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Re: CERIL REPORT 2018-1 on
Insolvency Regulation (Recast) and
National Procedural Rules

Realisation of the EU Insolvency Regulation (EIR 2015) in national (procedural) law of the Member States

1 INTRODUCTION: THE NEED OF AND BENEFIT FROM NATIONAL LEGISLATION TO REALISE THE INSOLVENCY REGULATION (RECAST)

The following text explains the concept and results of a research project executed by a working group of the Conference on European Restructuring and Insolvency Law (CERIL).¹ The study conducted a survey (between October 2017 and March 2018) sought to collect detailed information on several laws of EU Member States as to their introduction, amendment or adoption of national (insolvency) procedural rules to accompany the application of the Insolvency Regulation (Recast) (or: EIR 2015). This Regulation applies from 26 June 2017 onwards, is binding in its entirety and is directly applicable in the Member States in accordance with the EU Treaties.² The rules of the Insolvency Regulation (Recast) relate to:

- the international jurisdiction of a court in a Member State to open insolvency proceedings and the choice of law (or: private international law) provisions;
- the (automatic) recognition of these proceedings in other Member States;
- the powers of the insolvency practitioner to act in the other Member States;
- the duties for insolvency practitioners and courts to cooperate and to communicate to each other in cross-border insolvency matters, and
- the specific system for insolvency proceedings of members of a group of companies.

A Member State cannot divert from the content of the Regulation.

¹ The CERIL Working Party discussing and contributing to the Report was co-chaired by Bob Wessels (Netherlands) and Stephan Madaus (Germany) and further consisted of: Giorgio Corno (Italy), Ian Fletcher (United Kingdom), Tuula Lina (Finland), Ignacio Tirado (Spain) and Paul Omar (United Kingdom).

² Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) ('EIR Recast' or 'EIR 2015'), [2015] OJ L 141/19. Denmark is excluded. The Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ('EIR 2000'), [2000] OJ L 160/1, in legal force since May 2002, is repealed, see Article 91 EIR 2015. In Article 84 EIR 2015 of the original next the word 'on' has been replaced by 'from' the date of 26 June 2017, see Article 84 Corrigendum dated 21 December 2016, [2016] OJ L 349/9.

It seems odd to propose national legislation in the light of a Regulation that is binding and directly applicable in the Member States in its entirety. However, experience with the original Insolvency Regulation (EIR 2000), which entered into force 31 May 2002, proves that it is useful for national legislators to safeguard a seamless and effective adoption of a Regulation by arranging for legislation concerning the incorporation of the EIR 2000 (including compatibility with certain elements of domestic law) into national law. Of course, unlike Directives, Member States have no authority to ‘implement’ Regulations. Recital 8 to EIR 2015 (the text is similar to the text of recital 8 of the EIR 2000) stresses this very point by stating:

‘In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States.’

Nonetheless, when confronted with the EIR 2000, Member States like Austria, the UK, Germany, France and the Netherlands recognized that certain mainly procedural measures were necessary to put the Insolvency Regulation into practical effect, in order to secure its seamless adoption into the domestic legal environment.³ To express this type of legislative activity, the Working Party adopted the term ‘realisation’. In some instances the EIR 2015 explicitly draws attention to its expectation that certain matters should be further dealt with or covered by national law.⁴

In the light of the experiences and the call the EIR 2015 explicitly makes, the application of the Insolvency Regulation (Recast) may lead to an abundance of (detailed) questions of a procedural or substantial nature being raised. The following are a few examples of such questions:

Should a request for the opening of insolvency proceedings specifically state to which type of proceeding the request refers, i.e. main or secondary insolvency proceedings (Article 3(1) or Article 3(2) EIR 2015)? Note that Article 4(1), second sentence, EIR 2015 provides: ‘The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2)’.

Does a foreign insolvency practitioner (IP) need mandatory administrative support (e.g., by a local clerk or court official) when submitting a request (to open secondary proceedings, to not open secondary proceedings when the foreign IP has given an undertaking, to challenge the opening of secondary proceedings, to open group proceedings or to be heard in already pending secondary proceedings) into the proceedings of another Member State?

Which rules apply in case that an insolvency practitioner appointed in main insolvency proceedings gives an undertaking in the meaning of Article 36 EIR 2015? Would these rules also concern the approval requirements and/or the rejection of such an undertaking?

Which rules apply to a request to open group coordination proceedings? Which court in the territory of the Member State has jurisdiction? What rules apply to objections in the meaning of Article 64 EIR 2015 or a subsequent opt-in by an insolvency practitioner (Article 69 EIR 2015)? Which rules govern costs and remuneration of the group coordinator (Article 77(4) EIR 2015)?

³ See e.g. Bob Wessels, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands, in: European Business Law Review 2004, 73, also published in: Bob Wessels, Current Topics of International Insolvency Law, Deventer: Kluwer 2004, 229ff.

⁴ See recitals 21, 34, and 64, and Articles 24, 27 and 29 EIR 2015. Compare Zoltán Fabók, Adjusting the Hungarian Insolvency Act to the Recast Insolvency Regulation: Some Question Marks, in: eurofenix, Spring 2018 (forthcoming).

In some cases, better coordination of main and secondary insolvency proceedings must be facilitated, e.g. by inserting adequate domestic procedural rules related to such question as:

- Which procedural rules apply to a judicial review of a decision to open main insolvency proceedings (Article 5 EIR 2015)?
- Can an insolvency practitioner in main insolvency proceedings seek a stay (under Article 46 EIR 2015) in a secondary proceeding that is pending in another Member State? or
- May the IP in the main insolvency proceedings request the termination of such a stay and which court in the other Member State is authorized to deal with this request, with the possibility of an appeal, and the question who is eligible to make such an appeal?

These examples suffice to demonstrate that the application of the Insolvency Regulation (Recast) may produce a rather long list of national legal measures that may be required in order to allow seamless compatibility between the Regulation and the domestic laws of the various Member States.

2 GOALS OF THE WORKING PARTY

The Insolvency Regulation is one of the tools of the EU to establish an area of freedom, security and justice. Recitals 3 and 4 to the EIR 2015 underline the importance of the Insolvency Regulation in achieving an internal market:

'(3) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.

'(4) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.'

Beyond this background, it is obvious that the application of the Insolvency Regulation in Member States and, in particular, the alignment of national procedural rules and requirements (realisation) may not add discrepancies. The Regulation is to be applied in a uniform way and national legislation regarding realisation is restricted to the task of connecting these uniform rules to quite diverse domestic law. Therefore, the Working Party pursues the following goals:

- Raising awareness for some of the issues that hinder the effective and efficient operation of the Insolvency Regulation;
- Providing for examples to demonstrate how in some Member States these hindrances have been addressed, and
- Providing recommendations that aim to avoid local differences or at least potentially reduce the risk of these differences.

3 METHODOLOGY

The Working Group made a selection of six topics, which are mainly related to the provisions in the EIR 2015 that are new or expanding certain legal norms and concepts in comparison to the former Insolvency Regulation (EIR 2000). They cover the following items:

CERIL is an independent non-profit, non-partisan, self-supporting organisation of persons
committed to the improvement of restructuring and insolvency laws and practices
in Europe, the European Union and its Member States

a) *International jurisdiction of the court*

Article 4 Examination as to jurisdiction

Article 5 Judicial review of the decision to open main insolvency proceedings

b) *Publication and registration in registers of other Member States*

Article 28 Publication in another Member State

Article 29 Registration in public registers of another Member State

c) *The relation between main and secondary insolvency proceedings*

Article 36(5) Approval of an undertaking in order to avoid secondary insolvency proceedings

Article 36(8) Local creditors may apply for suitable measures

d) *Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners⁵*

Article 42(3) Cooperation and communication between courts, in relation to a protocol

e) *National provisions required in group coordination proceedings*

Article 61(2) Request to open group coordination proceedings

Article 64(3) Objection by insolvency practitioners (Opt-out)

Article 69(1) Subsequent opt-in by insolvency practitioners

f) *Remedies in group coordination proceedings*

Article 69(4) Challenge of a subsequent opt-in

Article 77(5) Decision on costs and share to be paid by each member of the group.

Following a short introduction to these topics, the Working Group describes the way in which a number of Member States have responded (or partly, or not) to the existing or perceived gap between the Insolvency Regulation and their domestic rules. These responses can be divided in two groups.

The first group collects timely national legislation adopted prior to 1 April 2018 and consists of France, Germany, Finland and the Netherlands. The second group contains national (draft-)legislation in different stages of development as of 1 April 2018 and consists of Italy and Spain.⁶ The report concludes with a comparative analysis of the national legislation (adopted or in draft) and several recommendations.

⁵ It is noted that Articles 41-44, containing these provision, are nearly similar to Articles 56-59 regarding similar rules for cooperation and communication between proceedings related to members of a group of companies.

⁶ Ignacio Tirado (Spain) informed the Reporters early March 2018 that a draft legislation for the realisation of the EIR 2015, developed by a commission, was in his possession but it had been given to him as confidential, as it is subject to further amendments.

4 SELECTED ISSUES

The recast Regulation provides for a number of rules that expressly or implicitly require a realisation by national legislators. The Working Group specifically highlights the following.

4.1 Article 4: Examination as to jurisdiction

Article 4(1) EIR 2015 provides that

'1. A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2).'

In practice, first, the court will take into account the facts presented in the request to open main insolvency proceedings. The court has the duty to assess its international jurisdiction *ex officio* (on its own motion), without any party asking for an examination of the court's jurisdiction. Recital 30 obliges the court to assess 'carefully' where a debtor's centre of main interest (COMI) is '*genuinely located*'. Such a decision presupposes quite some detailed analysis. In certain cases, the facts brought to the court may be insufficient or incomplete for such a careful considered decision. Recital 32 comes to the court's rescue by providing that, where

'... the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction'.

In the light of the utmost importance of determining a debtor's COMI carefully, it is unfortunate that recital 32 has not been included in the actual text of the EIR 2015 itself.

In recital 32, the term 'doubts' could relate to 'insufficient facts' to 'carefully' assess whether COMI of the debtor is 'genuinely' located within the court's Member State. The term could also relate to the situation that all facts seem available, but that these point at different directions. In both these situations the court can turn to the debtor and require the debtor '... to submit additional evidence to support its assertions'.

The recital is silent about the form of evidence (written or oral evidence, however written seems the most obvious). Where the *lex fori* allows, the court should give the debtor's creditors the opportunity '... to present their views on the question of jurisdiction'. Where national law does not provide for such an opportunity explicitly, the position of such a creditor is questionable. At the same time, it may seem neither fair nor in line with the principle of equal treatment of creditors not to allow such creditor's views to be shared.

Where the national law of a Member State does provide for an opportunity to be heard, other concerns may arise. As the stage of the insolvency process is in its very early beginnings ('the time of opening of proceedings' in the meaning of Article 2(8) EIR 2015 has not been reached), there can be doubts about (i) who these creditors are, (ii) how these creditors are informed, (iii) by whom they are informed, (iv) how it can be assessed whether these creditors indeed have a claim (and not a false pretence), (v) how they have to 'present their views on the question of jurisdiction' (only in writing or during a hearing?), and (vi) whether the information communicated to the creditors includes the facts presented to the court or whether they are presented with just a general question from the court.

4.2 Article 5: Judicial review of the decision to open main insolvency proceedings

Article 5(1) EIR 2015 states:

'1. The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction'.

Recital 34 provides:

'In addition, any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings. The consequences of any challenge to the decision to open insolvency proceedings should be governed by national law'.

Indeed, the EIR 2015 itself does not set any procedural rules, such as rules for the substantiation of the creditors' challenge, its form, in which phase in the procedure the challenge ultimately has to be made, which court ('before a court') has jurisdiction or the hearing of other creditors or the debtor regarding the challenge.

Article 5(1) EIR 2015 is also silent about the effects of the outcome of a challenge made. Does a challenge have a suspension effect to a stay already granted? What are the effects of a successful challenge (the result of which is that indeed the COMI of the debtor is not in the relevant Member State) on divestments or interim measures that have been ordered by the court and its effects in other Member States? May creditors immediately start enforcement actions against the assets of the debtor on the day of issuing the decision regarding the successful challenge? Is there a right to appeal this decision?

Article 5(2) EIR 2015 provides:

'2. The decision opening main insolvency proceedings may be challenged by parties other than those referred to in paragraph 1 or on grounds other than a lack of international jurisdiction where national law so provides.'

A Member State should address the question whether indeed it has been considered that other grounds have been considered and why this has led to a negative result.

4.3 Article 28: Publication in another Member State

Article 28 EIR 2015 provides:

'The insolvency practitioner or the debtor in possession shall request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing the insolvency practitioner be published in any other Member State where an establishment of the debtor is located' or any other Member State they deem it necessary.

These provisions do not specify which authority is competent to process such a request. It is also silent about the formalities of such a request. In case of a request under Article 28(2), Member States will need to designate a competent authority for publications regarding a debtor with no establishment or even assets in that jurisdiction.

4.4 Article 29: Registration in public registers of another Member State

Article 29 extends the right of insolvency practitioners or debtors in possession to publish commenced proceedings. Again, domestic legislation would be tasked to provide for procedural rules about where and how to file such information, especially in cases where the debtor has no assets or other connection to that Member State.

4.5 Article 36(5): Approval of an undertaking in order to avoid secondary insolvency proceedings

16. Article 36 EIR 2015 is a lengthy article, counting eleven paragraphs. These paragraphs relate to the undertaking itself (paragraphs (1) definition, (2) law applicable, (3) language and (4) form of the undertaking), its approval (paragraphs (5) to be approved by qualified majority of known local creditors and (6) the undertaking shall be binding on the estate), and the undertaking's execution (paragraphs (7) duty to inform regarding local distribution; creditors may challenge non-compliance with undertaking, (8) local creditors have remedy with COMI court, (9) local creditors have remedy with the court where secondary proceedings could be opened, (10) the liability of the insolvency practitioner in main proceedings having given the undertaking) and (11) about employee rights.

The novelty of the concept of an undertaking and the number of provisions used in the EIR to set its content will undoubtedly give rise to many questions, some of which may have to be resolved by the courts of the Member States. This report is limited to some remarks on the national procedural rules accompanying the application of the Insolvency Regulation.

Article 36(5) contains four rules about the approval of an undertaking. Its first sentence provides that the undertaking shall be approved by the known local creditors. Recital 44 explains:

'National law should be applicable, as appropriate, in relation to the approval of an undertaking. In particular, where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purpose of voting on the undertaking.'

Here the question arises whether domestic laws should establish specific rules regarding the approval of an undertaking. In addition, Member States should respond to recital 44, second sentence, which provides:

'Where there are different procedures for the adoption of restructuring plans under national law, Member States should designate the specific procedure which should be relevant in this context.'

In case the designation from the Member State itself is lacking, is a court allowed to step up? Another question is whether a 'deemed approval' rule exists 'under national law' regarding 'the voting rules for adopting a restructuring plan', and, if not, what rules should apply. Would it suffice to provide only for the approval of a creditors' committee?

4.6 Article 36(8): Local creditors may apply for suitable measures

Article 36(8) EIR 2015 gives a local creditor the right to apply to the courts of the Member State in which main insolvency proceedings have been opened,

'... in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings'.

The court in this case has an exclusive jurisdiction to ensure compliance of the undertaking in accordance with its terms.

The question arises whether Member States have adopted certain forms and requirements for the application mentioned.

Local creditors may also apply to the courts of the Member State in which secondary insolvency proceedings could have been opened. See Article 36(9). Together with Article 36(8), Article 36(9) warrants a strong position for local creditors allowing them to initiate several measures towards the main insolvency

practitioner in both courts, the COMI court and the court where insolvency proceedings could have been opened. However, paragraphs 8 and 9 differ as to the content of the application ('suitable measures necessary to ensure compliance', in paragraph 8, versus 'provisional or protective measures to ensure compliance', in paragraph 9) and regarding the court to be addressed. Following paragraph 8 it is the COMI court, following paragraph 9 the courts of the (other) Member State in which secondary insolvency proceedings could have been opened have authority to decide. The latter appeal seems to conflict respectively to break through the provision of Article 36(8). Where the contents of the appeal may differ, it may contradict the appeal made at the other court or, respectively both appeals would deal with a request for the same type of measures. It seems that any contraction should be an item for coordination between the courts mentioned, see Article 42.

4.7 Article 42(3): Cooperation and communication between courts, in relation to a protocol

Article 42 EIR 2015 introduces a duty for courts to communicate and cooperate in cross-border insolvency cases concerning the same debtor that fall within the scope of the EIR. The foundations of the Insolvency Regulation lie in Articles 67 and 81 TFEU and the Regulation is a measure to secure judicial cooperation within the meaning of Article 81. Consistent with this, the process of recasting the Regulation led to the introduction of specific provisions relating to the duties of courts and judges in Member States in relation to insolvency proceedings pending in different Member States. The principle of mutual trust supports the principal of automatic recognition of judgments opening main insolvency proceedings under the EIR. This principle of mutual trust (which appears to be based on Article 4(3) TFEU (Article 10 of the EC Treaty)) must also lead the court to be guided by the purpose and rationale of any particular EU measure. The cooperation as mentioned may be implemented by any means that the court considers appropriate. It may, in particular, concern for instance the coordination in the appointment of the insolvency practitioners, the coordination of the conduct of hearings or the coordination in the approval of protocols, where necessary (See Article 42(3)(a), (d) and (e)).

Recital 49 to the EIR 2015, introduces the concept of a 'protocol' in the following way:

'In light of such cooperation, insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. Such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions.'

Apart from questions as to the legal nature of a protocol, the question arises how coordination between courts will take place and indeed whether in their national laws the Member States surveyed have set requirements for the approval of a protocol, and where states have not done so, which approval requirements a court will or may set. Should a court check (i) whether indeed all parties in an insolvency proceeding have permission to agree on a protocol, e.g. including the approval by creditors or a creditors' committee, or (ii) the content of a protocol (recital 49 seems to allow '... an agreement ... to take, or to refrain from taking, certain steps or actions', but what about other clauses, such as a choice of law applicable or chosen by parties, a clause refraining to call upon a surety, a clause waiving the right to sue directors or a clause providing that costs of creating/drafting the protocol will be borne by creditors. Other questions relate to such items as how to deal with clauses that infringe rules of mandatory law, a confidentiality clause (and the relation to a requirement for instance on transparency of proceedings) or clauses that seem to conflict with the protection of information rights of creditors or a stay of proceedings? Moreover, what are the consequences of not using the agreed protocol and, thus, acting in conflict with the courts approval?

4.8 Article 61(2): Request to open group coordination proceedings 42(3): Cooperation and communication between courts, in relation to a protocol

Any insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group may request group coordination proceedings before any court having jurisdiction over the insolvency proceedings of a member of the group according to Article 61(1). Article 61(2) states that such a request ‘... shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.’ Member States would have to check which local provisions apply and whether they seem appropriate or not.

4.9 Article 64(3): Objection by insolvency practitioners (Opt-out)

A similar approval requirement is the content of Article 64(3). Prior to taking the decision to participate or not to participate in the coordination in accordance with Article 64(1)(a), ‘an insolvency practitioner shall obtain any approval which may be required under the law of the State of the opening of proceedings for which it has been appointed.’ Again, Member States should check whether the applicable provisions are adequate.

4.10 Article 69(1): Subsequent opt-in by insolvency practitioners

Article 69(1) provides for a similar approval requirement in cases where an insolvency practitioner requests to participate in group coordination proceedings either after overturning a former opt-out or after being appointed in a insolvency proceeding. Again, the IP would require the approval under local law and Member States should specify the applicable requirements.

4.11 Article 69(4): Challenge of a subsequent opt-in

When a request for inclusion in group coordination proceedings was turned down, any participating insolvency practitioner may challenge that decision according to Article 69(4) ‘in accordance with the procedure set out under the law of the Member State in which the group coordination proceedings have been opened.’ Thus, Member States should specify the applicable remedy.

4.12 Article 77(5): Decision on costs and share to be paid by each member of the group

Upon the conclusion of group coordination proceedings, the coordinator presents a final statement explaining the costs incurred and how to share it. If an objection is filed, Article 77(4) stipulates that the court that opened the group coordination proceedings shall decide on the costs and the share to be paid by each member. Any participating insolvency practitioner may challenge that decision ‘in accordance with the procedure set out under the law of the Member State where group coordination proceedings have been opened’ under Article 77(5). Thus, Member States must specify a remedy.

5 COMPARATIVE ANALYSIS

In a separate Annex to this report a short overview is provided of national legislation of various Member States (adopted or in draft) of the issues selected for analysis about national responses to the matter of realisation of the EIR 2015 by national legislators. The analysis of the selected issues dealt with in that overview, results in the following observations.

a) International jurisdiction of the court

CERIL is an independent non-profit, non-partisan, self-supporting organisation of persons committed to the improvement of restructuring and insolvency laws and practices in Europe, the European Union and its Member States

Article 4 Examination as to jurisdiction

National legislators differ as to whether Article 4 is sufficient or requires additional rules for details. Finnish, French and draft Italian national insolvency legislation provide that a court that opens main insolvency proceedings or secondary insolvency proceedings shall indicate whether the international jurisdiction of the court is founded on Article 3(1) or Article 3(2) EIR 2015. In Finland, it is provided that information reflecting this indication shall be registered in the Bankruptcy- and Restructuring Register. As a matter of already existing French law, all courts are required to examine the basis of their jurisdiction. German law stipulates that, if international jurisdiction could be an issue, any request of a debtor for opening insolvency proceedings in Germany shall contain information about the registered office of the debtor, the place of administration or any other information relevant for the conclusion that the debtor has its COMI in Germany. In addition, the debtor shall state where his assets are located and whether a petition for insolvency proceedings is already pending in another Member State. As a consequence under Article 4, all courts in these Member States are required to examine these points and issue a reasoned decision. The Italian draft legislation specifically allows the court to order the collection of information from public databases as well as from public registries.

Only in Italy is it specifically addressed that only creditors who could be entitled to claim the opening of the proceeding or to take part to the proceeding and only these debtor's creditors who are part of the proceeding or who are entitled to claim the opening of the insolvency proceeding, have the opportunity to present their views on the question of jurisdiction.

The position by the Netherlands' legislator is that the respective Article 4 EIR 2015 itself contains a complete regulation, and, in combination with the Dutch Act for Civil Proceedings, should suffice.

Overall, the question seems to be whether Article 4 itself safeguards that the court is in possession of sufficient information when making a decision on its jurisdiction. Rules of implementation focus on requirements for applicants to provide facts, but also on the limitation of courts to hear parties. The latter may lead to costly delays.

Article 5 Judicial review of the decision to open main insolvency proceedings

In the scope of the judicial review of the decision to open main insolvency proceedings (Article 5 EIR 2015), legislators have used to option under subparagraph 2 in different ways. France used it to authorise the Public Prosecutor to form an appeal against a decision to open main proceedings on grounds of [a lack of] international jurisdiction. A creditor may also appeal or file a third-party objection on the same basis. This is without prejudice to any other rights these parties may have under the law to object or appeal the decision that has been made.

In the Italian draft any interested party may challenge the decision to open main insolvency proceedings on the ground of (lack of) jurisdiction. Such a challenge takes place in accordance to art. 55 of the draft reform bill.

German law only provides for the type of appeal and the applicable provisions of German law on civil procedure for the judicial review without using the powers under subpara. 2. A similar position is taken in the Netherlands. In Finland Article 5 EIR 2015 has not resulted in specific legislation.

Overall, legislators seem to only make use of the options under subpara. 2 where this is in line with wider rights of third parties (e.g. public prosecutors) to initiate or interfere in insolvency proceedings.

b) Publication and registration in registers of other Member States

Article 28	Publication in another Member State
Article 29	Registration in public registers of another Member State

Both Articles 28 and 29 EIR 2015 leave the process of publication and registration to the respective procedures provided for in the respective Member State. Some legislators use the hint to expressively state how to proceed. In Finland's insolvency legislation several sections have been included to remind the IP that he or she shall take care of the publication in other Member States as the EIR 2015 requires. In addition, at the request of the IP, a Finnish state authority shall publish the publication in the Finnish Official Journal. In addition to the information provided in Article 28(1) EIR, the contact information of the court, the debtor, and the IP shall be published. German legislation sets out which courts are competent to publish in accordance with Article 28 EIR 2015 as well as that these courts also shall receive requests for registration under Article 29 EIR 2015. Publications and registrations are done in the German language. Foreign insolvency practitioners may be required to provide for official translations. In the Netherlands, at the request of a foreign IP the registrar (*griffier*) of the Court in The Hague notifies immediately the information as meant in Article 28 EIR 2015. As to Article 29, the Dutch legislator has expressed that the provision in the Regulation itself contains a complete regulation.

Other legislators do not see a need for specification. In France, the topics covered by Articles 28 and 29 EIR 2015 are not addressed in specific legislation. In Italy, the situation is rather similar. Both the current Italian insolvency law and the draft delegated reform bill do not provide for any specific provision regarding publication in Italy as well as registration in Italian registers of judgments opening the insolvency proceeding in a Member State different from Italy. Procedural rules about where and how to file such information, especially in cases where the debtor has no assets or other connection to that Member State are not provided for, as well, from the current Italian insolvency law or the delegated reform bill.

c) The relation between main and secondary insolvency proceedings

Article 36(5)	Approval of an undertaking in order to avoid secondary insolvency proceedings
Article 36(8)	Local creditors may apply for suitable measures

The undertaking in the meaning of Article 36 is a new concept to all Member States. It may seem surprising, therefore, that some legislators decided not to introduce specific legislation on how to proceed. In Finnish legislation, for instance, Article 36(5) ('Approval of an undertaking in order to avoid secondary insolvency proceedings') is not particularly addressed. Also in the Netherlands, the provision in the Regulation itself is regarded as containing a complete regulation.

Many legislators specified the process of accepting an undertaking under national law. French law permits the IP who has been appointed in main proceedings opened within French territory to make an undertaking to local creditors of an establishment belonging to the debtor situated in the territory of another member state. The existence of a valid undertaking permits the court, however, to reject a request for the opening of insolvency proceedings, provided that the practitioner or debtor-in-possession can justify its compliance with the terms of a new provision concerning agreement of the creditors and approval by the court. For the latter situation, the IP is required to file a petition with the President of the designated Commercial Court or High Court with jurisdiction over the territory where the debtor's establishment is situated with view to

having the undertaking approved. Without the approval, the undertaking does not come into force, although an application may still be made for the opening of secondary proceedings within 30 days of the approval being forthcoming.

Germany has included rather detailed provisions about the procedure applicable for the approval of an undertaking by local German creditors. The IP in the main proceeding initiates the voting procedure, which can be done electronically. He informs all known creditors and asks them to file their claims for a determination of voting rights. Disputed claims would be allowed to vote. Only if the result of the vote depends on the admission of disputed claims, the court would need to decide about their admission. The IP would inform all local creditors about the outcome. Any court decision would be deferred to the moment specified in Article 38(2) EIR 2015, so no immediate court approval would be required to approve an undertaking. Any dissenting local creditor may file for secondary proceedings where the local court would have to decide about the approval and the binding force of an undertaking according to Article 38(2) EIR 2015.

Draft Italian rules state that (a) the IP of a main insolvency proceeding opened in a Member State different from Italy may express in writing and in Italian an undertaking governed by Article 36 EIR 2015 to local creditors and regarding assets based in Italy; and inform any known local creditor, so that he can vote and, possibly approve it, and that (b) voting rules as well as majorities requested shall be those set for the existing voluntary composition with creditors' proceeding.

Some legislators also included rules on the enforcement of an undertaking under Article 36(8) EIR 2015 ('Local creditors may apply for suitable measures'). German law addresses the rules on jurisdiction in Article 36(7)-(9) EIR 2015 by assigning a competent German insolvency court or referring to the (foreign) court of main proceedings. There is no specific rule on a possible conflict in the content of decisions from the foreign and the local court. Following the general rules of procedural law, the former decision would prevail as far as it decides about a request (*res judicata*).

French law allows local creditors of an establishment belonging to the debtor situated in the territory of another member state to object or to bring a request under the terms of Article 36(7)-(8) EIR 2015 the French courts in order to obtain adherence to the undertaking made by the insolvency practitioner, to ensure its compliance with the applicable law or to obtain any suitable measures/relief towards these ends. Any judgment of the court may be appealed by the IP, the debtor-in-possession, a petitioning creditor or the Public Prosecutor.

Draft legislation in Italy allows that local creditors may apply to (i) the deputy judge of the main proceedings opened in Italy to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings under Article 36(8) EIR 2015, or (ii) the court which has jurisdiction considering the place where the establishment of the debtor is located to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking, in accordance with Article 36(9) EIR 2015. Orders issued upon requests of local creditors may be challenged in accordance with ordinary Italian rules applicable to insolvency proceedings.

In addition to the jurisdictions covered by this report, attention should be given to the Hungarian legislator for explicitly determining what kind of measures may be applied by Hungarian courts. Article 6/J(8) of the Hungarian Insolvency Act now provides that the Hungarian court may order the foreign insolvency practitioner to provide financial security in the form of cash deposited to an escrow account at the court's

financial administration office to ensure compliance with an undertaking given to local (mostly Hungarian) creditors.⁷

Both Finland and the Netherlands do not address the matter.

d) Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners

Article 42(3) Cooperation and communication between courts, in relation to a protocol

Some jurisdictions introduced rules explaining the process in which to communicate or cooperate. In France, concerning Article 42(3) EIR 2015 ('Cooperation and communication between courts, in relation to a protocol') the law requires the practitioner to inform the supervising judge of any requests for cooperation and communication s/he receives from a practitioner appointed in proceedings (involving the same debtor or another entity that is a member of the same group as the debtor) opened in another member state by virtue of Articles 41 and 56 EIR 2015. Permission of the supervising judge is required for authority to communicate confidential information to any practitioner in such proceedings, provided the debtor, any other practitioner appointed in the same proceedings, the monitors (*contrôleurs*) and the Public Prosecutor are notified of the request for communication. French law also requires the practitioner to submit for the supervising judge's approval any agreement or protocol that is proposed to be 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.

The draft Italian rules confirm the application of rules set by EIR 2015 on communication and cooperation among courts, IP's of insolvency proceedings and courts; and among IPs of insolvency proceedings opened in Member States to whom EIR 2015 applies; and clarifies that, when cooperating and communicating, courts and IP use the Italian language and, where this is not possible, the English language. It is felt reasonable that former practice will be continued in that the IP of an insolvency proceeding opened in Italy acts under the control of the deputy judge, who her/himself would act under the control or coordinate its activities with the insolvency court or, at least, the head of the relevant insolvency court.

The laws of Finland and Germany do not provide specific rules specifying obligations under Articles 41-44. The assessment here is similar to the one in the Netherlands where the legislator stated expressly that these provisions contain the complete regulation itself. The responsible minister in the Netherlands has referred to recent non-binding soft law as an aid in the organisation of cross-border cooperation between courts.

Relying on flexible soft law for the various ways and situations of communication between courts and IPs may actually prove to be sufficient provided that local courts clearly accept that they are obliged to communicate with foreign courts and IPs.

e) National provisions required in group coordination proceedings

Article 61(2) Request to open group coordination proceedings
 Article 64(3) Objection by insolvency practitioners (Opt-out)
 Article 69(1) Subsequent opt-in by insolvency practitioners

The decision-making process about whether to join group coordination proceedings or leave them is not specifically covered in the Regulation. Thus, some Member States provide rules in this respect that often aim at safeguarding the involvement of relevant stakeholders (supervisory judge or creditors' committee) in the decision-making process.

In Finland a special section provides that the IP shall decide on the participation in group coordination proceedings (Article 61–77 EIR). Before that, the IP shall hear the Creditors' Committee or the biggest creditors. The same obligation was enacted in Germany. In Finnish restructuring proceedings, however, the IP is not obliged to hear the creditors before deciding on the participation in group coordination. A new Dutch legislative provision states that a request to open a group coordination procedure as referred to in Article 61 EIR 2015 can be made by an insolvency practitioner at the court referred to in the relevant Article 2 DBA. The draft Italian law, however, does not provide on this matter. The French national legislation seems to suggest that Articles 60(1)(c) and 61(1) EIR 2015 are sufficiently clear to constitute the necessary authority. The same suggestion applies to the authorisation of an appeal in the case of requests for stays of asset sales under Article 60(1)(b) and (2) EIR 2015. In the Explanatory notes, it is stated that the group coordination procedure is opened by any court which is seized of a matter involving one of the members of a group of companies and appoints a coordinator to carry into operation a common plan for members of the group facing insolvency procedures.

A remarkable rule was introduced in the Hungarian Insolvency Act. It provides that any choice of court agreement under Article 66 with relevance for a proceeding in Hungary may only be concluded with the prior approval of Hungarian courts.⁸ As the EIR does not hint any requirement of involving courts in a process under Article 66, it seems quite likely that such a provision is void.

For Articles 64(3) ('Objection by insolvency practitioners (Opt-out)) and 69(1) ('Subsequent opt-in by insolvency practitioners), it is stated in France that the permission of the supervising judge is required before the practitioner may accept or refuse inclusion in any group coordination procedure. The same is also required in respect of any request to participate voluntarily in (i.e. opt-in to) a group coordination procedure. In Germany, the local insolvency practitioner would need the consent of the creditors' committee. In Italy's draft, no specific legislation is provided for, whilst in the Netherlands for the opt-in and opt-out request the point of view is that the Regulation itself contains a complete regulation.

f) Remedies in group coordination proceedings

Article 69(4)	Challenge of a subsequent opt-in
Article 77(5)	Decision on costs and share to be paid by each member of the group

Some jurisdictions pick up the task of designating a court or procedure to the remedies granted under the EIR 2015.

In Finland, the general rule is that an appeal concerning the decision of the group coordinator (Article 69(4) EIR) can be made at the district court that considered the application for the opening of the group coordination proceedings. The appeal shall be made within 30 days from the day when the IP got the announcement of the decision of the coordinator. In France, concerning the challenge of a subsequent opt-in the court's decision is final and not open to appeal. German law specifies the judicial remedy available under German law for any insolvency practitioner in case of a rejected opt-in. Dutch law and Italian (draft) law bill does not provide on this matter.

As to Article 77(5) ('Decision on costs and share to be paid by each member of the group') the court in France which has opened group coordination proceedings is competent to adjudicate on any final statement produced in compliance with Article 77 EIR 2015. The advance of costs by the Treasury is expressly excluded. However, any practitioner participating in the group coordination proceedings who has raised an objection as well as by the non-disseised debtor and the Public Prosecutor may appeal the decision. German law specifies the judicial remedy available for any IP in case of a disputed final statement of the coordinator. Italian (draft) law is silent on the matter. In the Netherlands, however, a new provision states that any IP involved in the group coordination procedure may, during the eight days after the day on which the decision was taken, file for an appeal to be submitted to the clerk of the court that is competent to hear the case. In the event of an oral hearing, the court orders the call of the appellant on appeal, the coordinator involved in the group coordination procedure and the interested parties who appeared in the proceedings at first instance. The registrar shall immediately send a copy of the decision on the request referred to in the third paragraph to the court.

6 CONCLUSION

The Insolvency Regulation (Recast) is one of the tools of the EU to establish an area of freedom, security and justice. Achieving the proper functioning of the internal market requires that cross-border insolvency proceedings operate efficiently and effectively. Where the activities of businesses have more and more cross-border effects Union law is increasingly regulating them. The measures to be taken regarding an insolvent debtor's assets, which may be situated in two or more Member States, affects the proper functioning of the internal market. The Insolvency Regulation (Recast) provides for coordination of these measures.

Although the Insolvency Regulation, as a regulation, is binding and directly applicable in the Member States in its entirety, in several instances it is required that Member States recognize that certain mainly procedural measures are necessary to put the Insolvency Regulation into practical effect, in order to secure its seamless adoption of the Insolvency Regulation into the domestic legal environment. To express this type of legislative activity, the term 'realisation' has been coined.

From the brief survey, overall it follows that legislators in Member States are reserved when drafting legislation to 'realise' the recast Insolvency Regulation. Still, significant variations can be seen. Some legislators assess that the provisions under the Regulation are rather complete, leaving little to no room for supplemental national rules. This is especially the case for the Dutch lawmaker. Others, however, prefer to explain the decision-making processes and the venues of courts to hear and decide remedies found in the Regulation. It remains to be seen which approach results in less delay due to uncertainty on the one hand or interpretation disputes on the other.

Our brief analysis of only a few Member States' approaches towards the need and extent of an introductory bill for the recast Insolvency Regulation reveals a significant variation in both efforts and topics covered. As a consequence, we call national legislators in EU Member States to review their assessment or to initiate assessment and to better coordinate efforts in order to

- (i) prevent unnecessary confusing differences,
- (ii) save time, costs and precious time of courts (procedural battles in a court) to find these out, and
- (iii) encourage/strengthen effective and efficient national (procedural and substantive) rules, at least in the area covered by the survey underlying this report.

ANNEX: EXAMPLES OF NATIONAL (DRAFT) LEGISLATION

This Annex to the report provides an overview of the national responses (adopted or in draft) to the matter of realisation of the EIR 2015 by various Member States (Finland, France, Germany, Italy and the Netherlands) to the issues selected for analysis (see par. 4). For each selected Member State, the overview starts with a general introduction of the (envisaged) legislative measures before it focuses in detail on the selected issues.

Finland

- **General**

In Finland the governmental bill for the realisation of the recast EIR was introduced in March 2017.⁹ The bill proposed amendments of several pieces of legislation, as the Bankruptcy Act (BA, 120/2004) and the Restructuring Act (RA, 47/1993). The Finnish Parliament passed the bill in May 2017 with minor amendments. Its content can be summarised as follows: Information relating to the opening of bankruptcy or restructuring proceedings and lodgements of claims is entered into the insolvency register instead of as announcements in the Official Journal. The information entered into said register concerning restructuring and bankruptcy is open to access on the Internet free of charge. The legal effect of the insolvency proceedings, the protection of good faith and the notification of unknown creditors are secured primarily through the register instead of the announcements. In bankruptcy and restructuring proceedings, the court shall indicate whether the international jurisdiction of the court is based on Article 3(1) or 3(2) EIR 2015.

It is the IP's task to determine when the announcement is needed to be addressed to targeted creditors abroad. The Finnish Bankruptcy Act and the Restructuring Act explicitly refer to Articles 28 (1) and 28(2). In addition, express provisions were added, according to which the foreign creditors referred to in the EIR 2015 shall be notified concerning the opening of the proceedings and of the lodgement of claims, as outlined in the Regulation. This means reminding the IPs of the specific form requirements of these notifications.

According to the amendments, in bankruptcy and restructuring proceedings, Finland allows creditors to lodge their claims in English in addition to Finnish and Swedish. Article 55(5) EIR 2015 provides that claims may be lodged in any official language of the EU, but a creditor may be required to submit a translation to the official language or language approved by the State of opening. According to the Finnish Bankruptcy Act, if necessary, translation into English is also possible. The costs of translation can be deducted from the creditor's disbursement if the translation of the claim letter is not provided in Finnish, Swedish or English.

Instead of the Official Journal, the information on the time and place of the creditors' meeting shall be entered into the insolvency register. At the discretion of the IP, in addition, the invitation can be published in the Official Journal or in any other appropriate manner, such as by means of electronic communication channels.

After opening bankruptcy proceedings, the normal rule is that an application for opening restructuring proceedings concerning the same debtor is inadmissible. However, the application may be examined in the situations referred to in Article 51 EIR (conversion of secondary insolvency proceedings). At the request of the IP of the main insolvency proceedings, the court may order that the bankruptcy estate should not sell more property of the estate than is necessary to avoid losses.

⁹ See HE 12/2017 vp.

The Finnish debt adjustment of a private person is now included in the scope of the Regulation (the debt adjustment proceeding is now mentioned in Annex A). Thus, some new provisions must be added to the Debt Adjustment Act referring to the Regulation concerning, e.g. where the centre of the debtor's main interests is located. In the reversed provision, there was a requirement that the debtor be domiciled in Finland. Also in debt adjustment proceedings, the English language is accepted.

The open access to the debt adjustment register is limited to cases in which the debt adjustment concerns debts incurred through business activities. The information concerning private persons in debt adjustment cases is public as such but available only from a governmental authority. The purpose of this is to protect the privacy of the debtor. This is possible because unknown creditors do not lose their disbursements in debt adjustment proceedings.

The new provisions of insolvency and debt adjustment registers enter into force 26 June 2018.

In bankruptcy proceedings, before deciding on participation in the group coordination, the IP shall consult the major creditors or the creditors' committee. In restructuring proceedings, the IP is not obliged to consult creditors or the debtor, and the IP can make the decision concerning participation independently.

The decision made by the group coordinator pursuant to Article 69(4) EIR 2015 can be challenged (within 30 days) in the district court that has decided to open the proceedings.

- **Detail**

In detail the Finnish bill adds the following regulation to their Bankruptcy Act (BA):

a) International jurisdiction of the court

Article 4 Examination as to jurisdiction

Chapter 7 Section 12 BA provides that the court decision of the opening of the insolvency proceedings shall indicate whether the international jurisdiction of the court is founded on Article 3(1) or Article 3(2) EIR. The RA incorporates the same kind of provisions (Sections 71 and 80). The same information shall be registered in the Bankruptcy- and Restructuring Register. Concerning the debt adjustment of private persons, the Debt Adjustment Register shall contain the information that the jurisdiction of the court is founded on Article 3(1) EIR.

Article 5 Judicial review of the decision to open main insolvency proceedings

No specific rules were introduced.

b) Publication and registration in registers of other Member States

Article 28 Publication in another Member State

Article 29 Registration in public registers of another Member State

Several sections in Chapter 22 BA remind the IP that he or she shall take care of the publication in other Member States as the recast EIR requires. There is a similar section in the RA (Section 71). Additionally, the separate Law on the publication in another Member State (581/2002) was amended so that, on the request

of the IP, a state authority (Oikeusrekisterikeskus) shall publish the publication in the Finnish Official Journal. In addition to the information provided in Article 28(1) EIR, the contact information of the court, the debtor, and the IP shall be published.

c) The relation between main and secondary insolvency proceedings

- | | |
|---------------|---|
| Article 36(5) | Approval of an undertaking in order to avoid secondary insolvency proceedings |
| Article 36(8) | Local creditors may apply for suitable measures |

No specific rules were introduced.

d) Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners¹⁰

- | | |
|---------------|---|
| Article 42(3) | Cooperation and communication between courts, in relation to a protocol |
|---------------|---|

No specific rules were introduced.

e) National provisions required in group coordination proceedings

- | | |
|---------------|---|
| Article 61(2) | Request to open group coordination proceedings |
| Article 64(3) | Objection by insolvency practitioners (Opt-out) |
| Article 69(1) | Subsequent opt-in by insolvency practitioners |

Chapter 14 Section 4 BA provides that the IP shall decide on the participation in group coordination proceedings (Article 61–77 EIR). Before that, the IP shall hear the Creditors' Committee or the biggest creditors. RA 8 § contains a same kind of provision with the difference that the IP in restructuring proceedings is not obliged to hear the creditors before deciding on the participation in group coordination.

f) Remedies in group coordination proceedings

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|---------------|--|
| Article 69(4) | Challenge of a subsequent opt-in |
| Article 77(5) | Decision on costs and share to be paid by each member of the group |

According to Chapter 23 Section 3 BA an appeal concerning the decision of the group coordinator (Article 69(4) EIR) can be made at the district court that considered the application for the opening of the group coordination proceedings. The appeal shall be made within 30 days from the day when the IP got the announcement of the decision of the coordinator. The same kind of provision is included in the RA (96 §).

France

• General

France's response to the EIR 2015 has come in the shape of Ordinance no. 2017-1519 of 2 November 2017, which was adopted by the Government in compliance with Article 38 of the Constitution and under the authority of Article 110 of Law no. 2016-1547 of 18 November 2016 ('Law of 2016'). The Ordinance amends

¹⁰ It is noted that Articles 41-44, containing these provision, are nearly similar to Articles 56-59 regarding similar rules for cooperation and communication between proceedings related to members of a group of companies.

the relevant parts of the Commercial Code, especially Book VI (insolvency), into which is inserted a new Title IX on 'Particular Provisions arising from Insolvency Procedures under [the Recast EIR]'. In addition, minor amendments have been made to Books VII (jurisdiction of the Commercial Courts) and IX (application to the overseas *départements* and territories). A law ratifying the terms of the Ordinance will be required before the Ordinance may come into force and must be tabled in Parliament within 6 months after the adoption of the Ordinance. In addition, the making of decrees fleshing out the details of the amendments and new procedures introduced by the Ordinance will also be necessary.

The Law of 2016 sets out the scope of the Ordinance as being to adapt the rules of jurisdiction and procedure applicable to the courts under the terms of the Recast EIR, It should also contain provisions on the determination of territorial jurisdiction, on the opening of secondary procedures and group coordination procedures, on the duty of cooperation and communication between courts and between courts and practitioners as well as on their nomination and content of their mandate, including the possibility for a practitioner to provide an undertaking so as to avoid the opening of secondary proceedings. It is required to also deal with the jurisdiction of courts within whose territory secondary proceedings are opened to determine the termination or modification of employment contracts. Finally, the Ordinance is intended to cover the possibility for notice to be made on appropriate registers and publication of information in relation to procedures open within France or in another member state of the European Union.

- **Detail**

In detail, the Ordinance adds the following provisions:

a) *International jurisdiction of the court*

Article 4 Examination as to jurisdiction

New Article L. 690-1 of the Commercial Code provides that a court may open, according to the case, either main proceedings (*procédure principale*) or secondary or territorial proceedings. Amendments to Article L. 728-1 stipulate that the Commercial Courts shall have jurisdiction over debtors exercising a commercial or craft activity in cases of main proceedings in respect of debtors who have an establishment on the territory of another member state, secondary or territorial proceedings within the meaning of Article 3 of the Recast EIR as well as secondary proceedings in respect of debtors where main proceedings have been opened in another member state. A court will have jurisdiction where the debtor's COMI is within its territory. Where the procedure is intended to be secondary or territorial proceedings, the competent court is where the debtor has an establishment within the meaning of Article 2(10) of the Recast EIR. As a matter of existing French law, all courts are required to examine the basis of their jurisdiction.

Article 5 Judicial review of the decision to open main insolvency proceedings

New Article L. 691-1 of the Commercial Code authorises the Public Prosecutor to form an appeal against a decision to open main proceedings on grounds of [a lack of] international jurisdiction. A creditor may also appeal or file a third-party objection (*tierce opposition*) on the same basis. This is without prejudice to any other rights these parties may have under the law to object or appeal the decision that has been made.

b) *Publication and registration in registers of other Member States*

Article 28 Publication in another Member State

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committed to the improvement of restructuring and insolvency laws and practices
in Europe, the European Union and its Member States

Article 29 Registration in public registers of another Member State

Despite the injunction in Article 110 of the Law of 2016, these topics were not the subject of express mention in the Ordinance.

c) The relation between main and secondary insolvency proceedings

Article 36(5) Approval of an undertaking in order to avoid secondary insolvency proceedings

New Article L. 691-2 of the Commercial Code permits the practitioner who has been appointed in main proceedings opened within French territory to make an undertaking to local creditors of an establishment belonging to the debtor situated in the territory of another member state. The existence of a valid undertaking permits the court under new Article L. 692-2-I to reject a request for the opening of insolvency proceedings, provided that the practitioner or non-disseised debtor (or: debtor in possession) can justify its compliance with the terms of new Articles L. 692-7 (agreement of the creditors) and 692-8 (approval by the court). The latter provides that the practitioner is required to file a petition with the President of the designated Commercial Court or High Court with jurisdiction over the territory where the debtor's establishment is situated with a view to having the undertaking approved. Without the approval, the undertaking does not come into force, although an application may still be made for the opening of secondary proceedings within 30 days of the approval being forthcoming.

Article 36(8) Local creditors may apply for suitable measures

42. New Article L. 691-3 of the Commercial Code allows local creditors of an establishment belonging to the debtor situated in the territory of another member state to object or to bring a request under the terms of Article 36(7)-(8) of the Recast EIR before the French courts in order to obtain adherence to the undertaking made by the insolvency practitioner, to ensure its compliance with the applicable law or to obtain any suitable measures/relief towards these ends. Any judgment of the court may be appealed by the IP, a non-disseised debtor, a petitioning creditor or the Public Prosecutor.

d) Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners

Article 42(3) Cooperation and communication between courts, in relation to a protocol

New Article L. 695-2-I requires the practitioner to inform the supervising judge (*juge commissaire*) of any requests for cooperation and communication s/he receives from a practitioner appointed in proceedings (involving the same debtor or another entity that is a member of the same group as the debtor) opened in another member state by virtue of Articles 41 and 56 of the Recast EIR. Permission of the supervising judge is required for authority to communicate confidential information to any practitioner in such proceedings, provided the debtor, any other practitioner appointed in the same proceedings, the monitors (*contrôleurs*) and the Public Prosecutor are notified of the request for communication. New Article L. 695-2-II requires the practitioner to submit for the supervising judge's approval any agreement or protocol that is proposed to be 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.

e) National provisions required in group coordination proceedings

Article 61(2) Request to open group coordination proceedings

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The Ordinance is ambiguous as to authority to open group coordination proceedings, the inference perhaps being that Articles 60(1)(c) and 61(1) of the Recast EIR are sufficiently clear to constitute the necessary authority. The Explanatory Report which accompanies it makes the same assumption when it notes that new Article L. 694-1, authorising an appeal in the case of requests for stays of asset sales under Article 60(1)(b) and (2) of the Recast EIR, directly addresses the situation of group coordination introduced by the Recast EIR. Although this reference could be more clearly articulated, the Explanatory Report goes on to state that the group coordination procedure is opened by any court which is seised of a matter involving one of the members of a group of companies and appoints a coordinator to carry into operation a common plan for members of the group facing insolvency procedures.

Article 64(3)	Objection by insolvency practitioners (Opt-out)
Article 69(1)	Subsequent opt-in by insolvency practitioners

New Article L. 694-6 states that the permission of the supervising judge is required before the practitioner may accept or refuse inclusion in any group coordination procedure. The same is also required in respect of any request to participate voluntarily in (i.e. opt-in to) a group coordination procedure.

f) Remedies in group coordination proceedings

Article 69(4)	Challenge of a subsequent opt-in
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New Article L. 694-6, noted above, also provides that the judge's decision is final and not open to appeal.

Article 77(5)	Decision on costs and share to be paid by each member of the group
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New Article L. 694-3 provides that the court, which has opened group coordination proceedings, is competent to adjudicate on any final statement produced in compliance with Article 77 of the Recast EIR. The terms of Article 663-1 (advance of costs by the Treasury) are expressly excluded. However, any practitioner participating in the group coordination proceedings who has raised an objection as well as by the non-disseised debtor and the Public Prosecutor may appeal the decision.

Germany

- **General**

The German government presented a draft law aiming at the realisation of the recast EIR in January 2017.¹¹ The law was adopted in the early summer of 2017 with some significant amendments regarding the ways to handle undertakings.¹² The 26 paragraphs of the law cover all the points mentioned in this report (and more).

- **Detail**

In detail, German law adds the following provisions:

a) International jurisdiction of the court

¹¹ See BT-Drucksache 18/10823.

¹² Art. 102c EGIInsO.

Article 4 Examination as to jurisdiction

§ 5 of the law stipulates that, if international jurisdiction could be an issue, any request of a debtor for opening insolvency proceedings in Germany shall contain information about the registered office of the debtor, the place of administration or any other information relevant for the conclusion that the debtor has its COMI in Germany. In addition, the debtor shall state where his assets are located and whether a petition for insolvency proceedings is already pending in another Member State.

Article 5 Judicial review of the decision to open main insolvency proceedings

§ 4 provides for the type of appeal and the applicable provisions of German law on civil procedure for the judicial review.

b) *Publication and registration in registers of other Member States*

Article 28 Publication in another Member State

Article 29 Registration in public registers of another Member State

§ 7 explains which court is competent to publish in accordance with Article 28. § 8 provides that these courts shall also receive requests for registration under Article 29. Publications and registrations are done in the German language. Foreign insolvency practitioners may be required to provide for official translations.

c) *The relation between main and secondary insolvency proceedings*

Article 36(5) Approval of an undertaking in order to avoid secondary insolvency proceedings

§§ 17-19 provide a rather detailed regulation about the procedure applicable for the approval of an undertaking by local German creditors. The insolvency practitioner in the main proceeding would initiate the voting procedure, which can be done electronically. He would inform all known creditors and asks them to file their claims for a determination of voting rights. Disputed claims would be allowed to vote. Only if the result of the vote depends on the admission of disputed claims, the court would need to decide about their admission. The IP would inform all local creditors about the outcome. Any court decision would be deferred to the moment specified in Art. 38(2), so no immediate court approval would be required to approve an undertaking. Any dissenting local creditor may file for secondary proceedings where the local court would have to decide about the approval and the binding force of an undertaking according to Art. 38(2).

Article 36(8) Local creditors may apply for suitable measures

§ 21 picks up the rules on jurisdiction in Article 38(7)-(9) by assigning a competent German insolvency court (Article 38(7) and (9)) or referring to the (foreign) court of main proceedings. There is no specific rule on a possible conflict in the content of decisions from the foreign and the local court. Following the general rules of procedural law, the former decision would prevail as far as it decides about a request (*res judicata*).

d) *Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners*

Article 42(3) Cooperation and communication between courts, in relation to a protocol

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The ways to conclude protocols and to communicate between courts are not specifically addressed in the law. Provisions similar to those in Art. 41, 42 do not exist. There are, however provisions for local group insolvencies similar to those in Art. 56, 57 in a second piece of legislation that enters into force on 21 April 2018: the new rules on German group insolvencies. New provisions in the German Insolvency Code (§§ 269a, 269b *InsO*) will set a legal basis for local courts and practitioners to communicate and cooperate when handling insolvent corporate groups as far as Art. 56, 57 are not applicable. For secondary proceedings, courts and IPs will have to solely rely on Art. 41, 42.

e) National provisions required in group coordination proceedings

Article 61(2)	Request to open group coordination proceedings
Article 64(3)	Objection by insolvency practitioners (Opt-out)
Article 69(1)	Subsequent opt-in by insolvency practitioners

§ 23 provides for a single approval requirement for all these requests. It states that the local insolvency practitioner would need the consent of the creditors' committee (see §§ 160, 161 *InsO*).

f) Remedies in group coordination proceedings

Article 69(4)	Challenge of a subsequent opt-in
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§ 25 specifies the judicial remedy available under German law for any insolvency practitioner in case of a rejected opt-in.

Article 77(5)	Decision on costs and share to be paid by each member of the group
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§ 26 specifies the judicial remedy available under German law for any insolvency practitioner in case of a disputed final statement of the coordinator.

Italy

- **General**

Existing insolvency law – set by Royal Decree 267 of 16th March 1942 and subsequent amendments – does not deal with European Union laws and, specifically, with EIR 2015, apart from a general recall to EU rules with regard to jurisdiction¹³ as well as to provisions regarding insolvency registers.¹⁴

¹³ Art. 9, which sets rules on internal jurisdiction but is considered applicable to international jurisdiction as well, states, at para. 4, that '[t]he previous provision applies except in those cases where an international treaty or European Union regulation applies'. This rule has been confirmed by artt. 14 and 29.2 of the draft delegated reform bill below mentioned. Reasonably the existence of two rules within the same reform bill which confirm the same principle is due to a lack of coordination between them, because of the short time made available to the appointed commissioners to prepare the draft reform bill.

¹⁴ Rules regarding insolvency registers set by Articles 24 and 25 EIR 2015 have been included in the legislative decree 27th June 2015, n. 83, converted in law 6th August 2015, n. 132, which amended art. 28 of Italian Insolvency law, establishing the so-called 'Registro dei fallimenti' (compulsory liquidation proceedings' registers). Furthermore, law decree 3rd May 2016, n. 59, converted in law 30th June 2016 n. 119 established 'registro elettronico delle procedure d'insolvenza e degli strumenti di gestione della crisi' (electronic register of insolvency proceedings and proceedings for facing crisis).

Law no. 155 dated 19th October 2017, effective from 14th November 2017, empowers the Italian government, within one year time (and, therefore, no later than 14th November 2018), to reform the current insolvency law. While doing so, this law requires the government to consider rules of the European Union and, specifically, EIR 2015, Recommendation 2014/135/UE of the European Commission of 12 March 2014, as well as the principles of the UNCITRAL Model Law on cross-border insolvency.

A draft delegated reform bill,¹⁵ prepared by a group of experts appointed by the Italian Ministry of Justice,¹⁶ sets specific general rules on cross-border issues regarding insolvency proceedings.

- **Detail**

The following comments cover the points mentioned in this report according to the existing rules as well as the said draft delegated reform bill.

a) *International jurisdiction of the court*

Article 4 Examination as to jurisdiction

According to existing Italian insolvency law, an order on jurisdiction is issued and the grounds on which jurisdiction of the court is asserted are expressed only in case jurisdiction is challenged by the court, possibly following challenge from one of the parties involved.¹⁷

Art. 14 of the draft delegated reform bill expressly states that the judgment opening insolvency proceedings states the grounds on which the jurisdiction of the court is asserted, and, in particular, whether the opened proceeding is a main, secondary or territorial proceeding. Such provision operates when EIR 2015 applies, and complies, therefore, with the content of recital 30 of EIR 2015.

Pending the proceeding for the opening of an insolvency proceeding, according to art. 15 of Italian Insolvency Court as well as to art. 45 of the said draft delegated reform, the Court oversees the admission and examination of evidence as requested by the parties or on motion of the court. Specifically, art. 45 of the said draft delegated reform bill allows the court to order the collection of information from public data bases as well as from public registries.

¹⁵ At the moment of finalising this report (1 March 2018) the draft is being examined by the Ministry of Justice and available on http://www.osservatorio-oci.org/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=69&Itemid=1024.

¹⁶ In view of the expected reform, on 5th October 2017, the Ministry of Justice appointed a commission of experts headed by Mr Justice Renato Rordorf. The number of members of the said commission has been extended on 16th November 2017. The chair of the commission submitted, on 22nd December 2017, to the Ministry of Justice a draft legislative decree entitled 'Codice della crisi e dell'Insolvenza' ('Crisis and insolvency code') together with other two complementary decrees.

¹⁷ Usually, however, a preliminary appeal to the Supreme Court of Cassation under art. 41 of the Italian Civil Procedure Code (*regolamento preventivo di giurisdizione*) is brought by the interested party pending the proceeding for the opening of an insolvency proceeding.

According to existing art. 15 of Italian Insolvency Law¹⁸ as well as art. 45 of the draft delegated reform – which allows only creditors who could be entitled to claim the opening the proceeding to take part to the proceeding – only debtor’s creditors who are part of the proceeding or who are entitled to claim the opening of the insolvency proceeding have the opportunity to present their views on the question of jurisdiction.

Article 5 Judicial review of the decision to open main insolvency proceedings

According to current Italian insolvency law, judicial review of the decision to open main insolvency proceeding on the ground of jurisdiction should be made within the proceeding set by art. 18 of current Italian Insolvency Law.

Article 14 of the draft delegated reform bill expressly faces this issue. Specifically, it entitles any interested party to challenge the decision to open main insolvency proceedings on the ground of jurisdiction; and clearly states that challenge takes place in accordance to art. 55 of the draft reform bill. § 4 provides for the type of appeal and the applicable provisions of German law on civil procedure for the judicial review.

b) *Publication and registration in registers of other Member States*

Article 28 Publication in another Member State

Article 29 Registration in public registers of another Member State

Both the current Italian insolvency law and the draft delegated reform bill do not provide for any specific provision regarding publication in Italy as well as registration in Italian registers of judgments opening the insolvency proceeding in a Member State different from Italy. Procedural rules about where and how to file such information, especially in cases where the debtor has no assets or other connection to that Member State are not provided for, as well, from the current Italian insolvency law or the delegated reform bill.

c) *The relation between main and secondary insolvency proceedings*

Article 36(5) Approval of an undertaking in order to avoid secondary insolvency proceedings

Under current Italian insolvency law, adoption of restructuring plans is regulated within the voluntary composition with creditors’ (*concordato preventivo*) proceeding. Whereas under existing Italian insolvency law uncertainties exist on which procedures for the adoption of restructuring plans under national law should apply, art. 14bis of the draft delegated reform bill states that:

- the IP of a main insolvency proceeding opened in a Member State different from Italy may propose in writing and in Italian an undertaking governed by Article 36 EIR 2015 to local creditors and regarding assets based in Italy; and inform any known local creditor, so that he can vote and, possibly approve it.
- voting rules as well as majorities requested shall be those set for the voluntary composition with creditors’ (*concordato preventivo*) proceeding.

The local creditors, as meant under a), are those who meet the requirements under Article 2(11) EIR 2015. No specific legislation has been proposed for requirements for the proposal. It should reasonably be made

¹⁸ According to such provision: ‘the court summons, by an order in the margin of the relevant petition, together with the debtor, the creditors who are party to the proceeding. The public authorities will also take part in those cases where they initiated the bankruptcy proceedings’.

in writing, unless it is given at a hearing called and results from the minutes of the hearing. According to section 124 of Italian insolvency law, which refers to a composition with creditors following the opening of an insolvency compulsory winding up proceeding, the proposal for a composition may be filed before claims have been lodged to those creditors who result from the debtor's accounting records. In Italian practice, it is felt that the IP in the foreign main proceedings could follow its own member state rules and decide to apply for publication of the proposal for an undertaking in the Official Gazette or in the Ministry of Justice web portal ('Portale delle Procedure Concorsuali del Ministero della Giustizia').

Article 36(8) Local creditors may apply for suitable measures

Art. 14bis of the draft delegated reform bill states that local creditors may apply to:

- The deputy judge (*giudice delegato*) of the main proceedings opened in Italy to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings under Article 36 (8) EIR 2015;
- the court (*Tribunale*) which has jurisdiction considering the place where the establishment of the debtor is located to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking, in accordance with Article 36(9) EIR 2015.

According to the said art. 14bis of the draft delegated reform bill, orders issued upon requests of local creditors may be challenged in accordance to ordinary Italian rules applicable to insolvency proceedings.

d) Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners

Article 42(3) Cooperation and communication between courts, in relation to a protocol

Article 14-quaer of the draft reform bill confirms the application of rules set by EIR 2015 on communication and cooperation among courts, IP's of insolvency proceedings and courts; and among IPs of insolvency proceedings opened in Member States to whom EIR 2015 applies; and clarifies that, when cooperating and communicating, courts and IP use the Italian language and, where this is not possible, the English language. Even if not expressly mentioned, it looks reasonable – based on practical experience - that the IP of an insolvency proceeding opened in Italy would act under the control of the deputy judge; whereas the deputy judge would act under the control or coordinate its activities with the insolvency court or, at least, the head of the relevant insolvency court.

e) National provisions required in group coordination proceedings

Article 61(2) Request to open group coordination proceedings
 Article 64(3) Objection by insolvency practitioners (Opt-out)
 Article 69(1) Subsequent opt-in by insolvency practitioners

No specific rules were introduced.

f) Remedies in group coordination proceedings

Article 69(4) Challenge of a subsequent opt-in
 Article 77(5) Decision on costs and share to be paid by each member of the group

CERIL is an independent non-profit, non-partisan, self-supporting organisation of persons committed to the improvement of restructuring and insolvency laws and practices in Europe, the European Union and its Member States

No specific rules were introduced.

Netherlands

• General

On 30 May 2017 a draft for an Act for the Realisation of the EU Insolvency Regulation (*Uitvoeringswet EU-insolventieverordening*) has been presented to the Dutch Parliament. It contains some 20 amendments to the Dutch Bankruptcy Act (DBA). Three or four of these are substantial. Others mainly have a technical character.

The Explanatory Memorandum¹⁹ to the draft Act contains a Correlation Table indicating the number of the respective article of the EIR 2015 and the indication A or B. 'A' means that a provision in the Regulation itself contains a complete regulation, whilst 'B' means that Dutch law, specifically the Dutch Bankruptcy Act, complies with the Regulation. In some cases the Correlation Table expresses in more detail respective provisions from the Dutch Bankruptcy Act.

In June 2017, the Netherlands Law Society has send a letter to parliament, suggesting amendments to the Bankruptcy Act, to which the Minister for Legal Protection has responded, whilst addressing queries from the political parties in the Parliament.²⁰ (Parliamentary papers 34 729, nr. 5 of 6 November 2017). The Act for the Realisation of the EU Insolvency Regulation has entered into legal effect per 23 December 2017.²¹ In the list below the indications A and B of the Correlation Table have been included.

• Detail

In detail the Dutch Act changes the DBA as follows:

a) *International jurisdiction of the court*

Article 4 Examination as to jurisdiction

Indication A. The Regulation in combination with the Dutch Act for Civil Proceedings should suffice.

Article 5 Judicial review of the decision to open main insolvency proceedings

Indication B, with reference to Articles 10 and 11 DBA.

b) *Publication and registration in registers of other Member States*

Article 28 Publication in another Member State

At the request of a foreign insolvency practitioner the registrar (*griffier*) of the Court in The Hague notifies without delay the information as required in Article 21 EIR 2000. The data have to be provided to the registrar in Dutch, English, German or French. In the draft of the Realisation Act the reference has been changed to Article 28 EIR 2015.

¹⁹ Parliamentary papers, Second Chamber, 2016/17, 34 729, nr. 3.

²⁰ Parliamentary papers, Second Chamber, 2017/18, 34 729, nr. 5.

²¹ Official Gazette 2017, 497.

Article 29 Registration in public registers of another Member State

Indication A.

c) The relation between main and secondary insolvency proceedings

Article 36(5) Approval of an undertaking in order to avoid secondary insolvency proceedings

Indication A.

Article 36(8) Local creditors may apply for suitable measures

No specific rules were introduced.

d) Provisions related to cooperation and communication between insolvency practitioners, between court, and between insolvency practitioners

Article 42(3) Cooperation and communication between courts, in relation to a protocol

For Articles 41-44 the indication A is given. In practice non-binding EU Cross-Border Insolvency Court-to-Court Principles and EU Cross-Border Insolvency Court-to-Court Communications Guidelines have been developed.²² By the Dutch Minister the JudgeCo Principles and Guidelines have been introduced as 'aids' in the organisation of cross-border cooperation between courts.²³

e) National provisions required in group coordination proceedings

Article 61(2) Request to open group coordination proceedings

In a new Article 5a(1) DBA it is provided that a request to open a group coordination procedure as referred to in Article 61 EIR 2015 can be made by an insolvency practitioner at the court referred to in Article 2 DBA.

Article 64(3) Objection by insolvency practitioners (Opt-out)

Article 69(1) Subsequent opt-in by insolvency practitioners

For both articles the indication A has been given.

f) Remedies in group coordination proceedings

Article 69(4) Challenge of a subsequent opt-in

Indication A.

²² In short, they are called JudgeCo Principles and JudgeCo Guidelines). For the text, see www.trileiden.eu/project/categories/eu-judgeco/. See B. Wessels (Ed.), EU Cross-border Insolvency Court-to-Court Cooperation Principles, European and International Insolvency Law Studies 1, The Hague: Eleven International Publishing 2015.

²³ See Parliamentary documents 2016/17, 34 729, nr. 3, p. 8, and 2917/18, nr. 5, p. 7 respectively.

Article 77(5) Decision on costs and share to be paid by each member of the group

In a new Article 5a(2) DBA it is provided that against a decision of the court referred to in Article 77(4) an insolvency practitioner involved in the group coordination procedure may, during the eight days after the day on which the decision was taken, appeal.

The appeal is lodged by request, to be submitted to the clerk of the court that is competent to hear the case, see Article 5a(3) DBA. Paragraphs 4 and 5 of the new Article 5a DBA provide:

'4. In the event of an oral hearing, the court orders the call of the appellant on appeal, the coordinator involved in the group coordination procedure and the interested parties who appeared in the proceedings at first instance.

5. The registrar shall immediately send a copy of the decision on the request referred to in the third paragraph to the court.'