



**INSOL**  
INTERNATIONAL

GLOBAL INSOLVENCY  
PRACTICE COURSE

# European Union Regulation on Insolvency Proceedings

**Professor Michael Veder, Radboud University and RESOR NV,  
The Netherlands**

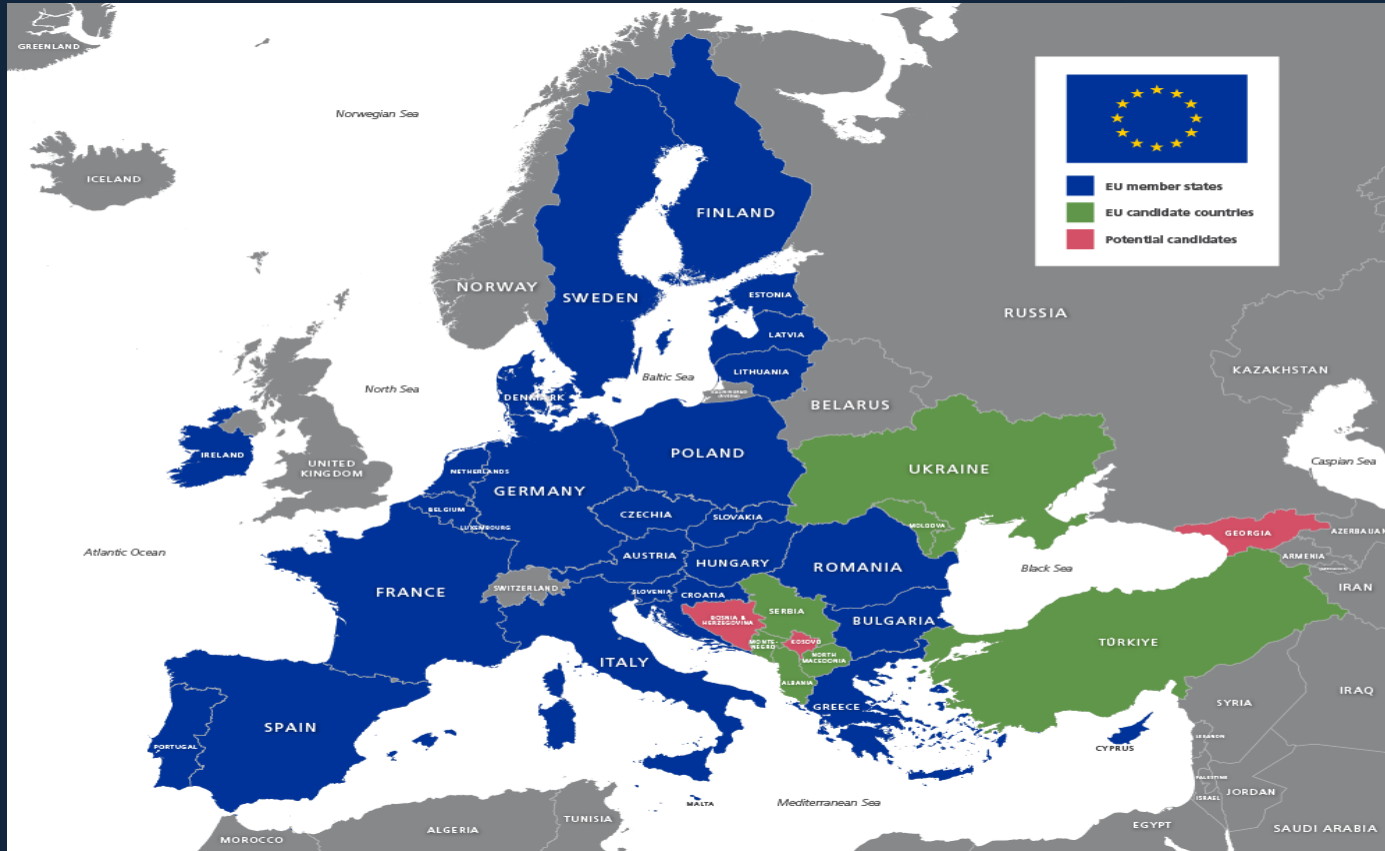


# Road map

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# European Union




# Introduction (1)

- Art. 288 TFEU refers to various instruments to exercise the EU's competence, such as:
  - Regulations: general application, binding in its entirety and directly applicable in all Member States without the need (or possibility) for ratification or implementation by domestic legislation
  - Directives: binding upon each Member State as to the result to be achieved, but left to national authorities to choose form and method (i.e. subject to implementation in domestic legislation)
- Interpretation of EU instruments: Court of Justice of the European Union (preliminary rulings – art. 267 TFEU)
- For EU legislation and case law, see [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)



# Introduction (2)

- European insolvency framework (*work in progress*)
  - EU Insolvency Regulation (EIR)
  - EU Directive on restructuring and insolvency (2019)
  - Proposal for a Directive harmonising certain aspects of insolvency law (2022)
- The Insolvency Regulation is binding in its entirety and directly applicable in all Member States (except Denmark).
- The EIR does not harmonise substantive or procedural insolvency law in Europe. It is a private international law instrument that contains uniform rules on (i) jurisdiction, (ii) applicable law, and (iii) recognition.
- Mutual trust (Recitals, par. 65)
- Regulation 1346/2000 (from 31 May 2002)  Regulation 2015/848 (from 26 June 2017)



# Scope - territorial

- The EIR applies only to insolvency proceedings where the centre of the debtor's main interests (COMI) is located in the EU (with the exception of Denmark) (Recitals, par. 25).
- If a debtor's COMI is located outside the EU (or in Denmark), the EIR does not apply and courts are free to apply their own domestic private international law rules.
- If a non-EU corporate debtor's COMI is located in the EU, the EIR applies!
  - E.g. BRAC Rent-A-Car International Inc



# Scope - substantive

- The EIR applies to public collective proceedings based on laws relating to insolvency: art 1(1).
  - former EIR was restricted to proceedings in which a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, i.e. proceedings within Art 1(1)(a).
  - the scope of the EIR has been extended to include hybrid, debtor-in-possession and preventive restructuring proceedings
- Annex A
- Certain entities are excluded: art. 1(2)



# Modified universalism

- Main proceedings with universal effect
  - Centre of main interests (COMI) (art. 3)
  - Automatic recognition in other Member States (art. 19 and 20)
  - Insolvency proceedings and their effects are governed by the law of the Member State where the proceedings have been opened (art. 7, with exceptions in art. 8-18)
  - Insolvency practitioner can exercise his powers in other Member States (art. 21)
  - Publicity (art. 24-30): [interconnected insolvency registers](#)
- Secondary proceedings with territorially limited effect in Member States where the debtor has an establishment
  - Establishment (art. 3 (2), 2 (10))
  - Effects restricted to assets situated in that Member State (art. 3(2), 34)
  - Limits the 'universal' effect of main proceedings
- Rules to localise assets: art. 2(9)
- Cooperation and Communication (art. 41 et seq.)





# COMI

- Uniform driver to establish jurisdiction to open insolvency proceedings
- Jurisdiction to be determined by the court *ex officio* (art. 4 (1))
- Art. 3 (1)
  - For incorporated debtors: presumption that COMI is at registered office
  - How to rebut the presumption?
    - CJEU re Eurofood (case C-341/04)
    - CJEU re Interedil (case C-396/09)
    - Recitals, par. 28 and 30
- COMI to be determined on the basis of the facts at the time of filing of the request to open proceedings
  - CJEU re Staubitz-Schreiber (case C-1/04)
  - CJEU re Galapagos (case C-723/20)
- COMI determination binding on courts of other Member States
  - CJEU re Eurofood (case C-341/04) , see also Recitals, par. 65



# Niki's COMI up in the air?



# COMIgration

- Forum shopping not looked at favourably
  - Recitals, par. 5
- Practice: COMI-shifts
  - Change of registered office
  - Change of “centre of management and supervision”
- Regulation seeks to provide safeguards against fraudulent or abusive forum shopping
  - Recitals, par. 29, 31, 32
  - Art. 3(1), 5



# The reach of the courts of the Member States

- The courts of the Member State where proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them
  - Art. 6(1)
  - See e.g. CJEU re NK/BNP Paribas Fortis (case C-535/17)
- Judgments are automatically recognised and can be enforced in other Member States (art. 32)
- Jurisdiction extends to defendants outside of the EU
  - E.g. CJEU re Schmid/Hertel (case C-328/12)
- If an action is determined to be within the scope of the EIR, the conflict of laws rules of the EIR apply
  - CJEU re Kornhaas/Dithmar (case C-594/14): German directors' liability rules apply to a UK company



# Secondary proceedings

- Objectives (Recitals, par. 40)
  - Protection of local interests (e.g. priority rights)
  - Efficient administration of the estate
- Risks
  - E.g. CJEU re Bank Handlowy (case C-116/11)
- Cooperation and Communication (art. 41 et seq.)
- “Synthetic” secondary proceedings (art. 36 and 38(2))
- Stay of the opening of secondary proceedings in view of negotiations on a rescue plan in the main proceedings (art. 38)



# Groups of companies

- Each entity within a group is a separate debtor
- Group COMI?
  - Recitals, par. 53
- Chapter V (Insolvency Proceedings of Members of a group of Companies)
  - Obligations of cooperation and communication (art. 56-60)
  - Group coordination proceedings (art. 61-77)



# BREXIT

