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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IX. Chapter 9: Reflections, Conclusions, and Recommendations of the JCOERE Project

9.1 Introduction: The JCOERE Research Project

This Chapter will provide some reflections based on the two Reports presented as part of the JCOERE Project. The Project began with the obligations imposed on courts to co-operate with courts in other jurisdictions and with insolvency practitioners in the European Union, which were introduced in the EIR Recast 848/2015. The obligations were newly introduced in the Recast Insolvency Regulation. As the Regulation itself did not come into force until June 2017, it is very early on in its application, and accordingly quite early to assess the overall impact of these enhanced obligations, particularly since no cases to date that deal with co-operation matters have been heard under the EIR Recast. Meanwhile, the European Commission published an intention to address corporate failure and rescue in its policy document entitled *'A New Approach to Business Failure'*.[1] It was therefore appropriate to consider preventive restructuring processes in light of the operation of the EIR Recast and, in particular, in light of the co-operation obligations contained therein. Thus, the JCOERE Project hypothesis was that the co-operation obligations would be particularly problematic in the context of preventive restructuring because of the nature of the substantive rules involved in restructuring, coupled with existing procedural challenges to co-operation. In short, the question was whether the ability of judges to comply fully with the co-operation obligations placed on courts by the EIR Recast would encounter substantive and procedural obstacles in the context of cross-border preventive restructuring.

9.2 The Preventive Restructuring Directive

Just as the JCOERE Project got underway in 2019, progress on the final passing of the Preventive Restructuring Directive ('PRD') 1023/2019 advanced significantly when the PRD was passed in June, the evolution of which was outlined in Chapter 5 of JCOERE Report 1. Accordingly, against a backdrop of lively academic commentary and considerable policy

[1] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'A new European approach to business failure and insolvency' Strasbourg, 12.12.2012, COM (2012) 742 final.

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engagement from the EU Commission, the JCOERE Project began an interrogation into the key substantive rules, which were both core to an effective preventive restructuring process and also likely to be problematic in terms of the type of recognition and co-operation envisaged by the EIR Recast. Based on experience with the Irish preventive restructuring process – the Examinership process – and familiarity with English Schemes of Arrangement, the JCOERE Project identified the following core rules or concepts as being particularly challenging to co-operation across jurisdictions:

- Provision for **a stay** of individual enforcement actions;
- Focus on a **debtor in possession** model;
- **Cram-down** of **dissenting creditors**, including intra-class cram-down and more importantly **cross-class cram-down;**
- Protection of new and interim financing of a restructuring; and
- The role of a court or administrative authority in approving a restructuring plan.

9.2.1 Methodology

In addition to a doctrinal approach to existing preventive restructuring processes with which we had familiarity, namely the Irish Examinership and Scheme of Arrangement process and the similar English Scheme of Arrangement process, the JCOERE Project adopted a comparative approach in relation to relevant restructuring processes (preventive or otherwise) in other jurisdictions within the EU.

Accordingly, project gathered responses to a questionnaire disseminated among insolvency and restructuring specialists of 11 Member States to gauge both existing preventive and restructuring frameworks and likely attitudes to the implementation of the PRD within these Member States. We enlisted the help of additional contributors (including but also beyond the jurisdictions of the original JCOERE Project Consortium) across the EU to complete this survey which is described in detail in Report 1.[2] Additionally as described below, we also conducted a survey of members of the European judiciary for the purposes of this second Report.

9.2.2 Different approaches to preventive restructuring in the EU

Pertinent to the issues of both recognition and future court-to-court co-operation and co-operation between courts and insolvency practitioners, was the discovery of considerable differences amongst Member States both in relation to existing laws and to proposed implementation of the PRD. These differences were underpinned by a lively and contested academic debate on the merits of preventive restructuring, which was also reflected in the

[2] See Chapters 6-8 of JCOERE Report 1 for a distillation and comparison of the JCOERE Questionnaire responses. The 11 jurisdictions responding to the questionnaire included Ireland, Italy, Romania (the original JCOERE Project Consortium members), France, German, Austria, Spain, the Netherlands, Poland, Denmark, and the United Kingdom.

approach of lawmakers within the European Union during the negotiation on the scope of the provision of the PRD. While Report 1 of the JCOERE Project provides detail on different approaches within Member States responding to the JCOERE Questionnaire, Report 2 summarises, in Chapter 3, these different approaches through the utilisation of a taxonomy broadly categorising the approaches along a spectrum representing those interested in what is termed 'robust restructuring processes' and those Member States, which are resistant to preventive restructuring.

The fact that there are these differences is underpinned by the broad range of choice provided in the PRD. Despite aiming to harmonise an approach to business failure and preventive restructuring, there are so many options provided for in the PRD that it is a fairly weak harmonising instrument. This will obviously present challenges in terms of recognition and in terms of co-ordination as envisaged by the EIR Recast. The PRD is also somewhat unusual in its characteristics in that it does not envisage a harmonising 'floor of rights' that one might see in the area of employment law for example, or a set of 'minimum standards' that one might see in environmental law. Instead, Member States must comply with the PRD and implement a preventive restructuring process, but this does not mean that they cannot have additional restructuring processes, which do not exactly mirror the principles of the PRD.

Not only that but, as is pointed out in both of the JCOERE Reports, there is a lack of complementarity between the terms of the PRD and the EIR Recast. This means that a restructuring process in a particular Member State, may be one of a few processes found in the legal code in a particular Member State and may or may not be included in the EIR Recast. As discussed in this Report, a process outside of the EIR Recast is not subject to either the recognition or the co-ordination provisions. Examples of this set of affairs are available in France, where some of the restructuring procedures are covered by the EIR Recast and others are not. In Ireland, for example, the Examinership process is covered by the EIR Recast and the Scheme of Arrangement process is not. The same applies to the new Dutch WHOA legislation, where one procedure is envisaged to be included in Annex A and the other is not. Furthermore, as identified in this Report, a conscious choice may be made by the Member State to create a procedure that would sit outside of the EIR Recast.

9.3 The EIR Recast 848/2015

As described, the JCOERE Project was focussed at the outset on the interesting co-operation obligations imposed on courts in relation to both individual debtor proceedings (in our case always corporate debtors) and groups. These obligations, in addition to the impetus for their creation, were discussed in detail in Chapter 2. As we continued our analysis and research it became important to articulate the distinction between recognition of a procedure and continued co-operation obligations that might arise. As we see from the summary in the previous section, recognition of various restructuring processes may not even arise as the processes may be excluded from the EIR Recast. Furthermore, under the EIR, co-operation obligations will only apply to insolvency proceedings to which the Regulation applies.

Even if a process is included in the Regulation, there is the possibility that main proceedings will be accompanied by secondary or territorial proceedings within the scheme of the Regulation. This is where the distinction between recognition simpliciter and recognition plus co-operation is most likely to arise. Given the nature of the creditors' interests and the challenge to those interests, which is inherent in preventive restructuring, it may be very likely that this eventuality will transpire following implementation of the PRD by Member States. Therefore, whilst courts may follow the normal obligations of recognition of another hearing in a Member State, co-operation will be distinctively important as it is a real issue where a few different proceedings are being run.

However, the focus of our work was not on the original set of problems raised by the Regulation, which stem from the COMI concept and move through when secondary or territorial proceedings might be opened. Rather, our focus was on the co-operation obligations per se. The first part of our hypothesis – namely that substantive rules inherent in preventive restructuring might be particularly problematic – is borne out, we would argue, by the significant levels of theoretical disagreement and policy debate discovered during our research. While the PRD does set out essential basic principles in the form of minimum standards for restructuring frameworks, the scope and permitted derogations have made such disagreements possible, creating a fertile ground for further debate and the potential for not insignificant diversity among the Member State frameworks created under the PRD.

The variety of preventive restructuring processes allowed for, both under the PRD and outside of it, will aggravate issues of co-operation as it is more likely that territorial and secondary proceedings will be maintained. Most importantly, the PRD will not be implemented across the EU until 2021 and so it is early days to predict how all of these variations will play out.

9.4 Co-operation as a Separate Concept from Recognition

Because it is early days in terms of describing how co-operation obligations may be treated in national courts, our discussion of some conceptual analysis of the obligation courts might have to assist a foreign court in Chapter 5 is pertinent to the nature of the co-operation obligations. In these common law decisions, the courts regard the obligation to assist a foreign court or officer of that court as standing separately from the issue of recognition of a proceeding or a court order arising from such a proceeding. It is possible that over time obligations to co-operate will emerge as a separately justiciable concept, not necessarily linked to the resolution of the recognition per se.

9.5 Co-operation and the European Judiciary

We demonstrated in Report 1 both how complex the Preventive Restructuring Directive itself was and the complexity generated around its design and implementation. However, when we turned to procedural obstacles and focussed on the courts and the nature of the obligation per se, we discovered a multilevel range of complexity.

The first issue concerned, of course, when and how the obligation to co-operate would apply. Many questions that arose are generated by the applicability of the Regulation itself. However, additional questions were generated by the terms of the co-operation obligations. These are considered in Chapter 3 and include unanswered questions of liability and consequences in the event of non-compliance with the obligation.

In our applied research, which included considerable engagement with members of the judicial wing of INSOL Europe, we also discovered a considerable diversity of views amongst European judiciary regarding co-operation in live cases. Some judges expressed particular concern regarding propriety in terms of constitutional and administrative law in the context of co-operating with another court, with others regarding this matter in purely pragmatic terms. We began to understand the variety of cultures, which persist within the European Union. These differences are clear in areas such as judicial training, required qualifications and judicial appointments but do not end with these practical differences and continue on to areas of judicial reasoning and function. Chapter 4 of this report considers these issues in depth, with Chapter 8 complimenting this analysis by exploring the responses of members of the European judiciary to the survey questions on some of these very issues. There was considerable divergence of experience, outlook and approach to matters of co-operation, particularly when these have been couched in terms of a positive obligation.

Furthermore, even when a generally positive approach was taken to the concept of European integration and co-operation in a broader context, (underpinned in rule of law concepts described in Chapters 1 and 4) we also identified considerable concern regarding the mechanics of co-operation. Even though some mention of specific issues is made in the Regulation, there is little to assist regarding the actual practice of co-operation. In this context, we considered the experience of the judiciary by engaging positively with them in workshops and through the survey, which is discussed in Chapter 8. We also considered the relevance and applicability of existing guidelines, which are described in Chapter 6. Overall, we found that many judges favoured creating their own protocols, something that is reflective of the US experience, (considered in chapter 7).

9.6 UNCITRAL Model Law and Guidelines

In this context it is not entirely clear that the aspirational, optimistic tone of the guideline documents discussed in Chapter 6 have engaged proactively with the legal principles, both substantive and procedural, which we have hypothesised will serve to block such co-operation. We also found a lack of awareness and willingness to utilise such guidelines amongst the judiciary, with this reaction being gleaned from the responses to the judicial survey analysed in Chapter 8. It is unclear from the survey why this is the case, but it is something that the Commission may want to consider in conjunction with national training initiatives, particularly given the emphasis that the Commission has given to judicial networking and training in the last decade, as discussed in Chapter 4.

9.7 Cross Border Insolvency?

Overall one of our most interesting, if not somewhat puzzling discoveries, was the fact that despite companies operating across borders in the EU, when it came to insolvency the cross-border nature of the trading patterns did not seem to result in significant cross-border insolvency issues or more accurately any formal argument, litigation or settlement of these issues. This phenomenon was first highlighted to us by practitioners in the field, who constantly expressed reservations regarding the frequency of any of these issues arising in practise, let alone in litigation. There seems to be a pattern of matters, which might have a cross-border element to them, being resolved informally. Indeed, it may be recalled that a contention in Chapter 2 was that a tendency towards co-operating prior to the introduction of the Recast, in the sense of concluding (in)formal agreements and protocols, was not particularly unusual amongst those practitioners in common law jurisdictions. Furthermore, the prevalence of informal resolutions possibly stems from the fairly rigid conception of the COMI rules, which has now become embedded in EU law given that the first Regulation was passed in 2000.

Though they clearly anticipated that such cases might arise, the judges that we surveyed also had generally low levels of experience with cross-border insolvency cases. This was despite the fact that most of these judges either specialised in insolvency law, habitually attended international conferences, such as those held by INSOL Europe, or both.

Within this unusual and surprising reality, we discovered some disquiet based on lack of knowledge of other Member States approaches and some level of disquiet regarding the lack of availability of official sources of information regarding the processes of other Member States. This is particularly aggravated in the context of preventive restructuring given the range of approaches and considerable concern about the prospective operation of the obligations in the Regulation. As discussed in Chapter 8, even the matter of receipt of information is far from clear-cut. Co-operation should also be considered in light of the adversarial nature of proceedings in certain jurisdictions, but not others. In other words, in certain jurisdictions, judges must generally rely only on sources that are opened to them by one side or the other during the course of a proceeding. Such a dynamic being present in only some EU jurisdictions may create a situation where some judges can freely attain necessary information, whereas others are confined by rules embedded in their legal system. In addition to this perceived informational challenge, judges continued to mention the simple barrier of language in a European context.

We also discovered that there was some resistance to a pan-European approach from practitioners based on what has been described as jurisdictional reach. This is discussed in Chapter 5 and can be seen in evidence in some of the cases discussed therein where arguments are made that particular actions are not covered by the Regulation and do not require ceding of jurisdiction or do not require compliance with co-operation obligations.

These kinds of issues, concerning practitioner and court interest in keeping the litigation within state is also reflected in the more sophisticated US approach.

9.8 Some Future Trends

In Chapter 7 we considered a different federalised group of States, namely the United States, to provide additional understanding of what might emerge in Europe as we continue to focus on integration of Member State insolvency cases, ranging from recognition of forums by second Member States, the possibility of co-ordination between courts of different jurisdictions and how that might be accomplished and ultimately harmonisation of state laws. It is possible that as the European Union becomes more integrated that patterns of recognition, co-operation and forum shopping may begin to reflect patterns that have emerged in the United States over a longer period of 100 years. More integration implies a greater knowledge of the characteristics of particular jurisdiction, reflected in the taxonomic characterisation presented in Chapter 3. Thus, certain jurisdictions may appear more attractive as forums for insolvency litigation and this may become an acceptable feature of the European Union.

As we progress incrementally towards harmonisation in Europe and as we discover through our work in preventive restructuring and in relation to cross border practise generally that, in fact, there is a commonality of concepts (eg. *actio pauliana* and variants thereof) across European jurisdictions, it is likely that greater convergence will occur. Against that background deliberate forum shopping driven by a search for efficient and expert courts, a concentration of legal and financial expertise in a particular jurisdiction and a willingness or openness to accept jurisdiction over cases may be a feature of future European practise. It is arguable that this has already developed in relation to the recognition of the jurisdiction of England and Wales as a restructuring centre in the last recession and the recognition of certain states, Ireland, the Netherlands and Luxembourg as the location for the FinCos of inward investing multinational companies.

9.9 Conclusion

In conclusion, it is not entirely clear that there will be an integrated European approach to preventive restructuring. This is for a variety of reasons. First, this is because of scepticism regarding the potential harmonising effect of the PRD. A second complication is the interface between the PRD and the EIR, which we have mentioned in various contexts throughout this report. Thirdly, while in some ways recognition determined by a COMI test under the Regulation may be fairly straightforward in the context of traditional insolvency processes, we do not expect that this will be the case in preventive restructuring; first, because not all of the processes will be covered by the Regulation but secondly even where they are, we expect to see secondary proceedings arising to protect the interests of the parties in the face of such radical rules as an ongoing stay, cram down and cross class cram down. In this context, it is also worth bearing in mind that co-ordinated group proceedings are optional in nature under

the EIR Recast – in that there is an opt out for the insolvency practitioner without the necessity to justify the decision – thus, we anticipate that this may yield a similar result, namely multiple proceedings in order to protect the interests of local parties and perhaps, even as a commercial decision. Fourthly, even if a process implemented under the PRD is covered by the Regulation, we remain puzzled by the empirical evidence surrounding a lack of cross-border insolvency issues. We consider the role of the practitioner in retaining jurisdiction for whatever reason is important here. Fifthly, even where the issues arise, we also detected considerable concern from the judiciary regarding the mechanics of co-operation and the interface between co-operation and concern for procedural transparency and consequent issues of administrative and constitutional propriety.

As a way forward, we intend to continue our focus on the procedural and substantive issues that judges, in particular, may experience in the future when dealing with obligations to co-operate. In keeping with the aims and deliverables of the Project, we will consider these issues through the creation of case studies, which will consider hypothetical scenarios based on the rescue processes envisaged in the PRD and potential obstacles to co-operation that may arise. In addition, we will also further consider the guidelines analysed in this Report and how they could pertain to these issues, by providing information to judiciary and other relevant parties on how to address situations where co-operation is not possible and how the obligations imposed under the Regulation could be addressed. It is hoped that this solution-driven research in the coming months will help to ameliorate some of the difficulties that judges might experience in the future.

In terms of future research questions that might be pertinent to consider, it is anticipated that further research will be required to consider how the PRD is transposed by different Member States, and whether an integrated and harmonised approach materialises. In addition, as the Recast Regulation becomes properly embedded into EU law in time, it is anticipated that further research will be required to consider how recognition relates to co-operation in light of different approaches in case law to *assistance* (which we would consider to be an equivalent concept to co-operation) as distinct from recognition or enforcement of court orders. Furthermore, additional research is called for as to how co-operation will practically be carried out by the judiciary across the variety of jurisdictions in the European Union, which at present display different characteristics in terms of judicial culture.