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Title	Judicial Co-Operation in Economic Recovery (JCOERE)
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Publication date	2019
Original Citation	Lynch Fannon, I. and Gant J. L .L. (2019) 'Judicial Co-Operation in Economic Recovery (JCOERE)', Eurofenix, Winter 2018/19, pp. 28-29.
Type of publication	Article (peer-reviewed)
Link to publisher's version	https://www.ucc.ie/en/jcoere/publications/an-introduction-to-the-judicial-co-operation-in-economic-recovery-jcoere-project.html
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Download date	2026-11-06 06:28:59
Item downloaded from	https://hdl.handle.net/10468/10148

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Judicial Co-operation in economic recovery (JCOERE)

Irene Lynch Fannon and Jennifer L. L. Gant provide an update on INSOL Europe's involvement in the new EU-funded project



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Dramatic changes to insolvency law throughout the EU in the last couple of decades have refocused on rehabilitation and rescue instead of liquidation.[1]

Rescue frameworks have often introduced conflicts with traditional insolvency law principles such as equality of treatment of creditors, transparency and predictability.[2] This has become even more complicated due to the requirement for judicial cooperation in cross-border insolvency cases.[3]

Judicial co-operation has been the subject of several projects since the passage of the European Insolvency Regulation (EIR) in 2000. After the EU recommendation on *A New Approach to Business Failure*[4] in 2014, the introduction of the Recast EIR in 2015, and the pending introduction of a preventive restructuring Directive,[5] the topic has again found the spotlight.

New project

An exciting new project has recently been launched: Judicial Co-Operation supporting Economic Recovery in Europe (**JCOERE**)[6] in order to identify obstacles to judicial co-operation in the context of the implementation of the proposed preventive restructuring directive. This project is funded by the European Union's Justice Programme (2014-2020)[7] and is based at University College Cork, IRELAND, which is particularly appropriate given the Irish experience with restructuring



provided under the Examinership process which is modelled on Chapter 11 US Bankruptcy Code.[8]

JCOERE will focus on the strengthened co-operation obligations imposed on the judiciary in the Recast Regulation but will confine its enquiry to preventive restructuring processes. In addition to exploring challenges that procedural rules might present to co-operation, this project will focus on specific substantive problems that will likely become more acute in the restructuring context, such as the commencement of secondary proceedings to protect a creditor's interests in the face of the 'cram-down' provisions as envisaged by the Directive. The question of whether it is reasonable for a court in the second state to decline jurisdiction becomes more immediate in such circumstances. Radical restructuring processes may make co-operation more difficult which may, in turn, inhibit restructuring in the EU.

The obstacles envisaged are illustrated in *SIAC Ltd.*, in which an Irish company embarked on an Irish Examinership procedure where a particular creditor, the Polish Roads Authority (PRA), was not brought into the restructuring at all. This creditor was effectively treated as an 'out of the money creditor' due to outstanding litigation occurring between the debtor company and

the creditor in Poland. The creditor lodged an objection at the last minute in the Irish court and although the court heard this argument the creditor did not prevail. If the PRA had commenced insolvency proceedings in Poland, how would the obligations have played out under the Recast EIR?

With the introduction of more sweeping restructuring procedures throughout the EU under the proposed Directive, situations like SIAC are likely to become more common. The JCOERE project therefore addresses the implementation of co-operation obligations imposed on EU domestic courts by the Recast EIR in anticipation of the introduction of new preventive restructuring procedures.

The project team

The JCOERE Project will operate under the leadership of Professor Irene Lynch Fannon based at the School of Law, University College Cork, Ireland. The project will be run in partnership with INSOL Europe, The Universitá degli Studi Firenze, and the University of Titu Maoirescu in Bucharest. The project team includes judges, practitioners, and scholars specialised in cross-border insolvency law. Many team members also have previous involvement in previous projects focussed on judicial co-operation in cross-border insolvency.[10]

Specific issues to be addressed

The project will address specific issues identified from existing research. The first relates to the nature of the obstacles which may arise due to the complex rescue regime envisaged by the Directive. In a departure from previous projects, rather than identifying specific rules, the issues will be identified thematically, such as those that alter existing insolvency principles or give wide discretion to courts.

The project will also identify procedural rules that present obstacles to effective co-operation, such as constitutional requirements for public hearings for the administration of justice, which would interfere with the informal communication expectation present in the Recast EIR.[11]

A third issue relates to the fact that the Recast EIR positively asserts the importance of 'best practices for co-operation in cross-border insolvency cases' as a solution to the difficulties of efficient judicial co-operation. The project will explore the level of general awareness amongst the European judiciary of the best practice principles and guidelines.

Fourthly, the full and effective implementation of communication and co-operation provisions in cross-border insolvency law requires more than a mere knowledge of the letter of the law. For example, it has been observed that other levels of experience and skills are necessary to really complement communication and co-operation in practice.

Planned activities and outcomes

A number of funded activities will take place during the project period of two years starting in September 2018. A literature review and a consultation exercise will be undertaken. They will describe the legal frameworks in key Member States and in the proposed Directive, identifying doctrinal and procedural rules relevant to judicial co-operation obligations described in the Recast EIR. Key Member States include Ireland, Romania, Italy and the UK (for comparative purposes), with additional states such as Germany, the Netherlands, and Spain to be added where interesting issues are presented.

Judicial utilisation and awareness of best practice guidelines on co-operation adopted by European and international organisations described in the Recast EIR will be benchmarked. This will take place through the Judicial Wing of INSOL Europe, which will give it a broad geographical scope, while consultation with the Turnaround Wing will add a key practical dimension to the project.

There will also be ongoing dissemination of knowledge and information on co-operation through enhanced judicial and practitioner networks aiming to improve judicial co-operation in relation to business recovery in the EU.

Expected results include the better exchange of information on business rescue frameworks and best practise guidelines and increased support and capacity for real co-operation for judiciary and national authorities.

These outcomes will be achieved by a comparative analytical report on restructuring rules, a benchmarking report on current best practice guidelines, and a website with curated data. It is intended that this project will result in an easily accessible ongoing resource providing guidance for judges who engage in cross-border insolvency cases. ■

THE PROJECT WILL BE RUN IN PARTNERSHIP WITH INSOL EUROPE, THE UNIVERSITÁ DEGLI STUDI FIRENZE, AND THE UNIVERSITY OF TITU MAOIRESCU IN BUCHAREST

Footnotes:

1 Christoph Paulus *et al.*, "Insolvency Law as a Main Pillar of Market Economy - A Critical Assessment of the Greek Insolvency Law" (2015) 24 *International Insolvency Review* 1; Jan Adriaanse, "The Uneasy Case for Bankruptcy Legislation and Business Rescue", in Michael Veder and Paul Omar (eds), *Teaching and Research in International Insolvency Law: Challenges and Opportunities* (INSOL Europe 2015). ; Vanessa Finch: The Recasting of Insolvency Law (2005) 68 Modern Law Review 713.

2 H Eidenmuller, "A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the EIR and Beyond" (2013) ECGI *Working Paper Series in Law, Working Paper no. 199/2013*.

3 Articles 42, 46, 57 and Recital 48 of the European Insolvency Regulation (Recast) (EIR Recast).

4 Commission Recommendation Com (2014) 1500 final.

5 COM (2016) 723 final 2016/0359 (COD) 22.11.2016.

6 EU Commission Grant JUST-JCOO-AG-2017 800807.

7 JCOERE Project 800807 DG JUST-JCOO-AG-2017

8 Irene Lynch Fannon and Gerard Murphy, Corporate Insolvency and Rescue (Bloomsbury Professional 2012), Chapters 1, 12, 13 and 14.

9 Re SIAC Construction Limited and Ors and the Companies (Amendment) Act 1990 (as amended) [2014] IESC 25; Irene Lynch Fannon, "*Examinership: Approval of Schemes—Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as amended)*" Commercial Law Practitioner, January 2015.

10 For example, the Leiden JudgeCo Project (2013-2015) which developed best practice guidelines for co-operation between judges and between practitioners in cross-border insolvencies. In addition, see the CODIRE Project website at: <www.codire.eu>.

11 Anna Bandina, "Judicial Cross-Border Co-operation on Insolvency Matters Today and Tomorrow: Roundtable Report" in Omar and Veder (eds) (n 1) 64.