A few remarks on the relationship between the EIR and preventive restructuring frameworks

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Abstract:

Despite recent amendments, many provisions of the EIR still reflect the paradigm of traditional court-based, liquidation-oriented insolvency proceedings. The disruptive emergence of innovative forms of restructuring frameworks, whose characteristics mark a sharp departure from such paradigm, pose increasing challenges to the cross-border insolvency regime envisioned by the EIR. An example of such challenges -the debate on the recognition regime for confidential preventive restructuring frameworks under German Law- is illustrated, and some conclusions are drawn regarding the need for a European framework for the recognition of Third Countries preventive restructuring proceedings.

Keywords*:* Preventive restructuring – EU Restructuring Directive – recognition – StaRUG – Germany

A. The footprint of traditional insolvency law in the EIR

The two fundamental instruments of contemporary international insolvency law, the EIR and the MLCBI, are approaching their thirtieth anniversaries. The MLCBI was adopted by UNCITRAL in 1997. The EIR, meanwhile, is the direct descendant of the 1995 Brussels Convention on Insolvency Proceedings; although that convention never entered into force, its substantive provisions were seamlessly transfused into the EIR of 2000. In this sense, the core framework of the EIR has already reached its three-decade milestone. Furthermore, the historical trajectory of the EIR stretches back even further: as early as the 1970s, the European Communities had embarked upon the drafting of an ambitious multilateral convention on cross-border insolvency, envisioned as the necessary complement to the

1968 Brussels Convention on jurisdiction and the recognition of judgments in civil and commercial matters[1].

Over the course the last thirty years, the landscape of insolvency law has undergone rapid and radical transformations. The insolvency of consumers and public entities[2], as well as sovereign debt crises (topics once deemed secondary to corporate insolvency) have steadily gained prominence[3]. Concurrently, corporate insolvency law itself has been profoundly reshaped. The traditional insolvency proceedings, primarily oriented towards the piecemeal liquidation of the debtor's assets, have gradually been supplemented by novel legal frameworks. These new mechanisms possess distinctive structural characteristics that differentiate them sharply from their traditional counterparts.

First and foremost, the primary objective of these modern instruments is the preservation of the enterprise's going-concern value, its financial rehabilitation, and the safeguarding of employment, know-how, and the broader economic ecosystem (in essence, preserving the social value of the enterprise). To achieve these goals, such instruments place the onus on the autonomy of the debtor and the creditors to negotiate an optimal exit from financial distress. Rather than entrusting the fate of the enterprise to a public official bound by a rigid statutory agenda, these frameworks demand a collaborative effort among the debtor, the creditors, and all relevant stakeholders. They provide a flexible legal arena within which these actors are free to tailor the most appropriate solution to the specific circumstances of the case. Consequently, the regulatory design of these modern tools does not rigidly prescribe the treatment of creditors and contractual partners (both present and past). This is a stark departure from traditional proceedings, which rely on strict, mandatory rules governing pending contracts, the avoidance of transactions detrimental to the general body of creditors, the liability of directors for the mala gestio that precipitated the crisis, and the statutory priority of claims. In traditional settings, such rigid rules afford insolvency practitioners virtually no margin of manoeuvre, limiting them to a binary choice of whether to exercise certain statutory powers or not. Conversely, in the new frameworks, the debtor typically retains control over the day-to-day management of the business as a 'debtor-in-possession'.

1 On the history of the EIR, see Fletcher, 339 et seqq.; Bork/Mangano, 13 et seqq.; Wessels, 19 et seqq.

2 Insolvencies of municipalities are a prominent example: on the topic, see Vaccari/Coordes/Marique/Quinot (eds), *passim*

3 Chukwu, *passim*

The judiciary, for its part, assumes a significantly reduced role. Indeed, many of these modern processes lack a formal opening phase dedicated to verifying the substantive prerequisites for access (such as the debtor's subjective status and his financial and economic condition), nor do they necessarily culminate in a judicial order declaring the process successfully (...or unsuccessfully) concluded. Instead, the court largely remains in the background, intervening only when the delicate balance of opposing interests between debtor and creditors necessitates judicial oversight (for instance, to impose a stay on individual enforcement actions, to authorize the modification of contractual terms, or to approve transactions that could substantially alter the financial equilibrium of the enterprise).

Despite these profound substantive developments, the normative architecture of the EIR remains heavily imprinted with the characteristics of traditional insolvency proceedings. A superficial reading of the Regulation (particularly its original 2000 text) reveals an instrument essentially designed for that older paradigm. The EIR is replete with rules and legal concepts that are either entirely absent from modern restructuring frameworks or exist in a vastly altered state. Notable examples include the following:

- Article 1 originally stipulated that the EIR applied exclusively to collective insolvency proceedings which entailed the partial or total divestment of the debtor and the appointment of a liquidator.
- Articles 4 et seq. establish conflict-of-laws rules for core aspects of traditional proceedings, such as the effects of the opening of proceedings on current contracts (Article 4(2)(e) and Article 10), the effects on individual enforcement and pending lawsuits (Article 4(2)(f) and Article 15), the rules governing the lodging and verification of claims to be satisfied by the insolvency practitioner (Article 4(2)(g) and (h)), the rules on the distribution of proceeds (Article 4(2)(i)), the treatment of acts detrimental to the general body of creditors (Article 4(2)(m) and Article 13), and the rules on set-off (Article 4(2)(d) and Article 6).
- Article 5 carves out an exception for rights *in rem* held by third parties over assets located in a Member State other than the State of the opening of proceedings, ensuring that such creditors can satisfy their claims exclusively from the proceeds of those assets. This rule is highly characteristic of traditional liquidation proceedings resulting in the piecemeal sale of the business, often designed to reduce procedural costs by 'outsourcing' the liquidation of the affected assets.

- Articles 16 et seq. govern the recognition of judgments handed down throughout the lifespan of the proceedings, from the opening judgment (Article 16) to closure, and any intermediate decisions (Article 25). Furthermore, Articles 21 et seq. establish a minimum common regime for the publication of these decisions, mirroring the classical structure of national insolvency law. As noted, this tripartite categorisation of judicial decisions is a hallmark of traditional insolvency.
- Under the original Article 3(3), secondary proceedings were strictly limited to winding-up proceedings.
- Articles 39 et seq. are dedicated to defining the rights of foreign creditors to be informed of the opening of proceedings, primarily to allow them to lodge their claims for formal verification.

B. Accommodating the EIR to restructuring proceedings

To be fair, it must be acknowledged that the 1995 Brussels Convention and the 2000 EIR were already applicable to a range of insolvency proceedings that lacked some of the hallmarks of the traditional model. These proceedings, despite their peculiarities, could still be classified as 'traditional' insofar as they had, in some instances, been part of the legal landscape for decades. A prime example is the Italian concordato preventivo. Featured in the 1942 Bankruptcy Act (*Legge fallimentare*, which had, in turn, inherited it from collateral legislation to the earlier *Codice di commercio* dating back to 1903[4]), this procedure does not entail a total divestment of the debtor, does not employ avoidance actions to recover assets, and lacks a formal phase for the verification of claims[5]. On the other hand, its procedural skeleton strongly resembles a traditional insolvency proceeding: it commences with a judicial decree, progresses through a series of phases requiring constant judicial involvement, and concludes with a court judgment homologating the arrangement. Consequently, the provisions of the EIR could only be applied to it 'halfway'.

For a long time, such procedures were regarded (rightly or wrongly) as marginal or exceptional. However, due to a confluence of factors that need not be detailed here, they steadily gained prominence and ultimately served as the blueprint for the most innovative modern restructuring frameworks.

4 Provinciali, 980 et seqq.
5 Fabiani, 200 et seqq.

The EIR managed to withstand the disruptive impact of these new frameworks for a certain period, largely thanks to targeted adjustments introduced by the 2015 recast. The definition in Article 1 was broadened to encompass proceedings that do not require the debtor's divestment but merely impose forms of control or supervision over the debtor's management of the enterprise. Furthermore, the scope was extended to proceedings designed to address not only current insolvency but also the mere likelihood or imminence of insolvency. On the other hand, the restriction in Article 3(3), which limited secondary proceedings solely to winding-up proceedings, was abolished.

Most importantly, the structural integrity of the EIR remained intact even in the face of the restructuring frameworks adopted by Member States to transpose the Restructuring Directive (Directive (EU) 2019/1023)[6]. Even more radically than the pre-existing reorganization procedures, these new frameworks have shed the traditional characteristics of insolvency proceedings. One need only consider the *Restrukturierungsrahmen* introduced in Germany by the *StaRUG*[7]. These do not constitute a 'procedure' in the orthodox sense, but rather a modular toolkit that the debtor can combine according to the specific needs of the corporate rescue.

This toolkit includes stabilization measures (*Stabilisierungsmaßnahmen*) aimed at imposing a stay on individual creditor enforcement actions that could disrupt the financial balance of the enterprise. It also offers the debtor the option to place the creditors' approval of the restructuring plan within a judicial setting (*gerichtliche Planabstimmung*), the right to request a court ruling on preliminary legal questions relevant to the plan's approval (*Vorprüfung*), and the possibility (sometimes a necessity) to have the creditor-approved plan homologated by a court (*Planbestätigung*).

Evidently, there is no formal judicial order opening or closing a unitary procedure; there is no appointed insolvency practitioner holding the power to bring avoidance actions; and numerous other traditional elements are absent.

6 Reports on the transposition of the Directive in six EU jurisdictions (plus the UK) are contained in Koster/Boon/Vriesendorp, *passim*; and in the CERIL 2024-1 report on the transposition of the EU Preventive Restructuring Directive: <https://www.ceril.eu/news/ceril-statement-report-2024-1-on-the-transposition-of-the-eu-preventive-restructuring-directive-2019-1023>.

7 The implementation of *StaRUG* (short denomination for the *Unternehmensstabilisierungs- und -restrukturierungsgesetz*) has already resulted in very rich literature and commentaries: see e.g. Braun (ed.) and Morgen (ed.)

Despite these profound structural differences, the *Restrukturierungsrahmen* (at least in their 'public', 'non-confidential' form: see *infra*) have been included in Annex A of the EIR. Thus, the EIR applies to these innovative instruments, even though they are decidedly eccentric when measured against the traditional proceedings for which European cross-border insolvency law was originally conceived.

C. New challenges: preventive confidential and selective restructuring frameworks

Concurrently, the EIR is forced to confront a much more radical challenge, posed by innovative rescue frameworks possessing two specific characteristics that render their inclusion in Annex A highly problematic. These instruments (which are better conceptualized as 'frameworks' or 'pathways' rather than 'proceedings') are inherently non-public. Their execution remains confidential, involving only the debtor and a select group of key creditors (typically banks and strategic suppliers). Strictly speaking, they are also not collective, as the negotiations to forge a rescue plan do not involve the general body of creditors, but only those essential stakeholders whose financial concessions are critical to overcoming the distress.

One notable example to illustrate this phenomenon: the confidential *Restrukturierungsrahmen* under German law. A vigorous academic debate is currently unfolding in Germany regarding whether the effects produced by these frameworks (whether arising from acts executed by the debtor and creditors, from statutory provisions, or from judicial orders in the rare instances where court intervention occurs) can be recognized across Europe, and if so, through which legal instrument.

Regarding the *Restrukturierungsrahmen*, there is a consensus that the EIR only applies as long as such proceedings take form in their public form, while as long as they unfold confidentially, without notice being given to unaffected creditors, the EIR does not apply[8]. The debate therefore focuses on the so-called 'dovetail' principle (the mutually exclusive relationship

8 § 84 *StaRUG* provides that the publicity of the proceedings is subject to a request of the debtor only. Thus, unless the debtor requests otherwise, a *Restrukturierungsverfahren* remains confidential (*nicht öffentliches* or *vertrauliches Restrukturierungsverfahren*); similarly, § 44 *Restrukturierungsordnung* (Austria).

between the Brussels regime and the EIR)[9]: does the exclusion of these frameworks from the EIR automatically trigger the application of the Brussels I-bis Regulation, or is the dovetail principle inapplicable here, leaving the matter to national private international law?

Proponents of the first solution, such as Madaus, Skuradszun and Nijmens argue that these frameworks do not qualify as analogous proceedings under Article 1(2)(b) of Brussels I-bis[10]. Instead, they fall squarely within the realm of civil and commercial matters, specifically contract or company law[11]. Furthermore, they contend that the EIR is wholly unsuited for these tools[12]. They maintain, that applying the EIR would result in shortcomings due to the poor compatibility of some of its provisions (namely, article 8 EIR on third-parties rights *in rem*) with reorganization purposes[13], and it would pave the way for abusive secondary restructuring proceedings[14].

Conversely, Bornemann argues that while these frameworks fail to meet the Article 1 EIR requirements of publicity and collectivity, this does not automatically push them into the scope of Brussels I-bis[15]. They observe

9 Recital 7 to the EIR reads: 'Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012'. Contrasting arguments as to the meaning of recital 7 are set forth in the CERIL Report 2022-2 on Cross-Border Effects in European Preventive Restructuring (pages 11 and 12): <https://congressus-ceril.s3.amazonaws.com/files/6bf538e8a3514e9bad224a67e07bf73c.pdf?response-content-disposition=inline%3Bfilename%3D2022-2_CERIL_Report_on_Cross-Border_Effects_in_European_Preventive_Restructuring.pdf&AWSAccessKeyId=AKIAIUTTQ23AZYZKILZQ&Signature=gxxtWlLbGzY8dpyKG5ObWK%2BEzhA%3D&Expires=1780861854>

10 Madaus, < https://stephanmadaus.de/2020/10/02/auf-in-die-moderne-das-saninsfog-macht-den-restrukturierungsstandort-deutschland-2021-wettbewerbsfaehig/>; Skuradszun/Nijmens, 11

11 Skuradszun, ZIP 2019, 1501 (1503).

12 Skuradszun/Nijmens, 11-13

13 Skuradszun/Nijmens, 11-13

14 Skuradszun/Nijmens, 11-13 observe that debtors might opportunistically initiate main restructurings in jurisdictions with more lenient access requirements (namely, regarding the insolvency/distress-test), only to subsequently seek secondary restructurings in jurisdictions where statutory requirements are far stricter by relying on the prohibition of re-examination of the debtor's insolvency of article 34 EIR.

15 Bornemann, in Graf-Schlicker InsO art. 1 EuInsVO, mn. 46.

that the abovementioned 'dovetail principle' strictly applies to annex actions related to insolvency, not to the proceedings themselves (a nuance confirmed by the CJEU in certain rulings[16]). According to Bornemann, the historical context of the dovetail principle is enlightening: the bankruptcy exclusion in Article 1(2) of the 1968 Brussels Convention anticipated the adoption of a parallel convention whose scope was originally meant to cover all collective debt restructuring proceedings[17]. However, Article 1 of the EIR subsequently adopted a narrower definition that expressly requires publicity. This legislative gap is therefore intentional. Abel and Herbst similarly argue that publicity is indispensable to the very functioning of the EIR (as highlighted in Recital 13, and in the rules on insolvency registers and creditor information obligations), as it is essential for the system of preventing parallel proceedings and thwarting putative main proceedings[18]. Moreover, these confidential frameworks are undeniably insolvency matters in substance, as evidenced by the fact that their 'public sisters' are covered by the EIR[19]. Consequently, cross-border recognition can be granted on the basis of national procedural law (in Germany, under the ZPO rather than the InsO, a choice further justified by their modular nature that eschews classic insolvency structures[20]). Finally, the lack of automatic European recognition is not a systemic failure, but rather a calculated trade-off: it leaves the debtor with a strategic choice between the detriments of publicity (which afford protection to creditors) and the benefits of EU-wide recognition (which require the safeguarding of creditor rights).

D. (Cautious) conclusions

In conclusion, the domain of insolvency law is being enriched by new instruments at an accelerating pace, both within and outside the EU (just consider the English Part A1 moratorium).

16 ECJ 8.11.2012 - case C-461/11, ECLI:EU:C:2012:704 paras 23-27 - *Ulf Kazimierz Radziejewski* v *Kronofogdemyndigheten i Stockholm* (regarding a debt relief proceeding under Swedish administrative law); ECJ 10.9.2009 - case C-292/08, ECLI:EU:C:2009:544 - *German Graphics Graphische Maschinen GmbH* v *Alice van der Schee.*

17 Bornemann, in Graf-Schlicker InsO art. 1 EuInsVO, mn. 44.

18 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 33 and 34.

19 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 29 and 30.

20 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 38.

The EU finds itself at a crossroads, compelled to determine what regulatory stance to adopt (not least because the emergence of these novel instruments was, to a significant extent, catalysed by the EU's own legislative initiatives in the insolvency sector). The vibrant and ongoing debate both within the European academic community indicates that generally acceptable legal solutions are still maturing [21]. For the time being, a matter worth exploring is the way Member States are currently handling the recognition of the effects of third Countries' preventive restructuring frameworks under their national regimes. Novel and unprecedented solutions might emerge and be empirically tested in 'national laboratories', before the European Union embarks upon more ambitious interventions, regarding both intra-EU and extra EU restructurings. Interventions that might take the form of an expansion of the reach of the EIR, or of the Brussels I-a Regulation, or of both instruments (with the view of letting each one covering individual facets of these innovative proceedings), or, lastly, the creation of a totally new instrument.

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21 In the past months, the European Commission has established an expert sub-group composed of members representing the Member States and including some scholars based in Switzerland and the UK to discuss the revision of the Brussels Ia Regulation, including the scope of the exclusion of insolvency from its sphere of application: see Cuniberti, on the EAPIL Blog: <https://eapil.org/2026/05/22/commission-expert-subgroup-on-brussels-i-bis-holds-first-meeting/>. On the ongoing discussion reg arding> [last accessed on 7.6.2026]. Meanwhile, in December 2025 CERIL issued a statement calling the EU to seize the occasion of the upcoming EIR recast to finally clarify whether such frameworks fall under the remit of EIR; see CERIL Statement and Report on Reviewing the EIR 2015: <https://www.ceril.eu/news/reviewing-the-eir-2015> [last accessed on 7.6.2026].

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