corporate law is also an area that is not harmonised across the United States. Nevertheless, in this particular arena, the states of Delaware, New York and California represent the majority of cases where choice of forum in corporate law is necessary. Thus, it is not accidental that the choice of forum in corporate bankruptcy follows this line. In the EU, in contrast, all Member States pursue their own corporate law frameworks, with some

[40] As regards the latter there is very little harmonised law in relation to individual employment law standards unlike the EU where levels of harmonisation are significant. In contrast laws regulating trade unions and collective bargaining are federalised. See generally Irene Lynch Fannon, *Working Within Two Kinds of Capitalism* (Hart 2003). Similarly, although there is a federal tax base states in the United States vary considerably as regards income tax levels and indeed sales tax.

elements of harmonisation across Europe.[41] In addition, tensions between the real seat doctrine and the place of incorporation make it difficult to replicate the US experience, although corporate mobility is becoming increasingly common in Europe.[42] On the whole however, it is clear that harmonisation of EU corporate insolvency law has a long way to go and this is clearly the case as regards our specific focus on preventive restructuring. Our first Report described in detail different approaches of EU Member States and these differences become more exaggerated the more one engages in discourse on the subject. The differences were adumbrated as early as 2014[43] in the period leading up to the publication of the Commission's policy document, *A New Approach to Business Failure,* discussed here and elsewhere in our Reports.

3.5 Procedural Obstacles: Findings from JCOERE Project Report 1

In our JCOERE Questionnaire, which we circulated to eleven Member State jurisdictions, we identified in advance some issues that we characterised as procedural obstacles and which we hypothesised would cause obstacles to co-operation. The EIR Recast itself includes some specific provisions regarding choice of forum and / or choice of law issues and in some senses therefore, the EIR Recast acknowledges that co-operation has its limits. What is interesting is the extent to which the EIR Recast itself embeds obstacles to co-operation in this way; these are discussed in the following section. For the moment however, we are focussing on issues, which arise in a typical preventive restructuring framework or issues that are specifically addressed in the PRD, which may prove to be problematic.

These include but are not exhaustive of the following issues:

- Rights in rem as provided for in article 8 of the EIR Recast. This issue was included in our JCOERE Questionnaire in anticipation of difficulties arising from it (Qn 11).
- Constitutional Parameters Delimiting Freedom of Judicial Communication (Qn 12).
- Training and Competency for Insolvency Judges (Qn 14), which is addressed in Chapter 4 of this Report (section 4.6).

3.5.1 Rights in Rem

Article 8 of the EIR Recast provides particular protection for creditors with rights *in rem* over assets 'which are situated within the territory of another Member State'.[44] Effectively this means that there is a limitation to the jurisdictional reach of any insolvency proceeding

[41] See *inter alia*, Shareholders' Directive, Council Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending *Directive* 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1.
[42]See for example, Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459 and Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (*NCC) [2002] ECR I-09919.
[43] Stefania Bariatti and Robert Van Galen, Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices TENDER NO. JUST/2012/JCIV/CT/0194/A4, (INSOL Europe 2014).
[44] EIR Recast, Art. 8(1): 'The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, which are situated within the territory of another Member State at the time of the opening proceedings.' Art 8(2) goes on to provide examples of such rights.

opened in one Member State in relation to assets situated in another Member State. In the context of the PRD, this imposes a limitation on the reach of any restructuring insofar as it affects the rights of a creditor secured with an *in rem* right. Dahl and Kortleben observe that article 8 relates to the right in an asset but not to the asset itself. [45] Thus, where the creditor obtains proceeds from the realisation of the asset, the underlying principle is that the asset belongs to the insolvency estate so that where there is a surplus generated the surplus reverts to the insolvency estate. Where the asset is realised for equivalent value, no further issues arise, but where the asset is realised for less than the value of the debt, the creditor will become an unsecured creditor of the company for the remainder. This seems a legitimate approach in the context of traditional insolvency proceedings. In a restructuring however, the question is whether the creditor's right in a particular asset is protected in this way under the European framework. In other words, is the protection in the EIR Recast absolute? It would seem to be so. Therefore, the creditor's right or claim cannot be part of the restructuring proceedings as such, unless the creditor specifically agrees to this. This would therefore seem to be an *ex ante* limit on the operation of cram-down or cross-class cram-down provisions.[46] Furthermore, in the scenario where proceeds of the realised asset are insufficient to meet the debt, the question persists as to whether the creditor remains in a different, protected position compared with other creditors that must submit to the restructuring process.[47]

As observed by Snowden,[48] the opening of a main insolvency proceeding, which will include a restructuring process if it is included in Annex A, essentially 'has no effects upon the right *in rem'*. This means that 'security rights in other Member States can be asserted and enforced in spite of the opening of insolvency proceedings as if no such proceedings existed'.[49]

3.5.2 Constitutional issues – public hearings

As argued by Moss, Fletcher and Isaacs, it would seem to be incompatible with procedural rights and principles if courts were to communicate with each other without the presence of legal parties or their advisors.[50] It seems to us that this might be the view of members of the judiciary (and commentators and practitioners) in a number of Member States, including Ireland, for example, which has a constitutional guarantee that justice would be administered in public insofar as possible. However, other commentators take a different view.[51] In our

[45] See Michael Dahl and Justus Kortleben, 'Chapter 1: General Provisions: Article 8, Third Parties' Rights in Rem in Mortiz Brinkmann (ed) *European Insolvency Regulation: Article by Article Commentary* (Beck and Hart, 2019), 131.
[46] See further *ibid.,* and references therein to Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016).
[47] For our contributors' perspective on rights in rem in relation to their protection under the EIR Recast and the potential conflict created in the PRD, see JCOERE Report 1, Chapter 8, section 8.4, available here: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter8/>
[48] Kristin van Zwieten, Georg Ringe, Richard Snowden, Francisco Javier Garcimartin and Miguel Virgos, 'Chapter 1: General Provisions (Art. 1-18)' in Reinhard Bork and Kirstin Van Zwieten (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).
[49] *Supra* n. 44, at para 25. See in addition reference to the opinion of the Advocate General Szpunar therein in the CJEU Case C-557/13 *Hermann Lutz v Elke Bäuerle* [2015] ECLI:EU:C:2014:2404.
[50] Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), at para. 8.695.
[51]Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings: Article 42. Co-operation and communication between courts in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019), p. 352 where it is argued that because co-operation is between two representatives of the courts and that the focus is on co-ordination this cannot

view, the nature of the co-ordination would be determinative of whether a procedural or indeed constitutional principle is breached. It could be that limited co-ordination such as setting a date might be finally decided upon without the parties present, but on the other hand, we would not agree that courts co-ordinating actions regarding the appointment of an insolvency practitioner could be done without informing the parties and ensuring their presence.[52] In addition, the requirement that a court hearing should be heard in public is not, in terms of constitutional jurisprudence, limited to the requirement that only the parties are heard. There is an understanding that the constitutional requirement extends to the interests of the public in general including journalists, reporters, other interested stakeholders, who may not be party to the action, *per se.* In the case of Ireland, this understanding can be said to stem from two articles of the Irish Constitution; first, Article 34.1 and second, Article 40.6.1.

Article 34.1 states that justice shall be administered in public and was considered in detail in *The Irish Times v Ireland*, wherein it was held by the Supreme Court that it was both 'a fundamental right in a democratic state and a fundamental principle of the administration of justice (…) for people to have access to the courts to hear and see justice being done' save in limited exceptions.[53] The exceptions to this are few and far between as demonstrated by *Doe v Revenue Commissioners*, wherein a potential exception to the requirement was considered.[54] At a preliminary hearing, the plaintiffs sought permission to bring the main proceedings anonymously and an *in camera* hearing for (part of) those proceedings. The case concerned the identification of the plaintiffs in Iris Oifigiúil (Government Official Gazette), effectively as 'tax defaulters'.[55] The plaintiffs argued for anonymity on two grounds: first, an entitlement to privacy in taxation matters and second, an entitlement of access to the courts, which would be lost in their case if anonymity was not permitted. The Court rejected both arguments and held that the constitutional rights to privacy or to a good name are insufficient to displace the constitutional imperative to administer justice in public and are distinguishable from the right to a fair trial, which may necessitate some proportionate restriction of that imperative.[56] Article 40.6.1 protects the right of citizens to express freely their convictions and opinions subject to certain limitations;[57] it acknowledges *inter alia* the 'grave import to the common good' of the education of public opinion. Naturally this right is not absolute and must cede to other constitutionally protected rights, such as the right to a fair trial or 'trial in due

be 'compared to a hearing or the court's examination of the evidence.' However, the following sentence contemplates courts coordinating about the 'appointment of the same insolvency practitioner' without informing the parties or inviting them to take part in the deliberations.

[52] This appears to be borne out in many of the guidelines considered in Chapter 6.

[53] [1998] 1 IR 359, 361. The court also expressed that the trial judge in this case, who prohibited contemporaneous reporting, could have dealt with the matter under contempt of court rules and by giving adequate directions to the jury, arguably further emphasising that any prohibition on the media from reporting on court cases should be exceptional. This case also considered the right of the media to report in the context of Article 40.6.1. See also *Cullen v Toibín* [1984] I.L.R.M 577 and *In re R* [1989] I.R. 196, in which Walsh J stated: 'The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done' [p.134].

[54] [2008] 3 IR 328

[55] The publication in Iris Oifigiúil would be of the settlement reached between the plaintiffs and the Revenue Commissioners under the 'Disclosure of Undeclared Liabilities by Holders of Off-Shore Assets' scheme. There was a disagreement between the parties as to the legal requirement for such a publication.

[56] The right to a fair trial was not relevant in *Doe*, as the plaintiffs had 'admitted' wrongdoing by virtue of reaching a settlement with the Revenue Commissioners.

[57] Article 40.6.1 identifies these limitations as 'public order and morality' and 'the authority of the State', however it does not extend to 'criticism of Government policy', which is expressly protected.

course of law'.[58] In *Kelly v O'Neill* the constitutionally guaranteed right to freedom of expression of the press was expressly acknowledged by the Supreme Court;[59] while it viewed this right as 'a value of critical importance in a democratic society', the Court held that it was not an absolute right and could be superseded by other concerns, such as the administration of justice and the right to a fair trial.[60]

Rules of this kind and their interaction with obligations to co-operate depend on the domestic legal framework. The nature of the constitutional guarantee that justice will be administered in public and how it is understood will no doubt affect the willingness of members of the judiciary to communicate with members of the judiciary in other Member States and it will certainly affect the manner in which that communication takes place.

It is noted, however, that not all jurisdictions will take the same approach as the Irish example. In contrast to the assumptions made in Ireland, contributors to the JCOERE Questionnaire from other countries with written constitutions (all apart from the UK) such as Denmark expressed the view that it is not generally considered that the process of communication raised significant challenges.

3.5.3 Co-operation: Statute, judge-made protocol or guideline?

From country to country, different approaches are taken to the issue of co-operation. In France, for example, the law that implements or adds to the EIR Recast and the co-operation provisions emphasise the need for security and privacy. The law states that communication may take place by any suitable means that enable security, confidentiality and the privacy of the information exchange to be guaranteed.[61] The court may also appoint a judge or authorise the supervising judge and / or the office-holder to carry out any necessary co-operation and communication.[62] The office-holder is also required to submit for the approval of the supervising judge, any proposed agreement or protocol agreed by virtue of the same provisions of the Recast EIR in respect of the same debtor or another entity that is a member of the same group as the debtor.[63] In some countries, such as the French example cited here, the manner in which judges might co-operate with other courts is regulated by statute. In other countries, there is no expectation of such regulation and so the matter may be addressed through the operation of protocols, such as those considered in Chapter 6.[64] When questioned, judges often expressed the view that they themselves would adopt and devise a

[58] Articles 38.1 and 40.3.
[59] [2000] 1 ILRM 507.
[60] [2000] 1 ILRM 507, 509. Although this was a criminal matter, critically the Supreme Court drew a distinction between "an article published after the jury have returned a verdict of guilty, but before sentence is imposed, which simply summarises the facts of the case … and includes innocuous background material" and the media having "an unrestricted licence, subject only to the law of defamation, to comment freely and publish material, however untrue and damaging, concerning a trial at a stage when it was still in progress".
[61] See JCOERE Consortium, Emilie Ghio and Paul Omar, 'Country Report: France' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionfrance/>. See also Article 2, Ordinance no. 2017-1519 of 2 November 2017, introducing Article L695-4 of the Commercial Code.
[62] *ibid,* introducing new Article L695-3 of the Commercial Code.
[63] *ibid*, introducing new Article L695-2-II of the Commercial Code.
[64] See further Chapter 6.

protocol if necessary and often expressed scepticism about the need for a common standard protocol. Certainly, it became apparent that there was little awareness of developed principles and guidelines amongst some judges, which is discussed further in Chapter 8 of this Report, with the principles and guidelines themselves being explored in Chapter 6.

According to the Polish Constitution, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Similar to Ireland, exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly (article 45 of the Polish Constitution).[65]

The Italian Constitution does not include any express parameter delimiting the freedom of judges to communicate, in general; however, pursuant to art 111 of the Italian Constitution, all proceedings must be conducted on an equal footing in a fair and impartial third-party hearing between the parties. This provision introduces the so-called adversarial principle in the Italian jurisdiction.

In light of the above, direct communications between Courts, although permitted, needs to occur in a way that is compliant with *domestic* constitutional principles provided here simply as examples of issues that might occur in all Member States. In particular, compliance with constitutional provisions prohibits that judicial decisions be taken without protecting the interested parties right to be heard (orally or in writing) on an equal footing.

While there is a focus on the rights of parties to the proceedings in the answers to our questions about constitutional issues, it is important to note that in some jurisdictions the constitutional issues regarding the hearing of judicial proceedings in public (as with Ireland) will extend well beyond the interests of particular parties to the proceedings.

3.5.4 Court or administrative authority?

Other difficulties that may arise have been illustrated by a consideration of case law in Chapter 5 of this Report. One of these includes the equation of a court with what is described as an 'administrative authority' in the PRD. In this case, even though the recitals to the PRD and the definition in article 2 refer to 'a court', in subsequent articles, reference is repeatedly made to 'a judicial or administrative authority' as is the case in article 5(2), article 6 relating to the imposition of a stay and so on.[66] A similar approach is taken in the EIR Recast where the definition in article 2(6)(i) states that court means 'the judicial body of a Member State' in

[65] See JCOERE Consortium, Michał Barłowski and Sylwester Zydowicz, 'Country Report: Poland' (JCOERE Website 2020) <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionpoland/>.
[66] The same phraseology is used in Article 10 in relation to confirmation of a restructuring plan and in Article 11 regarding the operation of cram-down provisions.

relation to specific provisions[67] but goes on to provide in article 2(6)(ii) that, in all other articles, 'court' means 'the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings'. This means that, for the purposes of articles 42-44 and articles 57 and 58, an equivalence is drawn between a judicial body and an administrative authority. Recital 20 of the EIR Recast states:

> Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Therefore, the term 'court' in this Regulation should, in certain provisions, be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened.

Many of the articles in the PRD refer to judicial or administrative authorities exercising power or authority in various ways. However, there can be a significant difference in the characteristics of judicial and administrative authorities, whether within a single jurisdiction or in a cross-border situation.

3.5.5. Court or administrative authority: Case law

From the very beginning the equivalence drawn between a court and an administrative authority was bound to present problems between the common law and civil law systems, where the perception of the latter type of arbiter is much more mixed than in civil law countries. However, the difficulties caused by this asserted equivalence between a court and an administrative authority will not be limited to simply a civil-common law divide, as is evidenced by some of our responses to the JCOERE Questionnaire. As expected, this issue presented problems in the *Eurofood* case.[68] Under article 2(d) of the 2000 EIR it is stated that 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings' and went on in art 2(e) to state that '"judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decisions of any court empowered to open such proceedings or to appoint a liquidator'. Article 2(f) provided that the time of opening of proceedings shall mean 'the date of the judgment which renders the commencement effective'. However, Recital 10 of the EIR explicitly stated as follows:

> Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings.

[67] These specific provisions are listed in PRD, Article 2(6)(i). None are of particular relevance to restructuring other than points (b) and (c) of Article 1(1) which refer to a stay.

[68] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813, and *Re Eurofood IFSC Ltd, (*C-341/04) [2006] Ch. 508; [2006] 3 WLR 309 [Hereinafter *Eurofood*].

In his opinion in *Eurofood*, Advocate General Jacobs explained that 'in various jurisdictions there are different ways in which insolvency proceedings may be commenced', usually a decision of a court, on the one hand, and the appointment of a liquidator, on the other hand. The EIR 'confers automatic recognition on insolvency proceedings opened in both ways'.[69]

The *Parmalat/Eurofood* case illustrates the potential for enormous difficulty in the application of these principles. Here, the first decision in Italy to commence the insolvency process was made by the Italian Minister for Production Activities on 9 February 2004. It is worth bearing in mind, however, that Parmalat SpA had been admitted to extraordinary administration proceedings and an extraordinary administrator appointed on 24 December 2003. In Ireland, the petition for the winding-up of the company had been presented to the High Court and a provisional liquidator appointed to *Eurofood* on 27 January 2004. Subsequently, the winding-up order was made, and an official liquidator appointed on 23 March 2004. The most important question, namely which proceedings would prevail in relation to *Eurofood IFSC*, turned on which step constituted the 'opening of proceedings'. The ECJ held that it was the appointment of the provisional liquidator by the Irish High Court on 27 January 2004, which constituted the opening of main insolvency proceedings. This issue was vigorously contested on behalf of the Italian authorities, which characterised a provisional liquidator as a 'temporary administrator' with 'limited powers' and therefore not a 'liquidator' for the purpose of the EIR. In contrast, it was contended that, as an administrative act, the Italian commencement did not amount to the commencement of proceedings as such. The ECJ concluded that under Irish law a provisional liquidator has 'extensive powers', including to take possession of the assets of a company, and his role is therefore much wider than a 'temporary administrator'.

On the continuing question of court-to-court co-operation and staying with the Italian situation, as suggested earlier in this Chapter, various restructuring processes in Italy involve an administrative authority rather than a court. The *procedimento di composizione assistita della crisi* involves an administrative authority. In other processes, the board (*collegio,* art 17 CCI) is composed of three members chosen among those included in a public register of experts. One of them is designated by the court and the other two by the Chamber of Commerce and by the trade association of the debtors' industry. While it is important to note that in Italy the court, not the board, has the power to grant a stay on enforcement actions, nevertheless, it is clear that in some cases courts could potentially be asked to co-operate with administrative authorities. As with *Parmalat*, this may cause difficulties in and of itself.

[69] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813, para 64.

3.6 Workers

In introducing a restructuring framework under the Preventive Restructuring Directive, article 13 provides:

> Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework.

As indicated in the text, the article then goes on to list some provisions but also notes that all rights of workers available in domestic legislation are protected under the article. The question then arises as to whether a restructuring, which includes a cram-down of workers' claims within a class or includes a cross -class cram-down of an entire class of creditors' claims of which workers form a part, can be achieved under these provisions?

The answer would seem to lie in the practical terms of a restructuring process, in other words the actual restructuring agreement. Usually workers will be kept in employment during a restructuring as preservation of jobs is indeed one of the aims of restructuring. However, some workers may be made redundant or there may be a reorganisation of working roles. In these cases, workers will have a claim against state insurance funds or will benefit from the provisions of Directives 98/59/EC,[70] 2001/23/EC,[71] and 2008/94/EC[72] and the PRD seeks to preserve this situation.

However, the PRD goes on to state in article 13(2):

> Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.[73]

This seems to imply that where a domestic restructuring framework allows for workers to be part of a restructuring claim, where workers could in fact waive rights to claims for payment or other rights that might arise, this is permissible under the PRD.

The EIR Recast also includes the proviso that in all cases, '[t]he effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.'[74] Effectively, as with the provisions of the EIR Recast in relation to rights *in rem* discussed above, the EIR Recast itself

[70] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.
[71] Council Directive (EC) 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.
[72] Council Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.
[73] PRD, art 13(2).
[74] EIR Recast, art 13.

places a limitation on universal recognition of any particular insolvency process, including any rescue framework implementing the PRD, which is covered by the EIR Recast. Where the process is not covered by the EIR Recast, article 13 of the PRD provides that workers are protected by domestic law. However, article 13.2 implies or envisages that Member States may introduce particular restructuring frameworks under the PRD, which may not insist that workers rights are absolute.

3.7 Further Obstacles

3.7.1 Liability for non-co-operation

In the commentary on the EIR Recast edited by Brinkmann[75] and specifically the commentary on article 42, which obliges courts to co-operate, Skauradszun and Spahlinger observe that this obligation was not present in the EIR 2000.[76] The authors note that this obligation stems from article 81 of the TEFU regarding judicial co-operation in civil matters with cross-border implications but note that despite this European aspiration, co-operation with foreign courts 'will be an entirely new experience for many judges' though some jurisdictions already have an obligation embedded in legislation.[77]

The authors continue to address the very important issue that this provision does in fact impose an obligation on the court and raise the issue of what happens when there is non-compliance. The first point is that article 2(6)(ii) of the EIR states that 'court' includes in its definition 'the judicial body or another competent body of a Member State empower to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings'. Most importantly the authors go on to assert that, under German law, this definition comprises judges as well as officers of justice as individuals.[78] This is further considered in Chapter 5 of this Report.

3.7.2 Effect of non-co-operation

Perhaps of more significance is the consequence of non-compliance with co-operation obligations for the validity of a procedure and its outcome. So, for example where an insolvency practitioner operating a preventive restructuring process recognised under the EIR Recast (for example the Irish Examinership) notifies a second court that an examiner has been appointed and that a stay is in place, is the second court obliged to recognise this stay? The answer seems to be an unequivocal yes. A further question then arises; if the court decided to ignore the stay to give a creditor a remedy in the second court, would this decision and any

[75] Mortiz Brinkmann (ed), European Insolvency Regulation: Article by Article Commentary (Beck, Hart, Nomos 2019).
[76] See also, Chapter 2 of this Report.
[77] The authors quote 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) and also refer to the experience of English courts under the UK Cross-border Insolvency Regulation 2006 which implements the UNCITRAL Model Law in the UK.
[78] See above full reference at 46, para 4. Full reference, Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings: Article 42. Co-operation and communication between courts in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos 2019) 352, para 4.

consequent orders be invalid? The issues concerning recognition and ongoing assistance or co-operation are considered in detail in light of existing case law in Chapter 5 of this Report.

3.7.3 Practitioner resistance

An additional obstacle to real co-operation in restructuring processes lies in the dynamics of legal practice. In large restructuring cases involving a range of corporate entities, in groups of companies for example, practitioners will be anxious to protect their own role, or practice interest.[79] This will have two effects:

- First, it may be the case that a particular restructuring processes will not be included within the remit of the EIR Recast thus avoiding the COMI issue and allowing the Member State to attract restructuring business from across Europe, much as the English Scheme of Arrangement has done in recent years. Alternatively, some states, but not all, will adopt 'robust restructuring processes' such as those adopted in Ireland and the Netherlands and perhaps attract business from Europe through operation of a COMI shift.
- Second, arguments may be made that particular actions are not centrally part of the insolvency process. In our case, reference to 'an insolvency process' includes a restructuring process created to implement the PRD and included in the EIR Recast, which will be subject to jurisdictional rules generated by the determination of COMI. If actions which impact on a particular creditor's position such as *an actio pauliana* are not a part of the restructuring process included in the EIR Recast, then they will also not be subject to any terms of the EIR Recast. It is possible that practitioners will identify particular types of action which allow for a removal of their client's action from the insolvency process, thus removing the action from the shadow of the EIR Recast and the obligation to co-operate. We have already seen this phenomenon in a number of cases that are considered in Chapter 5 of this Report.[80] In other words the strategies of practitioners may serve to dilute the effect of the co-operation obligations in the EIR Recast.

During our discussions and attendance at conferences with practitioners and other insolvency specialists, we have definitely seen this effect, where practitioners are actively promoting their jurisdiction as supporting rescue or where practitioners are concerned regarding loss of business. This is discussed further in Chapter 7 of this Report in the US context.

[79] See Chapter 2 where a similar point is made in relation opt out of co-ordinated proceedings contained in the EIR Recast.
[80] See, for example Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805, and Case C-535/17 *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96.

3.8 Observations from the European Judiciary

Interestingly, further obstacles to co-operation have been identified by members of the European Judiciary themselves at events attended by the JCOERE Project. This section describes observations made by members at the Judicial Wing meeting of INSOL Europe, which took place at the annual conferences held in Athens in 2018 and in Copenhagen in 2019. In Athens Greece, the JCOERE Project gave a simple introduction to the Project. Even at that point, there was a great deal of interest and a number of significant points arose, even in those initial stages. First, there was a concern amongst the judiciary regarding a lack of knowledge of legal systems of different Member States. This was considered to be an obstacle to effective co-operation. Methods for ascertaining knowledge of Member States' legal systems varied from availing of informal networks to a formal request for information from a home ministry of justice or similar government entity.[81] It is clear that the EU can contribute further to judicial training in this regard. Some consistency of approach in terms of the provision of information is important. A second key point that emerged even at that point was the varied methods of appointment of members of the judiciary, who may have to deal with cross-border cases. These differing standards regarding training and experience requirements were identified as a possible obstacle to co-operation; this discussion is furthered in Chapter 4 of this Report, where it is analysed in the context of mutual trust. Chapter 4 also explores the judicial education and training requirements of our eleven contributing jurisdictions in the JCOERE Questionnaire, which is set out in section 4.6 of this Report.

In Copenhagen, the members of the Judicial Wing were presented with a case study concerning the application of the co-operation provisions in the context of the opening of restructuring proceedings in Ireland (the Examinership process) and the enforcement of a compromise in those proceedings against a debtor of the group located in a second Member State.[82] The outcome of this discussion is described in the following section. The purpose of this case study was to identify potential obstacles to court-to-court co-operation and to discern any differences in understanding held by the judges.

[81] As is described in Chapter 2 in instances of cross-border judicial co-operation in other trading blocs, 'information that courts will want…will often revolve around the governing law of another court.' See further, Jay Lawrence Westbrook 'International Judicial Negotiation' (2003) 38 Tex Int's L J 567, 579.

[82] This survey is attached in Annex I of this Report.

3.8.1 The nature of insolvency

A generally acknowledged view from members of the judiciary at the INSOL Europe Judicial Wing Meeting in Copenhagen was the desirability of one forum, particularly as regards bankruptcy or insolvency proceedings. This is derived from the particular nature of insolvency proceedings, which is based on the fundamental concept of the collective distribution of the insolvent estate to all creditors.

3.8.2 Procedures and protocol[83]

Many judges expressed concern regarding the nature of the obligations and their own role in facilitating co-operation. Several senior judges were uncomfortable with the idea that they or their court would engage in a high level of communication. Instead, it was considered preferable that this communication, as part of a formal process, would take place via a court clerk or other individual. As discussed previously, the EIR Recast does envisage the appointment of an independent person or body.[84] The insolvency practitioner was also seen as a possible support in terms of co-operation. There would be considerable resistance to any perception that a judge would or would be perceived as communicating behind the scenes. The following key principles were proposed by the Judicial Panel held at the main INSOL Europe conference in Athens:[85]

i. Open Court is a key idea.[86]
ii. Transnational transparency is also important. There must be directions given to notify all parties.
iii. Protection of confidential information of course also important.
iv. Fair Procedures.

These procedural rules are relevant to all processes but are relevant to preventive restructuring when such a process is court-based. However, the differences in approach in legal systems was noteworthy. Whereas in common law countries, the judges were in a position to exercise discretion as to the type and method of co-operation, other jurisdictions, including Italy as a sample civil law country, were subject to more specific rules or guidance. For example, the following rules applied in Italy according to Judge Panzani:

[83] Again, these observations from members of the judiciary at INSOL Europe Judicial Wing in Copenhagen, reflect observations described in Chapter 2 of this Report. 'There are also gaps in knowledge of foreign insolvency frameworks that could lead to distrust, inhibiting cooperation as trust requires knowledge of how such a framework functions.' Again this is reflective of observations made by Jay Lawrence Westbrook: 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 Am Bankr L J 457.
[84] See further EIR Recast, Article 42(1) and 57(1).
[85] This was discussed by the Judicial Wing Panel: 'Cooperation and Communication between Judges in Cross-Border Insolvencies under the EIR Recast' (INSOL Europe Annual Congress, Athens, 5th October 2018). The Judicial Wing Panel was composed of Judge Caroline Costello, Judge Luciano Panzani, and Emil Szczepanik, Ministry of Justice, Poland.
[86] Although the judges did acknowledge that there would be limited possibilities for private hearings in the context of insolvency proceedings, for example the hearing of an *ex parte* application for an injunction or stay. In Ireland the initial appointment of an examiner can be based on an *ex parte* application of private hearings. For example, Mareva or ex parte hearings.

i. Italian laws state that the rules of the Regulation must be applied by the court regarding proceedings opened in the EU, but also elsewhere.
ii. There should be a general approach in all cases of cross-border insolvency.
iii. The language of co-operation will be Italian and if this is not possible, it should be English. The Court is allowed to use English, but provision should be made for translation.
iv. The costs of co-operation will be considered an expense of the courts system and would not be considered to be part of the professional costs of the insolvency practitioner.
v. Co-operation would ideally be facilitated by IP for the same sorts of reasons regarding procedural safeguards as applied in Ireland.
vi. Italian judges / courts are not permitted to engage in side bar phone calls. At the very least such calls should be recorded.
vii. The IP appointed in Italy cannot be the same as the IP in second jurisdiction. This also indicates that the IP cannot be from the same firm or practise.

In contrast, in former Eastern bloc countries, the idea of co-operation between courts seemed more 'normal' and acceptable.

In France, the procedure for the recognition of a foreign judgment follows the ordinary rules of civil procedure and involves an application to the court by any interested party, including the foreign office-holder and the debtor, even if the foreign judgment was obtained *ex parte*. The court hearing the application must content itself with an examination of the regularity of the foreign judgment and that the public interest and legal system in France would not be offended by the recognition of the judgment. The elements a court would look at in its examination include whether the foreign court had proper jurisdiction; whether the proper law was applied; compliance with due process and public policy rules, including whether the procedure was adversarial; and the absence of fraud. This examination of compliance conditioned the ability of French judges to extend assistance to foreign proceedings.

It is suggested by the JCOERE Project that the markedly different attitudes and existing legal frameworks may constitute barriers to court-to-court co-operation. A judge or administrator[87] operating in a jurisdiction where it is commonplace to have a telephone conversation as a means of communicating and co-operating, may be met with clear resistance to such a suggestion in another jurisdiction. As articulated, certain jurisdictions have clear rules on co-operation and information sharing, however, it appears that others do not. If there is an unawareness of the extent to which the obligation to co-operate is permissible within a jurisdiction or procedure, then it may act as a barrier to it. In this context, the importance of the applicability of the obligation to co-operate to administrative authorities cannot be overlooked.

[87] Meaning the relevant person in an administrative authority.

3.9 Conclusion and Transition

The JCOERE Project research revealed certain categories of Member State approaches to preventive restructuring, which we applied to our contributors in the analysis of their approach to preventive restructuring. Also discussed was the likely divergence that will arise in implementation of the PRD due to certain policy differences, which may well present obstacles to co-operation. We also presented an analysis of our findings in relation to questions relating to procedure queried in the JCOERE Questionnaire, along with additional observations around how procedural differences may also inhibit effective co-operation in cross-border preventive restructuring cases. This Chapter has connected this issue with the broader issue related to EU integration and harmonisation and how this affects mutual trust and, by extension, effective co-operation.

The next chapter will examine additional issues that may challenge mutual trust and co-operation, namely different aspects of legal and judicial culture. As the characteristics of a jurisdiction's legal culture are deeply imbedded features that underpin the development and application of commonly held legal principles, these are particularly difficult to dislodge or otherwise harmonise. They influence the approach of a jurisdiction to fundamental legal principles, such as the rule of law, which underpin many other important characteristics of a legal system, including the role of the courts and judicial independence. The EU has taken a proactive approach to harmonising or Europeanising Member State judiciaries with a view to increasing mutual trust and effective co-operation. The next Chapter will explore issues of harmonisation as they relate to legal and judicial culture and how differences in this area may impact court-to-court co-operation.