

# CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW



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Re: **CERIL REPORT 2018-2 on  
Cross-border Restructuring and  
Insolvency post-Brexit**

Reporters: Professor Francisco  
Garcimartin and Professor Michael  
Veder<sup>1</sup>

*CERIL highlights the relationship between the EU and the UK after Brexit in the area of restructuring and insolvency law and seeks to formulate a position on the nature and content of a possible future instrument governing that relationship.*

Brexit is a serious and important development. In all fields of economic activity, the magnitude of the potential problems arising from separating four decades of unified markets is immense and the area of insolvency law is no exception. Brexit is very likely to have an impact on the recognition of UK insolvency proceedings in EU Member States. The same is true for the recognition of schemes of arrangement, which over the last number of years had more or less become the restructuring tool of choice for large European companies in financial distress. In the absence of applicable regulations or treaties, recognition will again become an issue that will have to be addressed under the domestic laws of the Member States. This creates a patchwork of approaches with sometimes uncertain outcomes. This is not in the interest of businesses and consumers with assets and/or liabilities spread out over the UK and the EU and that seek to restructure or enter insolvency proceedings.

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## **1 INTRODUCTION**

This report analyses the relationship between the EU and the UK after Brexit in the area of restructuring and insolvency law and seeks to formulate a position on the nature and content of a possible future instrument governing that relationship.

This Report focusses on the EIR Recast and how to fill the gap that will be left if, after Brexit, the EIR Recast will cease to apply as between the EU and the UK. The EIR Recast is not applicable to restructuring and insolvency proceedings concerning insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC and collective investment undertakings (see Art. 1(2) EIR Recast). These entities are subject to special arrangements and national supervisory authorities have wide-ranging powers of intervention. Accordingly, the EU legislators have laid down special rules (Directives) for those entities. For this reason, at this stage, we prefer to focus on the impact of Brexit on the EIR Recast and postpone the analysis of the impact of Brexit on financial entities to a future phase, while recognizing that Brexit may have a similar impact on those entities.

## **2 BRIEF DESCRIPTION OF THE CURRENT SITUATION**

### **2.1 EIR Recast**

Currently, i.e. pre-Brexit, the relationship between the UK and the other EU members States in the field of insolvency and restructuring proceedings is governed by the EIR Recast. In addition to the establishment of uniform rules on jurisdiction and applicable law, that instrument ensures the mutual recognition of insolvency and restructuring proceedings as well as the recognition and enforcement of insolvency-related judgments. Recognition of restructuring and insolvency proceedings is reciprocal and automatic in nature. Member States may only refuse to recognise insolvency proceedings opened in another Member State or refuse to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles of the constitutional rights and liberties of the individual. Finally, the cooperation and communication between both insolvency practitioners and courts is also regulated by the EIR Recast. The rules on coordination and cooperation cover both main and secondary proceedings against the same debtor and insolvency proceedings against members of the same group of companies opened in different States. In general terms, the framework set by the EIR Recast promotes the effective and efficient operation of cross-border insolvency proceedings and therefore constitutes a key element to promote the proper functioning of the internal market.

*Illustration:* a company, incorporated in England and whose centre of main interests (COMI) is situated in London, has an establishment in Luxembourg. Its main economic activity is the rental of immovable property in Luxembourg. Pre-Brexit, English courts have jurisdiction to open main insolvency proceedings, which will be recognised in Luxembourg with no further formalities under the EIR Recast. English Law applies to the insolvency proceedings, including their effects, conduct and closure, unless other rules contained in the EIR Recast state otherwise. Thus, for example, the effects of the English insolvency proceedings on the contracts conferring the use of the immovable property are governed by Luxembourg Law, as the law of the Member State where that property is located. Furthermore, Luxembourgish courts may open secondary proceedings which encompass the assets located in Luxembourg. The British and Luxembourgish proceedings will be coordinated and insolvency practitioners and courts will cooperate under the framework of the EIR Recast.

## **2.2 Schemes of Arrangement**

The UK Companies Act 2006 (Sections 895-901) lays down the rules governing schemes of arrangement. In practice, schemes of arrangement have proven to be a very useful mechanism in cross-border rescue and reorganisation of financially distressed firms. They allow a company to obtain a compromise or arrangement with its creditors or a class of them, even when the company is being wound up or an administration order is in force. In addition to other conditions, the compromise or arrangement is sanctioned by the court when a majority in number representing 75% in value of the creditors, or a class of them, approve it. And once the scheme of arrangement is sanctioned by the court it becomes binding on all creditors, or the corresponding class of them, dissenting creditors included.

The legal regime applicable to the cross-border effects of English schemes of arrangement is, however, unclear. Schemes of arrangement are outside the scope of application of the EIR Recast. They do not qualify as insolvency proceedings for the purpose of this Regulation (see Recital 16) and are not mentioned in Annex A. The impact of Brexit on the recognition of schemes of arrangement in EU Member States will therefore depend, mainly but not only, on the impact of Brexit on other EU instruments, such as the Brussels I Regulation (recast) or the Rome I Regulation.

It has been argued that the Brussels I Regulation (Recast) should apply to the recognition of schemes of arrangement. Since (i) the intention of the EU legislator is to avoid any loopholes between these two instruments (ie, the EIR Recast and the Brussels I Regulation, see recital 7 of the former), (ii) and schemes of arrangement do not fall within the scope of the EIR Recast, there are reasons to conclude that schemes of arrangement should fall within the scope of the Brussels I Regulation. The recognition of the court order sanctioning a scheme of arrangement – crucial to bind dissenting creditors – as a judgment within the terms of the Brussels I Regulation (Recast) is pivotal in this approach.

Alternatively, it has also been argued by some that the Rome I Regulation may apply to the recognition of the contractual consequences of a scheme of arrangement insofar as this institution entails an amendment or novation of a contractual relationship. Article 12 Rome

I Regulation indicates that the law governing a contract covers the various ways of extinguishing the obligations deriving from it, and It has been argued that a scheme of arrangement could be one of these ways of extinction. According to this interpretation, an English scheme of arrangement could be recognised in other Member States as long as the contractual obligations affected by such scheme of arrangement were governed by English law.

### **3 IMMEDIATE FUTURE POST-BREXIT**

#### **3.1 A 'no deal' Brexit framework**

After Brexit, the EIR Recast will cease to apply between the UK and the EU. The restructuring and insolvency of companies whose COMI is located in the UK will fall outside the scope of application of the EIR Recast. Each of the Member States, like the UK, will apply its own domestic laws to determine if and to what extent its courts have jurisdiction to open insolvency proceedings in respect of such companies and which law will apply to the effects of such proceedings. Proceedings opened in the UK will not benefit from automatic recognition in the EU. Similarly, insolvency and restructuring proceedings opened in an EU Member State will not benefit from automatic recognition in the UK. UK courts and courts of the Member States will each apply their national rules on jurisdiction, applicable law, recognition and enforcement of judgment and cooperation and coordination of insolvency proceedings.

We note that, according to the European Union (Withdrawal) Act 2018, any direct EU legislation which was operative on the date of Brexit shall, in principle, continue to exist as part of the UK's domestic law. However, on 13 September 2018 the UK government issued a Guidance Note on the effects of a 'no deal' Brexit on, inter alia, insolvency: "Handling civil legal cases that involve EU countries if there's no Brexit deal". In this Guidance Note the UK government observes:

"The majority of the Insolvency Regulation, which covers the jurisdictional rules, applicable law and recognition of cross-border insolvency proceedings, would be repealed in all parts of the UK. We would retain the EU rules that provide for the UK courts to have jurisdiction where a company or individual is based in the UK, and the law will ensure that insolvency proceedings can continue to be opened in those circumstances. But after exit, the EU Insolvency Regulation tests would no longer restrict the opening of proceedings, and so it would also be possible to open insolvency proceedings under any of the tests set out in our domestic UK law, regardless of whether (or where) the debtor is based elsewhere in Europe.

UK insolvency practitioners would need to make applications under an EU country's domestic law in order to have UK orders recognised there. In certain circumstances, some EU countries may not recognise UK insolvency proceedings, for example if that would prevent creditors from taking action against the assets held in that country. Where appropriate, insolvency practitioners may wish to take professional advice on the prospects of successfully obtaining recognition for a UK insolvency order in an EU country. EU insolvency proceedings and judgments would no longer

be recognisable in the UK under the EU Insolvency Regulation, but may be recognised under the UNCITRAL Model Law on Cross-Border Insolvency, which already forms part of the UK's domestic rules on recognising foreign insolvencies.”

In the exceptional case of the existence of a bilateral agreement, such agreement would be applicable again. According to the list of treaties contained Article 85 EIR Recast, that only happens with the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934.

The step back is evident. The result of the EIR Recast falling away between the EU and the UK will be an uncoordinated and unaligned patchwork of domestic laws. This may give rise to conflicting solutions as regards jurisdiction and applicable law. Furthermore, the (effects of) recognition of UK insolvency proceedings in the EU would depend on the domestic law in the respective Member and vice versa. The extent to which parallel proceedings can be coordinated equally depends on domestic national law and, consequently, is not ensured.

The above analysis shows four key-points of a hard Brexit:

(i) *International jurisdiction*

When the debtor's COMI is located in the UK, UK courts and EU courts will not apply the EIR Recast but national law. That may give rise to conflicting solutions if that debtor has assets or carries out activities in other Member States and therefore this may provoke positive or negative conflicts of jurisdiction: main insolvency proceedings may be opened in different States or in no one.

Other issues concerning jurisdiction may also be problematic in the context of a hard-Brexit, in particular the scope of the jurisdiction of the insolvency courts. According to the EIR Recast, this instrument determines the international jurisdiction for actions deriving from insolvency proceedings and which are closely linked with them (Art. 6 EIR Recast). But this only applies within the scope of this instrument. National laws may follow a different approach. Thus, for example, the court of a Member State may conclude that it has jurisdiction to deal with an insolvency-related action under Article 6 EIR Recast, whereas a UK court may conclude otherwise. Two parallel proceedings with possible contradictory judgments are perfectly imaginable.

(ii) *Applicable law*

Certainly, the law of the State of the opening of the proceedings governs the insolvency proceeding and their effects. Brexit will not affect this general principle. Conversely, issues unrelated to insolvency law remain governed by general civil and commercial rules even if they arise within the context of an insolvency proceeding, for instance, validity of contracts. A choice for English Law as the law governing a contract will not be affected by Brexit even if a dispute arises in the context of an

insolvency proceeding. Note that EU courts will apply the Rome I Regulation even when the law applicable to the contract is the law of a third country.

However, a hard-Brexit may affect the exceptions to the law of the State of the opening of the insolvency proceeding and the relationships between general civil and commercial rules and insolvency rules. Thus, for example, under the EIR Recast the effects of the opening of insolvency proceedings on an executory contract, e.g. the insolvency practitioner's right to terminate it in the interest of the insolvency estate, is governed by the *lex fori concursus* not by the *lex contractus* (unless an exception applies), whereas national conflict of law rules may conclude otherwise and apply to that right the same law that governs the contract.

The EIR Recast also contains uniform rules other than conflict of laws rules. Thus, for example, the return of satisfaction obtained by a creditor in a Member State other than the State of opening of the proceeding (Art. 23(1) EIR Recast) will no longer be guaranteed by the EIR Recast between the UK and the EU. The same happens with respect to the honouring of an obligation to a debtor instead of the insolvency practitioner (Art. 31(1) EIR Recast). Finally, the uniform rules about information to foreign creditors and lodging of claims of the EIR Recast fall away after Brexit. Standard forms which are very useful in cross-border cases will not be operative in the relations with the UK.

(iii) *Recognition and enforcement*

Brexit implies that EU judgments will be recognised in the UK under its domestic laws or, where applicable, bilateral treaties. At the same time, UK judgments on winding up, administration, bankruptcy, sequestration or voluntary agreements and the like will be recognised in the EU in accordance with the domestic laws of each Member State. Domestic law will also govern the recognition of the appointment and powers of the insolvency practitioner, liquidator, supervisor, administrator, official receiver, trustee, provisional liquidator or judicial factor. That situation is clearly a step back with regard to the current regime. Domestic law may not contain clear or specific rules for the recognition of foreign insolvency or restructuring proceedings. When domestic law does contain specific rules, these rules are usually more restrictive than the rules laid down by the EIR Recast which only contains a control of public policy. Apart from the UK, only 3 other Member States of the European Union have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency. Some domestic laws might contain rules of recognition based on the reciprocity principle. In accordance with that, the judgment from a State is recognised only if that State also recognises judgments given by a court of the State of recognition. Fortunately, the precedents of cooperation between the EU and the UK may be useful to reduce the impact of such a clause of reciprocity. Anyway, Brexit will usually imply recognition under some form of *exequatur* proceeding, which will necessarily entail procedural delays, whereas the EIR (original version and Recast) successfully

abolished *exequatur* and was based on an automatic recognition with no further formalities.

The EIR Recast in principle extends the effects that an insolvency proceeding has under the *lex concursus* to other Member States. After Brexit, it is no longer guaranteed that an insolvency proceeding will produce the same effects in the UK and the EU. Recognition of insolvency proceedings and the question whether recognition entails the extension of the effects of the *lex concursus* to the jurisdiction where recognition is sought, depends on the domestic laws of the State of recognition. Other issues concerning the recognition of insolvency proceeding might also be problematic, such as the exercise by insolvency practitioners of powers granted by the law of the State of opening or the publication in other States of the decision opening the insolvency proceedings or its registration in public registers. The valuable interconnection of insolvency registers between the UK and the EU provided for by the EIR Recast will, unfortunately, also be lost with Brexit.

(iv) *Cooperation between insolvency practitioners and courts*

After a no deal Brexit, it might be possible to open insolvency proceedings in respect of the same debtor in the UK and in the EU: both main proceedings or main and secondary proceedings. Even in the second case, the coordination of these proceedings is very important to ensure an effective and efficient outcome, but unfortunately will be at risk. Furthermore, the conditions for the opening of secondary proceedings may be different from those laid down by the EIR Recast. For instance, the opening of a local proceeding prior to main proceedings will no longer be restricted to specific requirements, such as that a main proceeding cannot be opened or that local proceedings are requested by local creditors or local public authorities. Also, the possibility of avoiding secondary proceedings through a unilateral undertaking given by the representative in the main proceeding may cease to exist.

Furthermore, after a hard-Brexit, the cooperation and communication between UK and EU insolvency representatives and courts will be dramatically affected as the framework for the coordination of parallel proceedings set by the EIR Recast falls away.

The same holds true, *mutatis mutandis*, in cases of corporate groups, i.e. in case of cooperation between main proceedings opened in respect of different members of the same group of companies. Although the EIR Recast is based on an entity-by-entity approach, practice has shown the need for cooperation when the debtors belong to the same group. The EIR Recast has recognized the relevance of this cooperation at a corporate group level. Unfortunately, these mechanisms of cooperation could be lost by a hard-Brexit.

### **3.2 Effects of UK proceedings in the EU**

The recognition of UK restructuring or insolvency proceedings in the EU will depend on the domestic laws of each Member State. In this respect it is important to note that, as already mentioned above, only a few of the EU member States have adopted the UNCITRAL Model Law. The result will be a fragmented situation.

*Illustration:* Let's imagine that a UK company, with its COMI also in the UK, has two establishments in the EU, one in Italy and another in Spain. The recognition of the UK insolvency proceedings in Italy and Spain will be governed respectively by the Italian and Spanish domestic national rules. That provokes a fragmented solution. Furthermore, the opening of restructuring or insolvency proceedings in Italy and Spain concerning the establishments in either of those Member States is not governed by the EIR Recast, since the debtor's COMI is in a third country. Neither the cooperation with British practitioners nor the cooperation between Italian and Spanish representative are regulated by EIR Recast.

### **3.3 Effects of EU proceedings in the UK**

And the same holds true with regard to restructuring or insolvency proceedings opened in EU member States vis à vis the UK, i.e. the recognition of these proceedings will be governed by UK domestic law. It is true that recognition and assistance in the UK will be facilitated by the fact that the UK has adopted legislation based on the UNCITRAL Model Law. A point of concern may, however, be the application of the Gibbs-rule – briefly stated: English law governed debt cannot be compromised in a proceeding governed by foreign law - to foreign restructuring plans that also seek to restructure English law governed debt. Under the EIR Recast (and instruments like the Brussels I Regulation) the Gibbs rule may not be applied, which facilitates the effectiveness of foreign restructuring plans in the UK.

*Illustration:* Let's imagine a Dutch company has two establishments, one in Ireland and another in the UK. The opening of insolvency proceedings in respect of that company in the Netherlands (main proceedings) and Ireland (secondary proceedings) is governed by the EIR Recast since the debtor's COMI is located in the EU. The effects in the UK are to be determined under rules of domestic law, which may make a global and consistent treatment of the insolvency of the debtor, either its restructuring or liquidation, cumbersome. Note that even if the UK courts and insolvency practitioners are willing to cooperate with their EU counterparts under the UK's domestic laws, that may not necessarily be the case for the courts and insolvency practitioners in the Member States of the EU (in the absence of a legal obligation, as included in the EIR Recast). This introduces a significant element of asymmetry that will have a negative impact in practice.

### **3.4 Pending insolvency proceedings**

It is important to keep in mind that there will be immediate problems in respect of insolvency proceedings that are pending at the time of Brexit. What happens with insolvency proceedings that commenced before Brexit but lead to the courts issuing decisions afterwards? This should be addressed by transitional arrangements. The

uncertainty and the need for transitional arrangements is illustrated by the recent decision in the insolvency of the Nortel group of companies not to extend the term of office of the administrators beyond the date of Brexit at this time. The transitional arrangements should also provide a solution for other matters that may be affected by Brexit, such as (i) cases where an undertaking within the meaning of Article 36 EIR Recast has been given by an insolvency practitioner in main proceedings opened in a Member State, but not yet approved by known local creditors in the UK or vice versa, (ii) cases where the EIR Recast is decisive for the allocation of rights, such as assets situated by applying the definition of Article 2, or (iii) cases where the direct applicability of national laws or bilateral treaties triggers retroactive effects.

The issues that may arise during the transitional period may become especially difficult. In general terms, it is very recommendable that proceedings commenced before Brexit but not finished afterwards continue to be governed by EIR Recast until their closure. The Commission “Position Paper on Judicial Cooperation in Civil and Commercial matters”, TF50 (2017) 9/2, of 12 July 2017, has already advanced this possibility. The first draft of the Withdrawal Agreement between the UK and the EU also envisages that approach. Those proceedings commenced under the principle of mutual trust and the application of this principle may be extended in time. This solution should not give rise to particular concerns in relation to the jurisdiction and recognition rules. Since the court opening the insolvency proceeding applied a common rule of jurisdiction, any control of jurisdiction is not necessary at the moment of the recognition of its judgment in other Member States. It could be sufficient that the courts of the State of recognition (UK or a Member State) simply checked that the court of origin (a Member State court or a UK court) applied the EIR Recast.

The same holds true with regard to the applicable law. The expectations of debtors and creditors about the effects of insolvency proceedings shall remain fixed at the time of the opening of the proceeding. At that moment the EIR Recast was applicable and it should continue to apply even if at the time of Brexit the insolvency proceeding is not finished.

Finally, it is very important to extend mutual trust in matters of cooperation. Cooperation and communication between insolvency practitioners or between insolvency courts or between practitioners and courts are a great achievement of the EIR Recast. An abrupt rupture of this cooperation may be avoided by extending that trust and the application of the EIR Recast to insolvency proceedings pending at the time of Brexit.

Certain more specific issues may also be of interest:

- (i) *Synthetic secondaries and the undertaking given by the insolvency practitioner*
- (ii) *Undertakings*

As already mentioned above, the EIR Recast envisages that the practitioner in the main proceeding may offer an undertaking to local creditors in order to avoid the opening of secondary proceedings in another Member State (Art. 36). The

undertaking shall be approved by known local creditors in accordance with the qualified majority and voting rules applicable in the Member State where secondary proceeding could have been opened. Issues may arise from undertakings given by insolvency practitioners appointed in an EU main proceeding that, at the time of Brexit, is waiting to be voted on by local creditors in the UK, and vice versa.

(iii) *Transitory localisation of assets*

In proceedings regulated by the EIR Recast, the localisation of assets is supposed to be clear and certain under the uniform rules incorporated in Article 2 and is to be determined at the time of the opening of the proceeding, which is also defined in Article 2. The establishment of common rules on the localisation of assets is very important, for example, in order to determine the assets belonging to the main proceeding and secondary proceedings respectively. Also such rules are important in order to ascertain whether a creditor can invoke the protection granted to rights *in rem* and reservation of title under Articles 8 and 10. Let us imagine, for example, that main insolvency proceedings are opened in an EU Member State before Brexit and territorial proceedings are opened in the UK afterwards. Conflicts may arise if English courts apply different rules on the localisation.

(iv) *Retroactive rules*

It is not clear that the national laws or bilateral treaties applicable after Brexit can trigger retroactive effects in relation to a proceeding commenced according to other rules, particularly, the EIR Recast. Many transitory dispositions of these national laws or bilateral treaties are not clear and were not designed for a situation so particular as Brexit. For example, it is not clear what will happen to transactional avoidance claims initiated before Brexit.

(v) *COMI migration*

The application of the presumptions in favour of the debtor's COMI may be doubtful when the registered office of legal persons or the place of business of businessmen is moved from the UK to the EU within the 3-month period prior to the request for the opening of insolvency proceedings and during this critical period Brexit takes place. The same can be said regarding the movement of the habitual residence of consumers within the 6-month period prior to the request. According to its verbatim text, the EIR Recast disapplies those presumptions only in cases of movement from a Member State to another Member State.

In any event, and even if the solution is incomplete, it is important to include transitional rules, if possible, in any agreement between the EU and the UK for the transitional period

and to clarify that insolvency proceedings opened under the EIR Recast will continue to be governed by this instrument and benefit from the application of its rules, in particular with regard to recognition of insolvency proceedings and coordination and communication between insolvency proceedings.

### **3.5 Other Instruments**

Not only will Brexit terminate the application of the EIR Recast as between the UK and the EU Member States, it will also terminate the application of the Brussels I Regulation in relation to the UK. Also the Rome I Regulation will cease to be directly applicable in the UK. As explained earlier, both regulations may also be of relevance to the efficacy of a scheme of arrangement in an EU context.

Insolvency and insolvency-related judgments are enforced in accordance with the procedural rules laid down by the Brussels I Regulation (see article Art. 32 EIR Recast). Furthermore, and according to some scholars, the Brussels I Regulation may be applicable to other decisions not based directly on insolvency law or not closely linked to insolvency proceeding, such as the (court order sanctioning the) scheme of arrangement. In this way, judgments and decisions obtain direct recognition and enforcement with no further formalities, unless a refusal of enforcement is requested by the defendant (Article 46). After Brexit, this privileged mechanism of enforcement based on mutual trust will be deactivated.

The impact of Brexit on other instruments than the EIR Recast is particularly relevant with respect to the scheme of arrangement. The following key-issues should be pointed out.

(i) *Jurisdiction for schemes of arrangement*

Obviously, after Brexit, English courts will not directly apply the Brussels I Regulation to determine their jurisdiction in relation to schemes of arrangement for non UK companies and therefore they will assume jurisdiction under their national rules. Conversely, Member States will usually apply the jurisdictional rules of the EIR Recast to insolvency and restructuring proceeding insofar as they are included in Annex A.

(ii) *Recognition of schemes of arrangement*

In case of a no deal Brexit, the Brussels I Regulation Recast will no longer be applicable as between the UK and the EU and therefore cannot provide a basis for the recognition of an English decision sanctioning a scheme of arrangement. Recognition of schemes of arrangement in the EU may still be possible on the basis of rules of domestic private international law in the Member States of the EU or, as argued by some, on the basis of the Rome I Regulation.

## **4 APPROACHES**

There are, in principle, three approaches to deal with a post-Brexit scenario: (i) doing nothing (par. 4.1), (ii) a unilateral approach (par. 4.2), and (iii) a bilateral approach (par. 4.3).

### **4.1 Doing nothing**

One possible option would be to do nothing, which would imply that the rules of domestic private international law of each State would apply to cross-border restructurings and insolvency proceedings. As observed earlier, this would lead to a patchwork of divergent, unaligned and fragmented rules in the field cross-border insolvency and restructuring between the EU and the UK. This option is simply not recommendable.

Conflicts of jurisdictions may arise in cases when, for instance, the debtor's COMI is in the UK but the debtor has assets in Member States of the EU. Furthermore, conflict of law rules would differ, and the effects of insolvency proceedings could be treated in a very different and conflicting way from one country to another. Furthermore, regarding recognition and enforcement, UK insolvency proceedings may be recognised in one Member State but not in another or under different conditions and with different effects. Similar risks may exist with respect to the recognition of EU proceedings in the UK, notwithstanding the implementation in the UK of the UNCITRAL Model Law on Cross-Border Insolvency. Finally, the advanced and common framework provided for in the EIR Recast for cooperation and communication between insolvency practitioners and courts would disappear. That is not recommendable in case of a main proceeding that is combined with one or more territorial proceedings in parallel, but it is particularly pernicious in cases of corporate groups.

Doing nothing would reduce legal certainty and create incentives for the parties to transfer disputes or assets from one country to another, seeking to obtain a more favourable legal position ("forum shopping"), or to realise their individual claims independently and regardless of the costs which this may entail for the creditors as a whole or to the going concern value of the debtor's business. The result would clearly harm the economic activity of EU and UK companies and persons.

### **4.2 Unilateral approach**

A second option is to incorporate the UNCITRAL Model Law at the EU level. Assuming the competence of the EU to establish such a uniform regime, this would partially eliminate the risks associated with divergence and fragmentation. Certainly, this option is better than the first one. The relationship between the EU and the UK would – to a certain extent – be subject to common rules, i.e. the UNCITRAL framework.<sup>2</sup> However, the UNCITRAL Model Law on Cross-Border Insolvency offers a rather outdated and, in comparison with the EIR

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<sup>2</sup> Note that complete harmonisation would only be achieved if the EU adopts a Regulation based on the UNCITRAL Model Law, directly applicable in all Member States. However, at this stage, even if the adoption of such a EU Regulation were considered desirable, it does not seem realistic.

Recast, limited and less developed framework for the treatment of cross-border cases. In our view the enactment of EU legislation based on the UNCITRAL Model Law on Cross-Border Insolvency should therefore be preceded by efforts to modernise and reinforce the system of the UNCITRAL Model Law on Cross-Border Insolvency, for example, by including conflict of laws provisions (possibly mirroring those incorporated in the EIR Recast), rules on the recognition of certain insolvency related decisions (e.g. in avoidance actions or directors' liability and disqualification cases) and the like.

### 4.3 Bilateral approach

A third option, more ambitious but in our view preferable, would be to develop a bilateral agreement between the EU and the UK in the field of insolvency and restructuring. We note that bilateral agreements between individual Member States and UK are not an option since the Member States have transferred competence to the EU in the area of cross-border insolvency and restructuring. Obviously, such bilateral agreement would mirror, with certain safeguards, the structure and content of the EIR Recast, i.e. it would be a "parallel instrument". The Lugano Convention, which basically extends the framework of the Brussels I Regulation vis à vis EFTA States, or the bilateral agreement extending the Brussels I Regulation to Denmark may be used as a model.

In our view, developing a bilateral agreement between the EU and the UK would be the best solution for dealing with the relationships between the EU and the UK in the field of insolvency post-Brexit. In July 2018, the British Prime Minister presented to the UK Parliament the document *"The Future Relationship between the United Kingdom and the European Union"* as continuation of the paper of the Department for Exiting EU *"Providing a cross-border civil judicial cooperation framework. A future partnership paper"*, of 22 August 2017. In Section 1.7, concerning socio-economic cooperation, the UK proposes to explore a new bilateral agreement with the EU on civil judicial cooperation, covering a *"coherent package of rules on jurisdiction, choice of jurisdiction, applicable law and recognition and enforcement of judgments in civil, commercial, insolvency and family matters"*. Particularly, in paragraph 148, the UK highlights that the future agreement would be built on *"the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation (...). This would also reflect the long history of cooperation in this field based on mutual trust in each other's legal systems"*.

#### (i) Danish model

The most ambitious solution for such a bilateral instrument would be the "Danish model", i.e., an agreement that simply extends the application of the EIR Recast to the UK in the same ways as the Brussels I Regulation (and its Recast) was extended to Denmark. Probably an agreement extending the EIR Recast would be the easiest solution for professionals and practitioners taking into account that the rules of the agreement would simply mirror the EIR Recast. Jurisdiction, applicable law, recognition and co-operation would be very similar. The effects of Brexit would be substantially reduced.

*(ii) Lugano model*

A second option would be the negotiation of an agreement *ad hoc* for the cases of insolvency post-Brexit, i.e. the “Lugano model”. Such a specific agreement would be inspired by the EIR Recast but would not reproduce exactly and necessarily the same solutions of the EIR Recast; particular solutions and precautions may be added. Actually, this is precisely the case of the Lugano model. There are differences between the Brussels I Regulation Recast and the Lugano Convention in matters such as spatial application in consumers, workers and insurance, parallel proceedings with third countries, control of the international jurisdiction of the court of origin. A particular agreement between the EU and the UK would be a good solution although it would probably be more difficult for practitioners and professionals since new rules will be introduced. Politically, however, the Lugano model seems more realistic insofar as it allows to adapt the EIR Recast regime to the particular situation of the UK. The principle of mutual trust that underpins the EIR Recast does not have the same strength vis-à-vis the UK after Brexit.

*(iii) Istanbul Convention*

Finally, a third solution may be to go back to the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990. However, this option should be ruled out. The Convention has been unsuccessful. In fact, the Convention has not entered into force. Neither the UK nor the EU have manifested special interest in this Convention. Furthermore, the Convention does not cover restructuring proceedings.

In any event, since Member States have transferred competence to the EU in this field (i.e. cross-border insolvency and restructuring), there are good reasons to conclude that the agreement should be negotiated and concluded between the EU and the UK and not individually between the Member States and the UK.

## **5 ADDITIONAL POLICY CONSIDERATIONS**

In developing a new framework for judicial cooperation in the field of insolvency, the EU and the UK start from a high level of close integration and a long history of cooperation, also in the field of insolvency and restructuring, which undoubtedly will facilitate the negotiations of a future instrument.<sup>3</sup>

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<sup>3</sup> Politically, however, the fact that there is no bilateral agreement between the EU and Denmark extending the application of the EU Insolvency Regulation to this Member State may be a bad precedent for a future instrument with the UK. Conversely, the successful conclusion of a bilateral agreement between the EU and UK might provide an opportunity for Denmark to conclude a similar agreement, thereby “completing the network”.

## **5.1 UNCITRAL Model Law vs a bilateral agreement**

From a policy perspective the option for a bilateral agreement is clearly better than the option for a unilateral approach based on the UNCITRAL Model Law on Cross Border Insolvency.

The UNCITRAL Model Law was a great achievement when it was adopted twenty years ago, but it has not been updated since and, in comparison to the EIR Recast, offers a more limited and less developed framework for cross-border insolvency and restructuring. It is silent in very relevant aspects, such as jurisdiction and conflict of laws rules. In establishing a new framework for cross-border cooperation and assistance between the EU and the UK, due attention should be given to the close links that have existed for the past decades between the UK and the EU. In our view, adopting a framework that is based on the principle of mutual trust, as embodied in the EIR Recast, is much more suitable in the relation between the EU and the UK than a framework that is based on a more “neutral” and inquisitive approach that is aimed to cover the relationship with not just one particular country but rather the “rest of the world”. As between the EU and the UK there is every reason for insolvency and restructuring cases to continue to adhere to the principle of mutual trust, thereby, for example, allowing for automatic recognition of insolvency and restructuring proceedings (and judgments delivered in the context of such proceedings) and allowing for elaborate obligations for insolvency practitioners and courts to cooperate and communicate. One should not forget that the original EIR applied since 31 May 2002 and the EIR Recast has been in force since 26 June 2017. Therefore, by March 2019, the EU and the UK will have enjoyed some seventeen years of close and successful cooperation in matters of insolvency on the basis of the EIR (original and recast). In the field of insolvency and restructuring, the UK and the EU have a very relevant legal background which should not be lost.

## **5.2 Economic integration between the UK and the EU**

Also, from an economic perspective, it seems clear that an approach based on the UNCITRAL Model Law does not cater to the needs of the EU-UK market. A close relationship between the UK and the EU is of mutual importance in the field of cross-border restructuring and insolvency since thousands of EU companies, businesses and individual professionals in general have established a place of business in the UK and vice versa. Additionally, companies and businesses across Europe have chosen English law to govern their affairs and English courts to rule on their disputes. And this may continue in the future. The EU and the UK will continue to be key trading partners and will continue to invest in each other’s economies.

According to the Study *“An Assessment of the Economic Impact of Brexit on the EU27”*, prepared by the Centre for European Policy Studies and managed by the Policy Department on Economic and Scientific Policies for the Committee on Internal Market and Consumer Protection of European Parliament, in 2015 the EU27’s exported goods to the UK totalled

€306 billion, whereas it imported €184 billion. The volume of trade in services was also very substantial, with €94 billion of exports from EU27 to the UK, and €122 billion in imports. For all firms that carry out these activities, even outside the internal market, it is necessary that insolvency and restructuring proceedings operate efficiently and effectively on the basis of a common framework in the UK and the EU.

As the UK is a strategic place for arbitration and litigation in matters of contracts, it is very important that the effects of insolvency proceedings on arbitration, pending lawsuits and contracts are regulated in a common and clear way, both in respect of jurisdiction and applicable law.

The EIR Recast provides such a common and comprehensive framework.

### **5.3 Businesses and consumers value predictability and certainty**

A common legal framework will support business confidence to trade, and minimise the potential risk associated with opportunistic tactics in restructuring or insolvency situations.

A common legal framework is the best solution post-Brexit. Businesses and consumers will find clear rules and can predict the effects of the cross-border insolvency and restructuring. A fragmented situation with different rules and legal solutions would be an obstacle to maximise the value of a company in insolvency or restructuring proceedings. Furthermore, this fragmented situation may create (positive and negative) conflicts of jurisdiction and implies a high risk of forum shopping practices.

*Illustration:* as explained above, it is unclear what will happen when the registered office of legal persons or the place of business of businessmen are moved from the UK to, for example, Finland or from Finland to the UK within the 3-month period prior to the request for the opening of insolvency proceedings. The same is true for a transfer of the habitual residence of consumers within the 6-month period prior to the request for opening of insolvency proceedings. Such transfer does not imply a presumption of COMI in the new State according to the EIR Recast, as such presumption is provided for in case of a transfer to “another” Member State. The EIR Recast is silent as regards third countries. It could be possible that UK Courts and EU Courts would have contradictory interpretations and consider that the debtor’s COMI is simultaneously located in two States, in the UK and in a Member State; or in neither of them.

## **6 STRUCTURE AND CONTENT OF THE FUTURE AGREEMENT**

### **6.1 EIR Recast as basis for the agreement**

It is clear from the above that we take the view that the structure and content of the future instrument(s) should be inspired by the EIR Recast. But even though the EIR Recast should be the basis of the new instrument, it should not be applied in a rigid manner. The structure and contents of the future agreement must, of course, be adapted to the particular circumstances of Brexit.

Firstly, the future agreement should include transitional provisions to deal with proceedings initiated before Brexit but that will continue after Brexit. Secondly, substantial amendments in relation to the rules laid down by the EIR Recast may be included in the future agreement to adapt it to the new framework governing the relationships between the EU and the UK, i.e. cooperation but not integration. The solutions therefore may not be exactly the same as in the EIR Recast but shall meet the objective of the new instrument: avoiding conflicts of jurisdictions and divergences of conflicts of laws rules and promoting the recognition and enforcement of judgments and cooperation and communication between insolvency practitioners and courts.

In this sense, the precedent of a data protection agreement between the UK and the EU could be the way to go. The Technical Note of the British Government of 7 June 2018 reveals the benefits of a UK-EU agreement in this matter, improving legal certainty, stability and transparency at the level of international cooperation mechanisms.

When designing the content of a future agreement, the following issues should be taken into consideration. In general terms, we note that, in drafting a new instrument due attention should be given to the relation between such instrument and the EIR Recast (which rules should be applied by the courts in the EU if, for example, a debtor has its COMI in the EU and an establishment in the UK?).

(i) *International jurisdiction*

Like under the EIR Recast, the debtor's COMI should be the decisive factor for determining the scope of application of the instrument and the conferral of jurisdiction on the courts of the UK or one of the Member States.

(ii) *Applicable law*

In order to ensure legal certainty and predictability it is very important that the conflicts of laws regime will be exactly the same in both instruments. A possible approach to ensure this objective would be to include in the new instrument a cross-reference to the conflict of law rules laid down by the EIR Recast.

(iii) *Recognition and enforcement*

The new instrument should apply to the recognition and enforcement of UK orders and judgments in the EU and, vice versa, the recognition and enforcement of EU orders and judgments in the UK. Due attention will have to be given to more complex situations. On the one hand, if the debtor's COMI is situated neither in the UK nor in the EU, the future instrument should not be applicable. On the other hand, if the debtor's COMI is situated in the EU and has two establishments, one of them in the UK and another in a Member State, the rules of the instrument would be applied for recognition in the UK and the rules of the EIR Recast would be applied for recognition in the other Member State. In this way, the EIR Recast should not be affected by the new instrument unless the negotiations of the instrument lead to

other solution. This underlines that the regime of recognition and enforcement of the new instrument should be very similar to the EIR Recast.

*(iv) Cooperation*

Like the EIR Recast, a new instrument must contain rules on the cooperation and communication between UK and EU insolvency practitioners and courts. The regime of the future instrument should apply in case the debtor's COMI is in the UK or the EU. Due attention must be given to more difficult cases. Let us imagine a debtor whose COMI is in the UK and has two establishments in different Member States. In this case, the cooperation between the representatives in the two Member States could be governed by the future agreement and not by EIR Recast, since the debtor's COMI is outside the EU. But the answer is more complex when the COMI is in the territory of the EU and the debtor has an establishment in a Member State and another one in the UK. The cooperation between the representative in the EU main proceeding and the representative in the EU local proceeding should be governed by EIR Recast. The cooperation with British representative would be governed by the future instrument. To avoid any inconsistency, it is thus important that both instruments have a similar regime.

*(v) Relation of a future agreement with other instruments*

As a result of the ratification of the future instrument by the EU, such instrument becomes an EU act. To avoid any uncertainty, the future instrument should include a provision dealing with its relationship with the EIR Recast and other EU acts.

Also, it is interesting to consider what would happen with schemes of arrangement. These arrangements may be included within the future instrument, but it is also imaginable that they remain outside the scope of a new instrument. In this case, it will be relevant if the UK ratifies the Lugano Convention, since they may fall within the scope of this latter instrument.

Another point of relevance concerning the Lugano Convention is the enforcement of judgments in matters deriving from insolvency law and closely connected with the insolvency proceedings. The EIR Recast refers to the Brussels I Regulation (Recast) in order to regulate the enforcement procedure. After Brexit, the future agreement could refer to the Lugano Convention if the UK joins that Convention.

## **6.2 Role of the CJ EU**

After Brexit, the UK will no longer be subject to the jurisdiction of the CJ EU. At the same time, it is very important that the future instrument is uniformly interpreted in the UK and the EU. Conflicts of interpretation would be an undesirable result. International law provides rules of interpretation of international instruments. But additional solutions could be considered, notably following the 'Danish' model (see above) or the Lugano model.

*(i) Take decisions of courts of the other States into account*

The courts should pay due account to rulings of the courts of other States bound by the new instrument and also to judgments of the Court of Justice. Note that paying attention is not the same as being bound by the case law of the CJ EU. This solution is actually contained in the Lugano Convention.

*(ii) Relevant similar decisions under the EIR Recast*

Any court applying and interpreting the future agreement should pay due account to the principles laid down by any relevant decision concerning similar provisions of the EIR Recast. Again, this solution is provided for by the Lugano Convention in reference to the Brussels I Regulation.

*(iii) Exchange of information of relevant decisions*

Similar to the Lugano Convention, a system of exchange of information concerning relevant judgments delivered pursuant to the future agreement could be included. CERIL could be a very useful mechanism for supporting the exchange of information about relevant decisions.

*(iv) Preliminary rulings of CJ EU*

The future agreement would be an EU Act. In principle, only the courts of Member States of the EU, and not UK courts, will be entitled to submit preliminary rulings to the CJ EU and be bound by its case law. The UK will not be bound by the jurisdiction of CJ EU and it would not be obliged or entitled to submit requests for preliminary rulings. That happens in the Lugano Convention as well. However, we note that the role of the CJ EU in the Agreement between Denmark and the EU is broader than in the Lugano Convention. Certainly, uniform interpretation similar to the Agreement Denmark-EU would be more advanced and show a greater degree of cooperation, but this option does not seem realistic vis-à-vis the UK.

*(v) Submission of statements or observations to CJ EU*

It has already been pointed out that in principle the UK courts could not submit requests for preliminary rulings to CJ EU nor will it be bound by its case law. But it may be worth considering to allow the UK, although not a Member State of the EU, to submit statements or written observations to CJ EU, in case of requests for preliminary rulings referred by Member States with relation to the future agreement. That approach is also contained in the Lugano Convention.

## ANNEX: Documents and legal literature

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