Study on the issue of abusive forum shopping in insolvency proceedings

Final Report

Written by Spark Legal Network
February – 2022

This study was carried out for the European Commission by

Patricia Ypma
Peter McNally
Erika Sander
Morgana Grácio
Network of national legal experts

Gerard McCormack
Oriana Casasola

Paul Omar (Advisory Board)
Stefania Bariatti (Advisory Board)
Giorgio Corno (Advisory Board)

Sylvie Giraudon

EUROPEAN COMMISSION

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Contact: [First name Last name]

E-mail: […]*@ec.europa.eu (functional e-mail if existing, or)*
[First name.Last name]*@ec.europa.eu*

European Commission
B-1049 Brussels

Study on the issue of abusive forum shopping in insolvency proceedings

Framework Contract JUST/2020/PR/03/0001 on Legal analysis services, including compliance assessment of national transposing measures, in the Justice and Consumers policy areas - Lot 2

Directorate-General for General for Justice and Consumers
2022
EUR [number] EN

Printed by [XXX] in [Country]

PRINTED ON ELEMENTAL CHLORINE-FREE BLEACHED PAPER (ECF)

PRINTED ON TOTALLY CHLORINE-FREE BLEACHED PAPER (TCF)

PRINTED ON RECYCLED PAPER

PRINTED ON PROCESS CHLORINE-FREE RECYCLED PAPER (PCF)

Manuscript completed in [Month] [Year]

[Revised/Corrected/nth] edition

LEGAL NOTICE

Print	ISBN [number]	ISSN [number]	doi:[number]	[Catalogue number]
PDF	ISBN [number]	ISSN [number]	doi:[number]	[Catalogue number]
EPUB	ISBN [number]	ISSN [number]	doi:[number]	[Catalogue number]
HTML	ISBN [number]	ISSN [number]	doi:[number]	[Catalogue number]

Luxembourg: Publications Office of the European Union, [Year]

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Abstract

This report is the result of the “Study on the issue of abusive forum shopping” for the European Commission’s Directorate-General for Justice and Consumers, conducted by Spark Legal Network, in cooperation with Tipik and a team of key legal experts. The Study aims at assisting the European Commission to: (i) determine whether the safeguards included in the European Insolvency Regulation (EU) 848/2015 (EIR) with the aim of discouraging forum shopping practices actually met the expectations; (ii) assess whether removing discrepancies in certain targeted areas of national insolvency regimes would mitigate the incentives for abusive forum shopping; and (iii) understand the legal practice aiming at the cross-border exploitation by debtors of pre-packaged private workouts and their cross-border circulation. To meet this objective, the Study relied on data collected through national desk and field research, targeted consultations, and literature review. This report provides an overview of the functioning of the safeguards introduced in the EIR to mitigate (abusive) forum shopping, with particular focus on the introduction of the suspect period mechanisms for COMI relocations set out in Article 3. The report also outlines similarities and differences of national insolvency frameworks, and analyses the benefits, drawbacks, and possible obstacles in harmonising certain targeted areas of national insolvency laws. Finally, the report sheds light on pre-insolvency workouts available across the Member States, as well as in the UK, with particular focus on the possible mechanisms for their cross-border circulation in the EU.

Résumé

Ce rapport est le résultat de l' « Étude sur la question du forum shopping abusif dans les procédures d'insolvabilité » menée par Spark Legal Network et Tipik, avec le soutien d'experts juridiques, pour la Direction générale de la Justice et des Consommateurs de la Commission européenne. L'objectif de l'Étude est de permettre à la Commission européenne de : i) Déterminer si les garanties incluses dans le Règlement (UE) 2015/848 relatif aux procédures d'insolvabilité (RIE) dans le but de décourager les pratiques de "forum shopping" répondent effectivement aux attentes ; ii) Évaluer si la suppression des divergences dans certains domaines ciblés des régimes d'insolvabilité nationaux atténuerait les incitations au forum shopping abusif ; et iii) Comprendre la pratique juridique visant l'exploitation transfrontalière par les débiteurs d'arrangements préventifs privés (*pre-packaged private workouts*) et leur circulation transfrontalière. Pour atteindre cet objectif, l'Étude s'appuie sur des données recueillies dans le cadre de recherches documentaires et d'étude de terrain, de consultations ciblées et d'une analyse de la documentation disponible. Ce rapport fournit une vue d'ensemble du fonctionnement des mesures de sauvegarde introduites dans le RIE afin d'atténuer le forum shopping (abusif), en mettant l'accent sur l'introduction des mécanismes de période suspecte vis-à-vis des transferts de centres des intérêts principaux (COMI), énoncés à l'article 3. Le rapport souligne également les similitudes et les différences entre les cadres juridiques nationaux applicable en matière d'insolvabilité et analyse les avantages, les inconvénients et les éventuels obstacles à l'harmonisation de certains domaines ciblés des droits nationaux de l'insolvabilité. Enfin, le rapport fait la lumière sur les arrangements préalables à l'insolvabilité disponibles dans les États membres, ainsi qu'au Royaume-Uni, en mettant l'accent sur les mécanismes possibles pour leur circulation transfrontalière dans l'UE.

Executive Summary

Introduction

This document constitutes the Final Report for the "Study on the issue of abusive forum shopping in insolvency proceedings" (the "Study") conducted by Spark Legal Network and Tipik, with the support of key legal experts. The aim of the Study is to enable the European Commission to: (i) determine whether the safeguards included in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)[1] ("EIR"), which aim to discourage forum shopping practices, actually met expectations; (ii) assess whether removing discrepancies in certain targeted areas of national insolvency regimes would mitigate the incentives for abusive forum shopping; and (iii) understand the legal practice aiming at the cross-border exploitation by debtors of pre-packaged private workouts and their cross-border circulation in the light of existing legislation.

Background and context

The European Union's judicial cooperation in civil and commercial matters has contributed to the development of an authentic area of justice, by providing more legal certainty and reducing the options for and negative impacts of strategies like forum shopping. With forum shopping strategies, a party or parties to a proceeding seek to bring their case to a jurisdiction where they expect the most favourable outcome. In the field of insolvency, it was reported[2] that debtors often achieved this goal by relocating their centre of main interest ("COMI"), which is the main connecting factor determining the jurisdiction for main insolvency proceedings.

It should be noted that forum shopping is not always illegitimate or abusive, as companies or entrepreneurs may exercise their rights in the context of the freedom of establishment when they change their seat or domicile and move to another Member State. Nonetheless, the abusive character of COMI shifts may be noted where a debtor shifts its COMI in the vicinity of insolvency, with the (sole) objective to achieve a more debtor-friendly treatment in insolvency proceedings, to the detriment of the general body of the creditors.

In this context, the EIR put in place safeguards to mitigate the risk of abusive forum shopping. These safeguards mainly encompass: i) the obligation of national courts to examine *ex officio* their jurisdiction pursuant to Article 3(1) or (2) of the EIR; ii) the opportunity for any creditor to challenge the decision of the court on its jurisdiction vis-à-vis the insolvency proceedings (Article 5); and iii) the introduction of the so-called 'suspect periods' according to which general presumptions determining the COMI of the debtors do not apply if there was a COMI shift just 3 (or 6) months prior to the opening of insolvency proceedings (Article 3). The insolvency proceedings towhich the rules and safeguards of the EIR apply are those that, having met certain requirements,[3]Member States decided to list in its Annex A.[4] In turn, variants of forum shopping concerning the use of so-called "schemes of arrangements" or "pre-insolvency workouts" have not been addressed at EU level, as these do not fall within the scope of application of the EIR. Finally, it should be

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19.
[2] See Hess/Oberhammer/Pfeiffer, Study for an evaluation of Regulation (EC) No 1346/2000 on Insolvency Proceedings, pp. 109. The final study was adopted in January 2013, this study has been mandated by the European Commission.
[3] See Article 1(1) of the EIR.
[4] Annex A of the EIR was updated following the enactment of Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B, OJ L 455, 20.12.2021, p. 4–14. Available at: http://data.europa.eu/eli/reg/2021/2260/oj (last accessed 27 January 2022). The Consolidate text of the EIR is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0848-20220109 (last accessed 28 January 2022).

noted that the landscape of proceedings having a pre-insolvency, restructuring or rescuing nature is currently evolving across the Member States, as a result of the transposition of Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132[5] ("Preventive Restructuring Directive").

Methodology

To meet the objectives presented above, with the support of a team of national experts, data was collected on existing national legislative insolvency frameworks (and their implementation) regarding (abusive) forum shopping across 27 Member States. For this effect, a team of national legal experts carried out i) legal desk research on the insolvency law regimes in each Member State, and ii) legal field research via interviews with national stakeholders (i.e., lawyers or judges, cross-border litigants, insolvency consultants or insolvency practitioners). Additionally, an online survey was carried out, targeting national representatives of consumers, businesses, SMEs and entrepreneurs. The last step of the Study entailed carrying out a thorough legal and empirical analysis based on the assessment of the data collected, including existing literature and case-law on the matters at hand. In this respect, this task was carried out following three streams of analysis, in respect of which the findings are summarised below.

Suspect periods and other measures aimed at mitigating (abusive) forum shopping

The Study's findings shed light on the functioning of the safeguards introduced in the EIR to mitigate (abusive) forum shopping, with particular focus on the introduction of the suspect period mechanisms for COMI relocations set out in its Article 3. The national applicability of suspect periods was considered through illustrative case-law and by analysing the assessment of national courts in cases dealing with connecting factors linking the proceedings to other Member States. From the outset of the data collected, most stakeholders interviewed opined that no changes would need to be made to Article 3 of the EIR. Still, some stakeholders suggested that an extension of the suspect period under the EIR may catch more abusive practices. However, the Study considers that the length of the suspect period should be carefully considered so as not to impact disproportionately on the freedom of establishment.

Additionally, the Study also highlights how practical difficulties remain with regards to the distinction between desirable and abusive forum shopping practices. In particular, the Study finds that the safeguards included in the EIR do not seem to precisely distinguish between COMI shifts carried out in mutual agreement with creditors (which would be beneficial) or based on the debtor's unilateral decision. In this context, the Study suggests that objective criteria could be formulated in the EIR in view of discerning abusive practices from neutral or beneficial practices, with presumptions in support of the assessment to be conducted by national courts.

Potential forum shopping strategies and underlying reasons in national insolvency laws

The EIR does not harmonise the differing national substantive insolvency laws of the Member States. Consequently, there are still considerable differences between the domestic insolvency law regimes. In this context, the Study assessed which factors of national insolvency laws may represent an incentive for debtors to shift their COMI to a

[5] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (Text with EEA relevance.) PE/93/2018/REV/1 *OJ L 172, 26.6.2019, p. 18–55.*

different Member State in order to benefit from the application of a different and more favourable insolvency law regime. First of all, procedural aspects, such as the simplicity, language and costs of the procedures, as well the predictability of the court decisions, and the experience of the courts and insolvency practitioners in the different Member States, were identified as potentially relevant factors. As regards substantial insolvency law aspects, divergencies across the Member States' legislative frameworks were noted, first of all, in respect of the conditions for opening of insolvency proceedings. In this context, for instance, a notable distinction was found between Member States requiring either the so-called "cash flow test", or the so-called "balance sheet test" to access insolvency proceedings. Other relevant factors concerned divergencies in national laws in respect of the rules on the ranking of creditors, avoidance actions, director's duties (before insolvency and during insolvency proceedings), debtors' discharge from remaining liabilities, creditors' majorities and cramdown rules (restructuring), and powers to trace and recover assets.

In this context, the Study analysed the benefits, drawbacks, and possible obstacles in harmonising certain targeted areas of national insolvency laws. Accordingly, the Study provides different recommendations in respect of the following areas of national insolvency laws. With regards to the conditions to access insolvency proceedings, the Study does not consider currently viable harmonisation across Member States, based in particular on the peculiar diverse basis of values and interests intertwined with insolvency policies in the different countries. In respect of avoidance actions and clawback rights, instead of full harmonisation, the Study considers two alternative routes: i) harmonisation on a principle-based approach ((a) the principle of equal treatment of creditors; and (b) the principle of protection of trust); or ii) a partial harmonisation of transaction avoidance rules, i.e., approximation of rules only for transactions characterised by cross-border elements.

In the field of directors' duties related to imminent/actual insolvency, full harmonisation would not be able to take into consideration the local peculiarity of private law, company law and criminal law. So-called "minimum harmonisation" could be considered, either by (i) harmonising the rules of private international law on the topic (e.g., to clarify the applicable law); or (ii) attempting a minimum harmonisation of the liability of the directors for breaching their duties.

With regards to the position of secured creditors, though unlikely achievable (due to different policy considerations which inform Member States' approaches on the matter), should the approximation route still be considered, the Study recommends in-depth research on (i) the common principles underpinning the security rights across the Member States and; (ii) policy reasons supporting the legislative choices concerning the position of secured creditors in the distribution ranking. The Study further suggests that court capacity and cooperation could be fostered via the development of national specialised chambers in commercial, corporate and insolvency matters, as well as the establishment of an EU training program for judges to deal with EU insolvency matters.

Finally, in respect of the field of asset tracing and recovery, rather than harmonisation of substantive national rules, the Study recommends the development of a unified database for assets located across the EU, as well as more stringent rules on cross-border cooperation among insolvency practitioners and courts.

Pre-insolvency workouts

Pre-insolvency workouts are arrangements allowing a debtor, in financial distress, to restructure its debt in a debtor-friendly environment, by reaching an agreement with the stakeholders (creditors and shareholders). As pre-insolvency workouts do not necessarily fall within the scope of application of the EIR, they still appear relevant when discussing (abusive) forum shopping as they may allow a debtor to circumvent national insolvency laws without relocating its COMI. A debtor in distress might make an agreement for restructuring of its obligations which will eventually bind all creditors, hence, preventing the application of insolvency law of the Member State where the COMI is located.

The Study highlights that only certain Member States have regulated pre-insolvency workouts in their national legislative framework. Additionally, the rules governing such workouts differ across the countries. First and foremost, the Study shows that certain legal orders only accept contractual arrangements agreed upon with (and only binding) certain creditors. In turn, other jurisdictions require the agreements reached within the scope of pre-insolvency workouts to be sanctioned by a court in order to have legal effects and possibly bind also dissenting or non-consulted creditors.

The circulation of effects of pre-insolvency workouts concerns the way in which agreements emanating from one Member State are granted effects in another Member State. The national data collection activities have not brought to light particular national practices or rules specifically dealing with direct circulation of effects of foreign EU and non-EU pre-insolvency workouts. In this context, the Study provides an assessment of whether EU arrangements homologated by a court may fall within the scope of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[6] ("Brussels Ia Regulation"), and whether EU pre-insolvency workouts that were not sanctioned by a court may fall within the scope of the Regulation (EC) No 593/2008 on the law applicable to contractual obligations[7] ("Rome I Regulation"). In order to do this, limits of the diverse bodies of rules contemplated by EU law are analysed, including the relations with the provisions of the EIR.

The Study highlights, in particular, the need to clarify a preliminary matter at EU level, namely that of the scope of application of the aforementioned regulations. It welcomes either an authoritative interpretation by the CJEU of the exclusion provisions contained in Article 1 respectively of the Brussels Ia and Rome I Regulations, or amendments to the texts of said Regulations.

Finally, the Study provides an assessment of the UK landscape, with a specific focus on the extent to which, following Brexit, UK schemes of arrangements and restructuring plans may be entitled to EU wide circulation under the Lugano Convention.[8] In this context, the Study concludes that in order to answer this question, the interpretation of the exclusion of 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' from the scope of the Lugano Convention (Article 1(2)(b)) should also be authoritatively clarified. However, the Study also highlights that it is doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention[9], and hence the potential relevance of other instruments, such as the Hague Judgments Convention[10], could be assessed as an alternative.

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[6] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Please, note that between Denmark and the other EU Member States the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see OJ L 299, 16.11.2005, p. 61–70) applies.

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R0593-20080724&from=EN (last accessed on 25 November 2021).

[8] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN (last accessed on 25 November 2021).

[9] See the European Commission's Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, Communication from the Commission to the European Parliament and the Council, COM(2021) 222 final, 4.5.2021. Available at: https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf (last accessed 28 January 2022).

[10] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last accessed 28 January 2022). See also the answer given by Mr Reynders on behalf of the European Commission (22.11.2021) to the Parliamentary question E-004121/2021, according to which "The EU's longstanding approach is that the appropriate framework for cooperation with third countries outside the EFTA/EEA in that field is provided by the multilateral Hague Conventions and the EU has consistently promoted that framework. Available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-004121_EN.html (last accessed 28 January 2022).

Document de synthèse

Introduction

Ce document constitue le rapport final de l' « Étude sur la question du *forum shopping* abusif dans les procédures d'insolvabilité » (l'« Étude ») menée par Spark Legal Network et Tipik, avec le soutien d'experts juridiques. L'objectif de l'Étude est de permettre à la Commission européenne de : (i) déterminer si les garanties incluses dans le Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité (refonte)[11] (RIE) dans le but de décourager les pratiques de *forum shopping* répondent effectivement aux attentes ; (ii) évaluer si la suppression des divergences dans certains domaines ciblés des régimes d'insolvabilité nationaux atténuerait les incitations au *forum shopping* abusif ; et (iii) comprendre la pratique juridique visant l'exploitation transfrontalière par les débiteurs d'arrangements préventifs privés (*pre-packaged private workouts*) et leur reconnaissance et exécution transfrontalières à la lumière de la législation existante.

Contexte

La coopération judiciaire au sein de l'Union européenne en matière civile et commerciale a contribué au développement d'un authentique espace de justice, en offrant une plus grande sécurité juridique et en réduisant les possibilités et les effets négatifs de stratégies telles que le *forum shopping*. Avec les stratégies de *forum shopping*, une ou plusieurs parties à une procédure cherchent à porter leur affaire devant une juridiction où elles espèrent obtenir le résultat le plus favorable. Dans le domaine de l'insolvabilité, il a été rapporté que les débiteurs atteignent souvent cet objectif en délocalisant leur centre d'intérêt principal, qui est le principal facteur de rattachement déterminant la juridiction pour la procédure d'insolvabilité principale.

Il convient de noter que le *forum shopping* n'est pas toujours illégitime ou abusif, car les sociétés ou les entrepreneurs peuvent exercer leurs droits dans le cadre de la liberté d'établissement lorsqu'ils changent de siège ou de domicile et s'installent dans un autre État membre. Néanmoins, le caractère abusif du déplacement du centre des intérêts principaux peut être constaté lorsqu'un débiteur déplace son centre des intérêts principaux à proximité de l'insolvabilité, dans le but (unique) d'obtenir un traitement plus favorable au débiteur dans la procédure d'insolvabilité, au détriment de l'ensemble des créanciers.

Dans ce contexte, le Règlement RIE a mis en place des garanties pour atténuer le risque de *forum shopping* abusif. Ces garanties comprennent principalement : i) l'obligation pour les juridictions nationales d'examiner d'office leur compétence conformément à l'article 3, paragraphe 1 ou 2, du RIE ; ii) la possibilité pour tout créancier de contester la décision de la juridiction sur sa compétence à l'égard de la procédure d'insolvabilité (article 5) ; et iii) l'introduction des « périodes suspectes », en vertu desquelles les présomptions générales déterminant le centre des intérêts principaux des débiteurs ne s'appliquent pas s'il y a eu un déplacement du centre des intérêts principaux seulement 3 (ou 6) mois précédant l'ouverture de la procédure d'insolvabilité (article 3). Les procédures d'insolvabilité auxquelles s'appliquent les règles et les mesures de sauvegarde du RIE sont celles que, ayant rempli certains critères,[12] les États membres ont décidé d'énumérer dans l'annexe A.[13] Par ailleurs, les autres formes de *forum shopping* concernant l'utilisation de ce que l'on

[11] Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité, JO L 141, 5.6.2015, p. 19.
[12] Article 1(1) du RIE.
[13] L'annexe A du RIE a été mise à jour suite à la promulgation du Règlement (UE) 2021/2260 du Parlement européen et du Conseil du 15 décembre 2021 portant modification du règlement (UE) 2015/848 relatif aux procédures d'insolvabilité afin de remplacer ses annexes A et B, JO L 455 du 20.12.2021, p. 4-14. Disponible à http://data.europa.eu/eli/reg/2021/2260/oj (dernière consultation le 27 janvier 2022). Le texte consolidé du RIE est disponible à l'adresse suivante : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0848-20220109 (dernière consultation le 28 janvier 2022).

appelle les « arrangements» (*schemes of arrangement*) ou les « arrangements préalables à l'insolvabilité » (*pre-insolvency workouts*) n'ont pas été traitées au niveau de l'UE, car elles n'entrent pas dans le champ d'application du RIE. Enfin, il convient de noter que le panorama des procédures ayant un caractère de pré-insolvabilité, de restructuration ou de sauvetage évolue actuellement dans les États membres, en raison de la transposition de la Directive (UE) 2019/1023 du Parlement européen et du Conseil du 20 juin 2019 relative aux cadres de restructuration préventive, à la remise de dettes et aux déchéances, et aux mesures à prendre pour augmenter l'efficacité des procédures en matière de restructuration, d'insolvabilité et de remise de dettes, et modifiant la directive (UE) 2017/1132[14] (Directive sur la restructuration et l'insolvabilité).

Méthodologie

Pour atteindre les objectifs présentés ci-dessus, des données ont été collectées, avec le soutien d'une équipe d'experts nationaux, sur les cadres législatifs nationaux existants (et leur mise en œuvre) en matière d'insolvabilité concernant le *forum shopping* (abusif) dans 27 États membres. À cet effet, une équipe d'experts juridiques nationaux a effectué i) une recherche documentaire sur les régimes juridiques de l'insolvabilité applicables dans chaque État membre, et ii) une étude juridique de terrain par le biais d'entretiens menés avec des parties prenantes nationales (avocats ou juges, parties à des litiges transfrontaliers, consultants en matière d'insolvabilité ou praticiens de l'insolvabilité). En outre, une consultation en ligne a été réalisée, ciblant des représentants nationaux de consommateurs, des entreprises, des PMEs et des entrepreneurs. La dernière étape de l'Étude a consisté à réaliser une analyse juridique et empirique approfondie sur la base de l'évaluation des données recueillies, comprenant également la documentation et jurisprudence existantes sur les problématiques en jeu. À cet égard, cette activité a été réalisée en suivant trois courants d'analyse, dont les résultats sont résumés ci-dessous.

Périodes suspectes et autres mesures visant à atténuer le forum shopping (abusif)

Les résultats de l'Étude mettent en lumière le fonctionnement des garanties introduites dans le RIE afin d'atténuer le *forum shopping* (abusif), avec un accent particulier sur l'introduction des mécanismes de période suspecte pour les relocalisations de centres des intérêts principaux, prévus à l'article 3. L'applicabilité nationale des périodes suspectes a été examinée par le biais d'une jurisprudence illustrative et par l'analyse de l'évaluation faîte par les tribunaux nationaux des cas où les facteurs de rattachement relient la procédure d'insolvabilité à d'autres États membres. La plupart des parties prenantes interrogées étaient d'avis qu'il n'était pas nécessaire d'apporter des modifications à l'article 3 du RIE. Néanmoins, certaines parties prenantes ont suggéré qu'une prolongation de la période suspecte en vertu du RIE pourrait permettre d'identifier davantage de pratiques abusives. Toutefois, l'Étude souligne que la durée des périodes suspectes devrait être soigneusement étudiée afin de ne pas avoir un impact disproportionné sur la liberté d'établissement.

Par ailleurs, l'Étude révèle également les difficultés pratiques qui subsistent en ce qui concerne la distinction entre les pratiques de *forum shopping* souhaitables et abusives. En particulier, l'Étude constate que les garanties incluses dans le RIE ne semblent pas faire de distinction précise entre les transferts de centres d'intérêt principaux effectués d'un commun accord avec les créanciers (ce qui serait bénéfique) ou basés sur une décision unilatérale du débiteur. À cet égard, l'Étude suggère que des critères objectifs pourraient être formulés dans le RIE en vue de discerner les pratiques abusives des pratiques neutres

[14] Directive (UE) 2019/1023 du Parlement européen et du Conseil du 20 juin 2019 relative aux cadres de restructuration préventive, à la remise de dettes et aux déchéances, et aux mesures à prendre pour augmenter l'efficacité des procédures en matière de restructuration, d'insolvabilité et de remise de dettes, et modifiant la directive (UE) 2017/1132 (directive sur la restructuration et l'insolvabilité) (Texte présentant de l'intérêt pour l'EEE.) PE/93/2018/REV/1 *JO L 172, 26.6.2019, p. 18–55.*

ou bénéfiques, avec un système de présomptions à l'appui de l'évaluation à mener par les tribunaux nationaux.

Stratégies potentielles de forum shopping et raisons sous-jacentes en droit national de l'insolvabilité

Le RIE n'harmonise pas les différents droits matériels nationaux des États membres en matière d'insolvabilité. Par conséquent, il existe encore des différences considérables entre les régimes nationaux de droit de l'insolvabilité. Dans ce contexte, l'Étude a évalué quels facteurs du droit national de l'insolvabilité peuvent inciter les débiteurs à transférer leur centre des intérêts principaux dans un autre État membre afin de bénéficier de l'application d'un régime différent et plus favorable. Tout d'abord, les aspects procéduraux, tels que la simplicité, la langue et le coût des procédures, ainsi que la prévisibilité des décisions judiciaires, et l'expérience des tribunaux et des praticiens de l'insolvabilité dans les différents États membres, ont été identifiés comme des facteurs potentiellement pertinents. En ce qui concerne les aspects substantiels du droit de l'insolvabilité, des divergences entre les cadres législatifs des États membres ont été constatées, tout d'abord en ce qui concerne les conditions d'ouverture des procédures d'insolvabilité. Dans ce contexte, par exemple, une distinction notable a été constatée entre les États membres exigeant soit le « test du cash-flow », soit le « test du bilan » pour accéder aux procédures d'insolvabilité. D'autres facteurs pertinents concernent les divergences entre les législations nationales en ce qui concerne les règles relatives au classement des créanciers, aux actions d'annulation, aux obligations des administrateurs (avant et pendant la procédure d'insolvabilité), à la décharge des débiteurs du reste du passif, aux majorités des créanciers et aux règles de regroupement (restructuration), ainsi qu'aux pouvoirs de recherche et de récupération des actifs.

Dans ce contexte, l'Étude analyse les avantages, les inconvénients et les éventuels obstacles à l'harmonisation de certains domaines ciblés des législations nationales en matière d'insolvabilité. En conséquence, l'Étude fournit différentes recommandations concernant les domaines suivants du droit de l'insolvabilité. En ce qui concerne les conditions d'accès aux procédures d'insolvabilité, l'Étude ne conclut pas qu'une harmonisation entre les États membres soit actuellement viable, notamment en raison de la diversité des valeurs et des intérêts liés aux politiques d'insolvabilité dans les différents pays. En ce qui concerne les actions en annulation et les droits de récupération, au lieu d'une harmonisation complète, l'Étude envisage deux voies alternatives : i) une harmonisation par l'intermédiaire de principes ((a) le principe de l'égalité de traitement des créanciers ; et (b) le principe de la protection de la confiance) ; ou ii) une harmonisation partielle des règles d'annulation des transactions, c'est-à-dire un rapprochement des règles uniquement pour les transactions caractérisées par des éléments transfrontaliers.

Dans le domaine des obligations des administrateurs liées à l'insolvabilité imminente/actuelle, une harmonisation complète ne serait pas en mesure de prendre en considération les particularités locales du droit privé, du droit des sociétés et du droit pénal. Une « harmonisation minimale » pourrait être envisagée, soit (i) en harmonisant les règles de droit international privé sur le sujet (par exemple, pour clarifier le droit applicable) ; soit (ii) en expérimentant une harmonisation minimale de la responsabilité des administrateurs en cas de manquement à leurs obligations.

En ce qui concerne la position des créanciers garantis, bien qu'il soit peu probable que cela soit réalisable (en raison des différentes considérations politiques qui sous-tendent les approches des États membres en la matière), si la voie du rapprochement est toujours envisagée, l'Étude recommande des recherches approfondies sur (i) les principes communs étayant les régimes de sûretés dans les États membres et (ii) les raisons politiques qui supportent les choix législatifs concernant la position des créanciers garantis dans le classement du partage de créances. L'Étude suggère en outre que les compétences et la coopération des tribunaux pourraient être encouragées par le développement de chambres nationales spécialisées dans les questions commerciales, d'entreprise et

d'insolvabilité, ainsi que par la mise en place d'un programme européen de formation des juges aux questions d'insolvabilité dans l'UE.

Enfin, en ce qui concerne le domaine de la localisation et du recouvrement des actifs, plutôt que l'harmonisation des règles nationales de fond, l'Étude recommande la création d'une base de données unifiée pour les actifs situés dans toute l'UE, ainsi que des règles plus strictes en matière de coopération transfrontalière entre les praticiens de l'insolvabilité et les tribunaux.

Arrangements préalables à l'insolvabilité (*Pre-insolvency workouts*)

Les arrangements préalables à l'insolvabilité sont des arrangements permettant à un débiteur en difficulté financière de restructurer sa dette dans un environnement favorable au débiteur, en parvenant à un accord avec les parties prenantes (créanciers et actionnaires). Étant donné que les arrangements préalables à l'insolvabilité n'entrent pas nécessairement dans le champ d'application du RIE, ils apparaissent pertinents dans le cadre de la discussion sur le *forum shopping* (abusif), car ils peuvent permettre à un débiteur de contourner la législation nationale sur l'insolvabilité sans déplacer son centre des intérêts principaux. Un débiteur en difficulté peut conclure un accord de restructuration de ses obligations qui finira par lier tous les créanciers, empêchant ainsi l'application de la loi sur l'insolvabilité de l'État membre où se trouve le centre des intérêts principaux.

L'Étude souligne que seuls certains États membres ont réglementé les arrangements pré-insolvabilité dans leur cadre législatif national. En outre, les règles régissant ces arrangements diffèrent d'un pays à l'autre. Tout d'abord, l'Étude démontre que certains ordres juridiques n'acceptent que les accords contractuels conclus avec (et ne liant que) certains créanciers. D'autres juridictions, exigent que les accords conclus dans le cadre d'arrangements préalables à l'insolvabilité soient autorisés par un tribunal afin de produire des effets juridiques, et potentiellement lier les créanciers dissidents ou non consultés.

La circulation des effets des arrangements de pré-insolvabilité dépend de la manière dont les accords émanant d'un État membre se voient accorder des effets dans un autre État membre. Les données recueillies au niveau national n'ont pas mis en lumière de pratiques ou de règles nationales particulières traitant spécifiquement de la reconnaissance directe (des effets) des arrangements de pré-insolvabilité étrangers, communautaires ou non communautaires. Dans ce contexte, l'Étude fournit une évaluation de la question de savoir si les arrangements européens homologués par un tribunal peuvent relever du champ d'application du Règlement (UE) n° 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (« Règlement Bruxelles I bis »), et si les arrangements de pré-insolvabilité européens qui n'ont pas été autorisé par un tribunal peuvent relever du champ d'application du Règlement (CE) n o 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (« Règlement Rome I »). Pour ce faire, les limites des divers ensembles de règles envisagés par le droit européen sont analysées, ainsi que leurs relations avec les dispositions du RIE.

L'Étude souligne en particulier le besoin de clarifier au niveau européen la question préliminaire du champ d'application des règlements susmentionnés. Sont considérés favorablement soit une interprétation par la CJUE des dispositions d'exclusion contenues dans l'article 1 respectivement des Règlements Bruxelles I bis et Rome I faisant autorité, soit une modification des textes desdits Règlements.

Enfin, l'Étude fournit une évaluation de la situation applicable au Royaume-Uni, vis- à vis, en particulier des conditions dans lesquelles, suivant le Brexit, les plans d'arrangements (*schemes of arrangement*) et les plans de restructuration (*restructuring plans*) britanniques peuvent bénéficier d'une reconnaissance à l'échelle européenne en vertu de la Convention

de Lugano.[15] Dans ce contexte, l'Étude conclut que, pour répondre à cette question, l'interprétation de l'exclusion des « faillites, concordats et autres procédures analogues » du champ d'application de la Convention de Lugano (article 1(2)(b)) devrait également être clarifiée de manière officielle. Toutefois, l'Étude souligne également qu'il n'est pas certain que le Royaume-Uni soit accepté comme membre de la Convention de Lugano[16] et que, par conséquent, la pertinence potentielle d'autres instruments, tels que la Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale,[17] pourrait être évaluée comme une alternative.

[15] Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, JO L 339, 21.12.2007, p. 3–41, disponible à: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN (dernière consultation le 25 Novembre 2021).

[16] Voir l'Évaluation de la Commission européenne concernant la demande d'adhésion du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord à la convention de Lugano de 2007, communication de la Commission au Parlement européen et au Conseil, COM(2021) 222 final, 4.5.2021. Disponible à: https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf (dernière consultation le 28 janvier 2022).

[17] Convention du 2 juillet 2019 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, Disponible à : https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (dernière consultation le 28 janvier 2022). Voir également la réponse donnée par M. Reynders au nom de la Commission européenne (22.11.2021) à la question parlementaire E-004121/2021, selon laquelle « l'approche de longue date de l'UE est que le cadre approprié pour la coopération avec les pays tiers en dehors de l'AELE/EEE dans ce domaine est fourni par les conventions multilatérales de La Haye et l'UE a constamment promu ce cadre ». Disponible à: https://www.europarl.europa.eu/doceo/document/E-9-2021-004121_EN.html (dernière consultation le 28 janvier 2022).

1. Introduction and objectives of the assignment

1.1. Introduction

This document constitutes the Draft Final Report for the "Study on the issue of abusive forum shopping in insolvency proceedings" JUST/2020/JCOO/FW/CIVI/0160 (the "Study") for the European Commission – Directorate-General for Justice and Consumers (the "Commission", or "DG JUST"), to be conducted by Spark Legal Network and Tipik, with the support of our key legal experts (the "Study Team", or "Management and Quality Assurance Team") and our network of national experts. The output of the data collection activities conducted under this Study, as described in Section 1.4, are a set of national country reports and survey reports included respectively in Annexes A and B to the present document. A list of sources relied upon for the drafting of this report is also provided in Annex C.

As such, this report contains five Chapters. The current **Chapter 1** presents the objectives and structure of this report, information on the context and objective of the Study, as well as a description of the methodology applied.

Chapter 2 presents an overview of the data collected relating to the functioning of the safeguards introduced in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)[18] (the "EIR") and other remedies at national level aimed at mitigating forum shopping practices (Section 2.2). Further, an analysis on whether there are inherent flaws in the application of the safeguards included in the EIR, with specific regards to the suspect periods introduced by Article 3 is included in Section 2.3. A case study is also provided in this Chapter (Section 2.4), with the aim of presenting an illustrative example of how one of these safeguards introduced in the EIR (the rebuttable COMI presumption) works in practice.

In **Chapter 3,** attention is given to national insolvency laws, with a focus on the divergences that may render certain jurisdictions more or less attractive for the opening of insolvency proceedings (Section 3.2) and an analysis is carried out on if and to what extent an approximation of national rules at EU level would be appropriate (Section 3.3). Finally, a case study is provided as an example of forum shopping related to divergent national rules on avoidance actions in insolvency proceedings, in connection to the application of the EIR in such court cases (Section 3.4).

In **Chapter 4,** the focus shifts towards pre-insolvency workouts and how EU Member States deal with questions of jurisdiction for such workouts, as well those concerning the cross-border circulation of foreign pre-insolvency workouts (Section 4.2). This Chapter also provides insight on the relationships between the EIR and other EU legislative instruments, as well as an analysis of the extent to which pre-insolvency workouts could fall within the scope of, in particular, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[19] ("Brussels Ia Regulation"), or the Regulation and Regulation (EC) No 593/2008 on the law applicable to contractual obligations[20] ("Rome I Regulation") (Section 4.3). The functioning of the UK schemes of arrangements and

[18] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141. Consolidate text available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0848-20220109 (last accessed 28 January 2022).

[19] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Please, note that between Denmark and the other EU Member States the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see OJ L 299, 16.11.2005, p. 61–70) applies.

[20] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R0593-20080724&from=EN (last accessed on 25 November 2021).

restructuring plans is also analysed in this Section 4.4. Additionally, two case studies are provided in respect of the Irish pre-insolvency workout and the UK scheme of arrangement (Section 4.5).

Finally, **Chapter 5** outlines brief conclusions drawn for this Study.

The following annexes are provided with the Draft Final Report:

- Annex A – National country reports;
- Annex B – Survey results;
- Annex C – Literature review.

1.2. Legal context and background

Judicial cooperation in civil proceedings is based upon the principle of mutual recognition of decisions. Since the 2010 Stockholm Programme, an emphasis was placed on the need to work on common rules on the conflict of laws and jurisdiction in the European Union.[21]

The work on common rules on the conflicts of laws and jurisdiction is still continuing in the field of insolvency law. Since 2015, the European Commission has intended to form a Capital Markets Union and as of 2020, this goal has been renewed.[22] Furthermore, the European Commission has recently published the initiative of "Enhancing the convergence of insolvency laws". This intends to address the main discrepancies in national corporate (non-bank) insolvency laws, which have been recognised as obstacles to a well-functioning Capital Markets Union.[23]

In addition, in February 2021, Paolo Gentiloni, the current Commissioner for Economy, emphasised at a press conference the need "to avoid the sharp rise in insolvencies in the future' and to organise an orderly exit for unviable firms, 'ensuring sound insolvency procedures".[24] This necessity is linked to the COVID-19 crisis, which would have caused 23% of EU companies to experience liquidity distress by the end of 2020 if it was not for government support measures or new borrowing.[25] This same research reinforces the Commissioner's statement by maintaining that "sound insolvency and pre-insolvency procedures will be key for dealing with a potential surge in corporate insolvencies".[26]

EU measures on insolvency proceedings date back to 1995 when the Member States concluded the Convention on Insolvency Proceedings.[27] The Convention was never ratified

[21] Stockholm Programme [2010] OJ C115, pp. 1-38, in particular point 3.3.2.
[22] European Commission 'Green Paper: Building a Capital Markets Union' SWD(2015) 13 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN (last accessed 19th March 2021) and European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan' COM(2020) 590 final, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF (last accessed 19th March 2021).
[23] European Commission, 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment', available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws (last accessed 19th March 2021).
[24] European Commission Press Corner, "Remarks by Commissioner Gentiloni at the Eurogroup press conference" SPEECH/21/624 (15th February 2021), available at: file:///C:/Users/Chloe/Downloads/Remarks_by_Commissioner_Gentiloni_at_the_Eurogroup_press_conference.pdf (last accessed 18th March 2021).
[25] European Commission Directorate-General Economic and Financial Affairs, 'Corporate solevency of European enterprises: state of play' (1 February 2021), available at: https://www.consilium.europa.eu/media/48396/20210402-ewg-commission-note-on-corporate-solvency.pdf (last accessed 18th March 2021), p.1.
[26] European Commission Directorate-General Economic and Financial Affairs, 'Corporate solevency of European enterprises: state of play' (1 February 2021), available at: https://www.consilium.europa.eu/media/48396/20210402-ewg-commission-note-on-corporate-solvency.pdf (last accessed 18th March 2021), p.4.
[27] Resolution on the Convention on Insolvency Proceedings of 23 November 1995 [1999] OJ C 279.

as the United Kingdom did not sign the Convention in the timelines specified.[28] Despite this, on the 31st May 2002, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings entered into force.[29] Council Regulation (EC) No 1346/2000 applied to all of the Member States with the exception of Denmark which does not take part in the EU's Area of freedom, security and justice cooperation.[30] The Regulation focused on the rules of jurisdiction for opening insolvency proceedings in the EU, in particular determining which Member States' courts have jurisdiction in these matters.[31]

Council Regulation (EC) No 1346/2000 was amended several times over its period in force (though these amendments only concerned the Annexes of the Regulation), therefore, a report on the application of the Regulation recommended that it should be 'recast' in the interest of clarity.[32] This was because, as much as the Regulation was functioning well in general, it was desirable to improve the application of certain provisions to enhance the administrative efficiency of cross-border insolvency proceedings.[33] Therefore, Council Regulation (EC) No 1346/2000 was repealed and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (EIR), which focused on filling the gaps and loopholes in the previous EU insolvency Regulation.[34]

1.2.1. Relevant Treaty articles

Article 81 TFEU forms the legal basis of the EIR. This Article focuses on judicial cooperation in civil matters. In paragraph 1 of Article 81 TFEU, it is provided that "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of laws and regulations of the Member States." Subsequently, paragraph 2 of Article 81 TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market,[35] aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of law and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; and (h) support for the training of the judicial and judicial staff.[36]

As the "proper functioning of the internal market" is explicitly mentioned in the legal basis for the current EU instruments, it is worth shedding some light on Article 26 TFEU and the importance of the internal market. Paragraph 2 of Article 26 TFEU emphasises that "[t]he

[28] Government of the United Kingdom, 'History and background to the EC Regulation on insolvency proceedings' (September 2008), available at: https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch37-48/chapter41/part1/part_1.htm (last accessed 19th March 2021).
[29] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160.
[30] Consolidated version of the Treaty on the Functioning of the European [2012] OJ C 326/47, Protocol (No 22) on the position of Denmark.
[31] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160.
[32] The report: Opinion on the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Economic Social Committee – A new European approach to business failure and insolvency' *COM(2012) 742 final* and on the 'Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' *COM(2012) 744 final* [2013] OJ C 271/55.
[33] EIR, Recital 1.
[34] EIR, Recital 7.
[35] Not *italicised* in the Treaties, but rather done for emphasis.
[36] Consolidated version of the Treaty on the Functioning of the European [2012] OJ C 326/47, Article 81.

internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[37] Again, in consideration of the importance of the internal market in judicial cooperation on civil matters, it is worth noting that Article 3(3) TEU emphasises that a key EU aim is the establishment of the internal market, of which should "work for the sustainable development of Europe based upon balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress […]".[38]

1.2.2. Definition of relevant concepts

In order to understand the problem of abusive forum shopping, it is necessary to consider the definitions of key concepts such as 'insolvency', 'insolvency proceedings', 'pre-insolvency proceedings', and 'forum shopping'.

'Insolvency' and 'Insolvency Proceedings'

The EIR does not define 'insolvency' and, in general, there is no definition for insolvency in EU law.[39] However, the EIR does refer to 'insolvency proceedings' and 'collective proceedings' in Article 2 concerning the relevant definitions.[40]

The traditional concept of insolvency presupposes some lack of liquidity or negative balance sheet of the debtor who is unable to pay their debts.[41] However, in the EIR, 'insolvency proceedings' "mean the proceedings listed in Annex A".[42] This defers to the national laws of each Member State governing insolvency proceedings, rather than providing an EU concept.

Nevertheless, Article 1(1) establishes a set of criteria that a national insolvency proceeding shall meet in order to be qualified as being an insolvency proceeding under the EIR. The provision reads as follows:

"This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)."

The third subparagraph of this provision of the EIR also clarifies that insolvency proceedings under the EIR shall be listed in its Annex A.

This concept makes it clear, that for a national insolvency scheme to be included in Annex A of the EIR (and be qualified as an insolvency proceeding under the same EIR), it shall comply with the following requirements:

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[37] Consolidated version of the Treaty on the Functioning of the European [2012] OJ C 326/47, Article 26.
[38] Consolidated version of the Treaty on European Union [2012] OJ C 236, Article 3(3).
[39] The CJEU has issued a number of judgments on the notion of insolvency with reference the 1968 Brussels Convention. See for instance Case 133/78 Gourdain v Nadler, ECLI:EU:C:1979:49.
[40] EIR, Article 2.
[41] Hess, Oberhammer and Pfeiffer, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' JUST/2011/JCIV/PR/0049/A4 (2011), available at: https://op.europa.eu/en/publication-detail/-/publication/4d756fa7-b860-4e36-b1f8-c6640dced486 (last accessed 19th March 2021).
[42] EIR, Article 2.

1. **The proceeding shall fulfil one of the structure criteria listed in points (a) to (c) of subparagraph 1 of Article 1(1),** namely: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).
2. The proceeding shall be a **collective proceeding** in the meaning of the EIR. It is worth considering the definition of 'collective proceedings' as per the EIR. 'Collective proceedings' are defined by the EIR as "proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them".[43] Recital 14 gives further clarification on the collective nature of a proceeding in the context of the EIR, as follows: "The collective proceedings which are covered by this Regulation should include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected. Proceedings that involve only the financial creditors of a debtor should also be covered. Proceedings that do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor. Proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the debtor's creditors. Moreover, the fact that some insolvency proceedings for natural persons exclude specific categories of claims, such as maintenance claims, from the possibility of a debt-discharge should not mean that such proceedings are not collective".
3. The insolvency proceeding must be a **public proceeding**. Recitals 12 and 13 clarify what the requirement of publicity should mean in the context of the EIR: "This Regulation should apply to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings" and "accordingly, insolvency proceedings which are confidential should be excluded from the scope of this Regulation".
4. The proceedings should be based on laws relating to insolvency.
5. The national insolvency scheme shall be included in Annex A of the EIR.

The distinction between both 'insolvency proceedings' and 'collective proceedings' in the EIR results from the discrepancies noted by the Court of Justice of the European Union ("CJEU") in *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten* and *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o.* In the former case, the CJEU dealt with the question of whether the Regulation applies to proceedings that fit into the first part of the definition in Article 1(1) of Council Regulation (EC) No 1346/2000 but are not provided in Annex A, as per the second part of the definition. The CJEU held that if the proceeding was not listed in Annex A, it could not be an 'insolvency proceeding' as per said regulation.[44] In the latter case, the question was raised as to whether Council Regulation (EC) No 1346/2000 could apply to a proceeding listed in the Annex, but did not correspond with the definition of Article 1(1). The CJEU held that if a

[43] EIR, Article 2.
[44] Case C-461/11 *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* [2012] ECLI:EU:C:2012:704, paras 23 et seq.

measure was contained in Annex A to the regulation at hand, their inclusion has the "direct, binding effect attaching to the provisions of a regulation".[45] This case law from the previous Council Regulation (EC) No 1346/2000 explains the separation of the two elements. In general, it furthermore emphasises that insolvency proceedings, for the purposes of the EIR, are exclusively those proceedings listed within Annex A to the EIR.[46]

Pre-insolvency proceedings

Pre-insolvency proceedings can be characterised as quasi-collective proceedings under the supervision of a court or an administrative authority which give a debtor in financial difficulties the opportunity to restructure at a pre-insolvency stage and to avoid the commencement of traditional insolvency proceedings.[47] These are especially popular as a company can enter pre-insolvency proceedings where financial distress seems likely, but it is not yet insolvent.

As referred to in the previous sub-section, Annex A of the EIR covers 'insolvency proceedings'. This also includes some pre-insolvency proceedings. Although, despite this, there are some pre-insolvency schemes that are not included and, thus, fall outside of the scope of the EIR.

Forum Shopping

A basic definition of forum shopping indicates that this involves identifying the optimum jurisdiction for a certain transaction and taking measures so that the law of that jurisdiction is applied.[48] With regard to insolvency proceedings, the EIR adopts a specific notion of forum shopping, insofar as this involves parties transferring assets or judicial proceedings "from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors".[49]

Forum shopping is not always illegitimate or abusive. However, to prevent abusive or fraudulent forum shopping in insolvency proceedings, safeguards have been incorporated at the EU level.[50] This is because in the EU, with a functioning internal market that allows businesses to establish, trade, hire, and raise capital in any Member State they please, failing businesses can utilise forum shopping by hiding behind the most favourable national law as they become distressed; thus, reaping the advantages of the internal market to mitigate their accountability by choosing an advantageous forum to open their insolvency proceedings.[51]

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[45] Case C-166/11 *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o.* [2012] ECLI:EU:C:2012:739, paras 31-35.

[46] See also: Hess, Oberhammer and Pfeiffer, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' JUST/2011/JCIV/PR/0049/A4 (2011), available at: https://op.europa.eu/en/publication-detail/-/publication/4d756fa7-b860-4e36-b1f8-c6640dced486 (last accessed 19th March 2021).

[47] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings /* COM/2012/0743 final */, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0743&rid=5 (last accessed 31st March 2021).

[48] Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (University of Oxford, Legal Research Paper Series: Paper No 33/2008), available at: https://poseidon01.ssrn.com/delivery.php?ID=599110006119020027103104017096108117063092005021001065087072070018066017125126106005050023002057007036006021102030106088115075037018087036085017116091009092124090021015007118006084118019112003106116124005127082087090097099100125085071025097093094071&EXT=pdf&INDEX=TRUE (last accessed 19th March 2021).

[49] EIR, Recital 5. It should be noted that in the definition provided in Recita 4 of the former Council Regulation (EC) No 1346/2000 no reference to the detriment of creditors was provided. In the recast EIR the definitio was amended with the view of acknowledging that in certain cases forum shopping through the shift of the COMI may be positive and may be achieved with the consensus of creditors.

[50] EIR, Recital 29.

[51] Joseph A. Caneco, 'Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU' (2016) *Law School Student Scholarship,* 843, available at: https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1839&context=student_scholarship (last accessed 19th March 2021).

1.2.3. Insolvency proceedings and the Capital Markets Union

In 2015, the European Commission released a Green Paper on Building a Capital Markets Union. The Capital Markets Union aims to strengthen capital markets and as a result, unlock more investment for all companies, especially SMEs, and for infrastructure projects; attract more investment into the EU from the rest of the world; and make the financial system more stable by opening up a wider range of funding sources.[52]

Disparities in the national insolvency laws can create obstacles, competitive advantages/disadvantages and difficulties for companies with cross-border activities or ownership within the European Union – these may hamper the creation of the Capital Markets Union.[53] The Commission's Green Paper emphasises that reducing divergences in national insolvency rules could contribute to the emergence of pan-European equity and debt markets, by reducing uncertainty for investors needing to assess the risks in several Member States.[54]

1.2.4. Regulation (RU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast)

As aforementioned, the EIR repealed and further amended Council Regulation (EC) No 1346/2000. It is the Regulation which governs "public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)."

Furthermore, the proceedings that the EIR governs are those listed in Annex A.[55] This Annex provides a list of the insolvency proceedings covered per Member State – for example, *Stečajni postupak* in Croatia.[56]

1.2.5. Regulation (EU) 2015/848 on the issue of abusive forum shopping

It is explicitly referenced in the EIR that "[the] Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping".[57] The necessity of these safeguards was established in the 2012 Impact Assessment on the Revision of

[52] European Commission 'Green Paper: Building a Capital Markets Union' SWD(2015) 13 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN (last accessed 19th March 2021).
[53] European Commission, 'Impact assessment study on policy options for a ew initative on minimum standards in insolvency and restructuring law' JUST/2015/JCOO/FW CIVI0103 FRAMEWORK CONTRACT ENTR/172/PP/2012FC LOT 2, available at: https://ec.europa.eu/info/sites/info/files/final_report_formatted_jiipib2_for_publication_final_opoce_0.pdf (last accessed 19th March 2021).
[54] European Commission 'Green Paper: Building a Capital Markets Union' SWD(2015) 13 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN (last accessed 19th March 2021).
[55] EIR, Article 1.
[56] Note: The majority of the Member States have multiple options available for insolvency proceedings.
[57] EIR, Recital 29.

Council Regulation (EC) No 1346/2000.[58] These safeguards all encompass the concept of the 'Centre of Main Interest' ("COMI"); therefore, the next section shall discuss this concept and the safeguards implemented to prevent using this concept for fraudulent or abusive forum shopping.

A. The concept of the 'Centre of Main Interest' ("COMI")

Article 3 of Council Regulation (EC) No 1346/2000 introduced the provision concerning 'International jurisdiction' and, thus, the concept of the COMI. It did not provide an exact definition of a COMI; however, Recital 13 of Council Regulation (EC) No 1346/2000 provided that: "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[59] More generally, however, Article 3 of Council Regulation (EC) No 1346/2000, which deals with jurisdiction issues, left open the opportunity for companies and individuals to utilise benefits of the internal market, in particular the freedom of establishment, by moving to a Member State with more preferable insolvency proceedings. Therefore, the recast Article 3 in the EIR introduced safeguards to prevent this possibility.[60]

The recast article 3 of the EIR provides that "the courts of a Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings". It continues to define the COMI in the same manner as Council Regulation (EC) No 1346/2000 and, thus, as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."[61]

There are different presumptions for the COMI depending upon whether the party is a company, an individual exercising an independent business or professional activity, or any other individual:

(a) For a company, the COMI is presumed to be the registered office in the absence of proof of the contrary – however, "that presumption shall only apply if the registered office has not been moved to another Member State within a 3-month period prior to the request for the opening of insolvency proceedings".

(b) For an individual exercising an independent business or professional activity, the COMI shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. Similarly to a company, this presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for opening the insolvency proceedings.

(c) For any other individual, the COMI is presumed to be the individual's place of habitual residence in the absence of proof to the contrary. However, in this case, the presumption shall only apply if the place of habitual residence has not been moved to another Member State within the 6-month period prior to the request for opening the insolvency proceedings.[62]

B. The safeguards against forum shopping introduced in the EIR

Four safeguards were provided in the EIR, these were: the COMI presumption should be rebuttable under certain circumstances; national courts must verify that the COMI is indeed

[58] European Commission, 'Commission Staff Working Document: Impact Assessment: *Accompanying the document:* Revision of Regulation (EC) No 1346/2000 on insolvency proceedings' (COM(2012) 744 final) (SWD(2012) 417 final), available at: http://insreg.mpi.lu/Impact%20assessment.pdf (last accessed 23rd March 2021).
[59] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, Recital 13.
[60] See the subsequent sections going into detail on the safeguards mentioned above.
[61] EIR, Article 3(1).
[62] EIR, Article 3(1).

in their Member State; the COMI presumption does not apply during a suspension of 3 (or, in the case of individuals, 6) months before the request for opening proceedings is filed; and finally, that any creditor or debtor must have an effective remedy under national law against the decision to open insolvency proceedings.

The first safeguard provided by the EIR is that the COMI should be rebuttable under certain circumstances when deciding on the jurisdiction to open insolvency proceedings. In Recital 30 of the EIR, it maintains that for companies, the presumption should be rebuttable where the company's central administration is located in a Member State other than its registered office and where a comprehensive assessment, in a manner that is ascertainable by third parties, establishes that the company's actual centre of management and supervision of its interests is located in that other Member State. While, for individuals, it should be possible to rebut the presumption when the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence or where it can be established that relocation occurred intentionally to file for insolvency proceedings.[63]

A second safeguard is provided by Article 4 of the EIR. This maintains that national courts must examine *ex officio* their jurisdiction pursuant to Article 3(1) or (2). Thereby, the national courts must verify whether or not the COMI is truly located within their territory. This safeguard also applies to insolvency practitioners if insolvency proceedings are opened without a decision by a Court.[64]

A third safeguard connected to the concept of the COMI is "suspect periods" of which where there was a COMI shift just 3 (or 6) months prior to the opening of proceedings, the general presumptions determining this cannot apply. As aforementioned, a COMI shift is not effective before 3 months in the case of a company or an individual exercising an independent business or professional activity and before 6 months in the case of any other individual.[65] This concept was suggested by INSOL Europe in its draft reform document; although, the suggestion in this draft was for a 1-year period rather than 3 (or 6) months.[66] The aim was to discourage pre-filing forum shopping on the assumption that transferring for insolvency indicates a fraudulent or abusive purpose.[67]

The final safeguard introduced was the opportunity for any creditor to challenge the decision of the court on its jurisdiction vis-à-vis the insolvency proceedings, provided for in Article 5 of the EIR. In particular, this can either be based upon the decision on the grounds of international jurisdiction or on other grounds.[68] The consequences of this challenge are governed by national law.[69]

1.2.6. Has the EIR fully achieved its goals?

The EIR codified case-law[70] and required national courts to rule on their own jurisdiction and introduced the 3 (or 6 months) suspect periods. These amendments, however, may have not necessarily resolved these issues, as seems to be suggested by case law following the implementation of the EIR.[71]

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[63] EIR, Recital 30.
[64] EIR, Article 4.
[65] EIR, Article 3(1).
[66] INSOL Europe, Revision of the European Insolvency Regulation (2012) 38 ff.
[67] See: Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisted' (2017) Hamburg Law Review 38, available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3091071_code836081.pdf?abstractid=3091071&mirid=1 (last accessed 23rd March 2021).
[68] EIR, Article 5.
[69] EIR, Recital 34.
[70] See: Case C-341/04 *Eurofood IFSC Ltd* [2006] ECLI:EU:C:2006:281; Case C-1/04 *Susanne Staubitz-Schrieber* [2006] ECLI:EU:C:2006:39; Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECLI:EU:C:2011:671.
[71] See the examples provided in Section 3 below.

The definition of 'insolvency proceedings' as provided by the EIR is narrow. This is because, as discussed above, 'insolvency proceedings' can only be those listed in Annex A of the EIR. However, each Member State has the discretion to decide whether to include certain proceedings in Annex A or not (provided these schemes fulfil the requirements described in Section 1.2.2) and, therefore, any proceedings (especially pre-insolvency proceedings) falling outside of its scope, cannot be regulated under EU insolvency law.

In addition, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law[72] ("Directive (EU) 2017/1132") made it easier for companies to relocate to other Member States and, therefore, should be reconciled with the aims of the EIR to combat abusive forum shopping.

As a result, further measures have since been taken to make the abusive relocation of companies even less likely, notably Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt ("Preventative Restructuring Directive").[73]

In this context, the relationship between the EIR and the Preventative Restructuring Directive will be analysed in Chapter 4 of this report.

1.2.7. The issue of abusive forum shopping in insolvency proceedings

As noted in Section 1.2.2, forum shopping is not always bad. It can sometimes have positive effects or be unavoidable; for example, in the case of a merger with a foreign company. However, it also can be problematic as it leads to unpredictability for creditors of the legal consequences of the debtor's insolvency. Moreover, it can lead to the concept of a COMI under the EIR being undermined because the new COMI is not the Member State most affected by the insolvency of the debtor.[74] Therefore, it is worthwhile to look at how forum shopping strategies, remaining issues with suspect periods, and pre-insolvency workouts continue to result in abusive forum shopping.

Forum shopping strategies

The literature identifies two main forum shopping strategies. In the first strategy, the corporate debtor seeks to move its registered office to another country, or an individual seeks to move its principal place of business or habitual residence to another country. In the second strategy, the debtor moves the 'head office functions' of a company abroad, whilst leaving the registered office behind.[75]

With regard to the first strategy, an example of a corporate debtor moving its registered office to another country to benefit from its insolvency laws is Deutsche Nickel AG. Deutsche Nickel AG was a German public limited company that was sold to a newly founded English

[72] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (Text with EEA relevance.) [2017] OJ L 169.
[73] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (Text with EEA relevance.) [2019] OJ L 172.
[74] NautaDutilh, 'The European Insolvency Regulation (recast): A brief summary of the most important provisions', available at: https://www.nautadutilh.com/en/file-download/download/public/1375 (last accessed 23rd March 2021).
[75] Furthermore, it is worth briefly noting that there is a third, more difficult and, thus, less likely, strategy which would entail moving actual business operations or such operations to another country.

private limited company (DNICK Ltd.) with a registered office in the UK.[76] DNICK Ltd subsequently filed for insolvency before the High Court in London. It is worth noting, however, that the Deutsche Nickel AG example not only occurred under the old Council Regulation (EC) No 1346/2000 but also took place before Brexit, when the UK was still an EU Member State and, therefore, other EU level legislative instruments were still applicable.

While, from the individual's perspective, an example appears from the *Tribunal da Relação de Guimarães* (Court of Appeal, Guimarães, Portugal)' preliminary reference to the CJEU in *MH, NI v. OJ, Novo Banco SA*.[77] In this case, MH and NI were UK residents where they pursued an activity as employed persons but applied to Portuguese courts to open insolvency proceedings. Said parties, however, did not proceed to formally shift their residence to Portugal but instead attempted to claim that their COMI was not the UK – their place of habitual residence – but rather Portugal, based on the fact that the latter country was where the sole immovable asset which they owned was located. The arguments were mainly based on Recital 30 of the EIR, according to which the COMI presumption is rebuttable, for example, where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence. The Portuguese court referred the question to the CJEU on whether, based on the EIR, Member States' courts have jurisdiction to open main insolvency proceedings in respect of a citizen whose sole immovable asset is located in that State, whereas he/she, along with his family unit, is habitually resident in another Member State where he is in paid employment. The CJEU held that the COMI was still their place of habitual residence – the UK – and that the COMI presumption is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence.[78]

With regard to the second strategy, a debtor would move the 'head office functions' – therefore, the management and board of directors – to a new Member State. An example of this can be seen from *Hellas Telecommunications,* where the English courts held that the COMI of *Hellas Telecommunications (Luxembourg) II SCA* had effectively been transferred from Luxembourg to England, despite the fact that the company's registered office remained in Luxembourg.[79]

Key issues with "suspect periods"

Article 3(1) of the EIR introduced "suspect periods" – something of which was not included in Council Regulation (EC) No 1346/2000. These "suspect periods" provide a period during which the registered office cannot be presumed to be the COMI if it has moved within this time. This is 3-months in the case of companies and individuals exercising an independent or professional activity and 6-months in the case of any other individuals.[80]

There are many criticisms of the concept of "suspect periods". There have been complaints by some that it is under-inclusive, however other critiques have claimed it is over-inclusive. Furthermore, complaints have been made that the 3-month period is susceptible to manipulation; the period is simply ineffective; and that it may conflict with the freedom of establishment.

The first criticism that it is under-inclusive stems from the fact that the "suspect period" does not apply if only the company's head office moves to another Member State and not the

[76] See: Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisited' (2017) Hamburg Law Review 38, available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3091071_code836081.pdf?abstractid=3091071&mirid=1 (last accessed 23rd March 2021).
[77] Case C-253/19 *MH, NI v. OJ, Novo Banco SA* [2020] ECLI:EU:C:2020:585.
[78] Case C-253/19 *MH, NI v. OJ, Novo Banco SA* [2020] ECLI:EU:C:2020:585, paras 9 ff.
[79] *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199, available at: https://www.insol.org/_files/Fellowship%202015/Session%206/Hellas%20Telecommunications.pdf (last accessed 23rd March 2021).
[80] It should be noted that while the present study covers potential forum shopping which could be carried out by all types of debtors, many of the issues concerned appear to be more relevant in the context of legal entities.

registered office.[81] As was mentioned in the above section with *Hellas Telecommunications (Luxembourg) II SCA,* this is a common method of forum shopping that is able to continue under the "suspect periods" provided in the EIR.[82] On the contrary, some argue that "suspect periods" risk being over-inclusive as it may discourage beneficial forum shifts that are agreed between the debtor and all creditors. This point sees 'fraudulent or abusive' forum shopping as that where the company migrates without the creditors' consent or otherwise to their detriment.

The second criticism sees "suspect periods" viewed as susceptible to manipulation. The European Commission, in particular, had concerns about the difficulty to know the precise moment that the COMI moved.[83] This is because a COMI cannot just migrate and transfer its activities from one Member State to another overnight. In fact, practitioners have estimated that it might take between 6 to 12 weeks for a COMI to migrate.[84] Therefore, it might be hard to monitor when the shift occurred, and this fact is open to manipulation.

The third criticism is that the period is simply ineffective. This is because "suspect period" only requires disapplying the presumption as to the registered office. Therefore, it does not make COMI shifts outright impossible. This is because the Member State courts may still be convinced that the new COMI is in their jurisdiction (albeit being required to explicitly assess why this is so), despite the movement of both the registered and head office from another Member State, followed by filing for insolvency.[85]

The final criticism refers to the potential conflict between the "suspect periods" and the freedom of establishment. The freedom of establishment is one of the four fundamental freedoms, allowing the "[participation], on a stable and continuous basis, in the economic life of a Member State other than [their] State of origin and to profit therefrom".[86] Linking back to the previous point concerning "suspect periods" being ineffective, restricting any possibility of moving the COMI could represent an unjustified restriction to the freedom of establishment.[87] Therefore, this conflict comes into play with the lack of effectiveness of the concept.

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[81] See: Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisted' (2017) Hamburg Law Review 38, available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3091071_code836081.pdf?abstractid=3091071&mirid=1 (last accessed 23rd March 2021).

[82] *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199, available at: https://www.insol.org/_files/Fellowship%202015/Session%206/Hellas%20Telecommunications.pdf (last accessed 24th March 2021).

[83] See: European Commission, 'Impact Assessment: Accompanying the document: Revision of Regulation (EC) No 1346/2000 on insolvency proceedings' (SWD/2012/0416 final), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012SC0416 (last accessed 24th March 2021), p. 35. See also Recital 28 of the EIR according to which: "When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means".

[84] Elizabeth A McGovern and James Hatchard, 'Forum shopping – the end of an era?' Global Restructuring Watch (29 May 2015), available at: https://www.globalrestructuringwatch.com/2015/05/forum-shopping-the-end-of-an-era/ (last accessed 24th March 2021).

[85] See: Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisted' (2017) Hamburg Law Review 38, available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3091071_code836081.pdf?abstractid=3091071&mirid=1 (last accessed 24th March 2021).

[86] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411, para 25.

[87] It should be noted that, however, under the current EIR rules COMI shift are not restricted *per se*. Debtors are free to establish the COMI elsewhere, but such relocation will become effective (only for purposes of applying for insolvency) after the so-called suspect period. It must be underlined that if the notion of COMI requires that the business is carried out on a stable basis, then the condition that a minimum period should elapse before the COMI shift becomes effective is not unreasonable.

1.2.8. Pre-insolvency workouts and the implementation of the Preventative Restructuring Directive

Pre-insolvency workouts (such as schemes of arrangement) are used to restructure the debts of a debtor company in financial distress. Some of these workouts "for the purpose of rescue, adjustment of debt, reorganisation or liquidation"[88] are covered under Annex A of the EIR and, therefore, fall into the scope of the EIR by being "insolvency proceedings" according to the definition of said notion as explained in Section 1.2.2. However, this is not always the case. In fact, it may well be that a pre-insolvency scheme is available in a jurisdiction, but does not meet the requirements to be classified as an insolvency proceeding according to the criteria set out in the EIR (see Section 1.2.2.); or it may be that, even though it meets such requirements, the said scheme has not been included within said Annex A, which has led to companies and individuals intentionally forum shopping outside of the scope of the EIR.

This situation, in particular forum shopping the English law's 'scheme of arrangement', led to the introduction of the Preventative Restructuring Directive. This introduced a minimum standard among EU Member States for preventative restructuring frameworks available to debtors in financial difficulty and to provide measures to increase the efficiency of restructuring procedures.[89] The Directive had to be transposed by the Member States by the 17th July 2021, though Member States could request a one-year extension from the European Commission.

Still, there is nothing in the Preventative Restructuring Directive that prevents debtors from selecting the forum with the most effective restructuring proceeding over the mechanisms for insolvency proceeding provided in the EIR.

Further details on the Preventive Restructuring Directive and its relations with the EIR is provided in Chapter 4, Section 4.3.

Finally, it is worth noting that on the 9th of January 2022, Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B[90] ("Regulation (EU) 2021/2260") came into effect. As can be inferred by the title, the enactment of this regulation brought along updates with regards to the scope of the application of the EIR, as certain Member States decided to list some of these workouts in Annex A of the EIR.[91] Further information on such updates will be given in Section 4.2.

1.3. Objectives of the Study

The main objective of the Study is to conduct a thorough legal and empirical analysis to enable the Commission to determine whether the safeguards included in the EIR with the aim of discouraging forum shopping practices actually met expectations, or whether there

[88] EIR, Article 1(1).
[89] Matthew Thorn and Manhal Zaman, 'And, now more keeping up with the Joneses: The new EU restructuring directive and reforms in the United Kingdom' (Norton Rose Fulbright, October 2019), available at: https://www.nortonrosefulbright.com/en-br/knowledge/publications/65ec62cf/and-more-keeping-up-with-the-joneses-the-new-eu-restructuring-directive-and-reforms-in-the-uk (last accessed 24th March 2021).
[90] Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B, OJ L 455, 20.12.2021, p. 4–14. Available at: http://data.europa.eu/eli/reg/2021/2260/oj (last accessed 27 January 2022). The Consolidate text of the EIR is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0848-20220109 (last accessed 28 January 2022).
[91] Prior to Regulation (EU) 20221/2260, Annex A of the EIR had previously been amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, OJ L 57, 3.3.2017, p. 19–30. Available at: http://data.europa.eu/eli/reg/2017/353/oj; and subsequently by Regulation (EU) 2018/946 of the European Parliament and of the Council of 4 July 2018 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, PE/25/2018/REV/1, OJ L 171, 6.7.2018, p. 1–10. Available at: https://eur-lex.europa.eu/eli/reg/2018/946/oj (last accessed 28 January 2022).

is a need for further action (non-legislative or legislative) in the future at EU level. In addition, the study will deliver analysis with regard to the legal practice aiming at the cross-border exploitation by debtors of pre-packaged private workouts (such as schemes of arrangement of UK law), looking into whether it incentivises abusive forum shopping practices, and what might be the most appropriate legal remedies to mitigate these possibilities. This analysis will address the cross-border recognition and enforcement of pre-insolvency workouts in the light of the scopes of the EIR and the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[92] ("Brussels Ia Regulation"). Finally, the study should assist the Commission in assessing whether removing discrepancies in certain targeted areas of national insolvency regimes would mitigate the incentives for abusive forum shopping.

1.4. Methodology and tasks

In order to meet the objectives of the Study, our methodology includes 4 tasks (in addition to the Inception):

Task 0 - Inception: This first task comprised the inception of the Study, where the Study Team conducted preparatory activities for the data collection and analysis tasks.

Task 1 - Legal desk and field research at national level: Task 1 focused on collecting data on the existing national legal frameworks (and their implementation) regarding (abusive) forum shopping in the 27 Member States.[93] For this task national legal experts carried out i) legal desk research (completion of a standardised questionnaire with targeted questions on the insolvency law regimes in each Member State, based on desk research) and ii) legal field research (interviews with national stakeholders, identified amongst lawyers or judges, cross-border litigants, insolvency consultants or insolvency practitioners). The outcome of this data collection is a set of completed country reports which can be found in Annex A. Each country report contains a) completed legal desk research questionnaire; b) completed interview report(s);[94]and c) a number of completed case reports.[95]

Task 2 - Centrally organised survey and interviews: With Task 2, the Study Team centrally carried out a survey among national stakeholders (i.e., representatives of businesses, SMEs or entrepreneurs, and consumers) by means of the EUSurvey tool (available at https://ec.europa.eu/eusurvey). As the response rate was lower than expected, the Study Team also conducted follow up-calls and further attempts to collect national stakeholders' views, and/or identify reasons for which the survey has not been answered. The survey findings can be found in Annex B. In parallel, the Study Team contacted EU stakeholders to invite them to conduct interviews in view of collecting additional knowledge and data for the Study.[96] However, the Study Team did not receive

[92] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Please, note that between Denmark and the other EU Member States the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see OJ L 299, 16.11.2005, p. 61–70) applies.

[93] It should be noted that, though desk and field research on the national insolvency framework was conducted also in Denmark, however the EIR does not apply in said country due to Denmark's opt-out from EU Justice and Home Affairs cooperation.

[94] The number of interview reports varies for each country, depending on the stakeholders" availability and willingness to conduct interviews across the Member States. It should be noted that in the following countries, interview with national stakeholders were not conducted due to a lack of availability of national stakeholders contacted: HR, and HU.

[95] The number of case reports varies for each country, depending on if and to what extent relevant case-law was identified and selected by national legal experts in their respective Member State.

[96] The following seven EU level organisations were contacted: i) Council of Bars and Law Societies of Europe (CCBE); ii) Association of European Administrative Judges (AEAJ); iii) Business Europe; iv) SME Europe; v) European Small Business Alliance; vi) BEUC (European Consumer Organisation); vii) UNIDROIT (in particular, Professor Ignacio Tirado - Secretary General, a specialist in insolvency law).

any expression of interest and/or indication of availability to conduct an interview from the contacted stakeholders.[97]

Task 3 - Legal analysis and evaluation: this task encompassed the legal analysis to be carried out on the basis of the assessment and the synthesis of all the information, data and views gathered through the legal desk and field research (Task 1 and Task 2). The Study Team discussed the preliminary analysis of the data during a meeting with the Advisory Board, consisting of two top experts in the field, whose relevant feedback informed the drafting and finalisation of the analysis contained in the present report. The analysis of the data collected followed three streams which are reflected respectively in Chapters 2, 3 and 4 of this report:

- **Stream 1:** the first stream of analysis focuses on the legal practice with regard to the suspect periods introduced by Article 3 of EIR and other measures aimed at mitigating (abusive forum shopping).
- **Stream 2:** the second stream of the legal analysis focuses on domestic insolvency law regimes, including the extent to which they differ and whether removing discrepancies in targeted areas of national insolvency regimes would mitigate the incentives of (abusive) forum shopping.
- **Stream 3:** the third stream of analysis looked into the circulation of pre-packaged private workouts and arrangements approved by court decisions across the Member States, and the extent to which this incentivises the circumvention of Member States' insolvency law and the questions of cross-border circulation of effects it raises.

Task 4 - Meetings and reports: under this task, the main outputs of the Study were submitted to DG JUST, with this report constituting the Final Report, and meetings were organised and held to discuss the deliverable and the progress of the Study.

[97] Out of seven stakeholders contacted, two expressly turned down the interview request, whilst no answer was received from the remainder stakeholders.

2. Suspect periods and other measures aimed at mitigating (abusive) forum shopping

2.1. Introduction

This section sets out the findings of the Study in relation to the functioning of the safeguards introduced in the EIR with particular focus on the suspect periods set out in Article 3 of the EIR, as well as other measures identified at national level to mitigate (abusive) forum shopping.

Section 2.2 describes the main findings of the data collected during this Study. Such data was gathered by means of desk research questionnaires and interviews completed with national stakeholders in respect of each Member State, to shed light on the practical experiences of the suspect periods. Section 2.3 sets out the Study Team's analysis in relation to the notion of "abusiveness" in respect of COMI relocations in the context of insolvency proceedings, as well as the assessment of the safeguards introduced in the EIR, with particular focus on the application of the suspect periods and other measures aimed at mitigating abusive forum shopping. Finally, Section 2.4 provides a case study in respect of the Netherlands (and Spain) in order to illustrate how the application of one of the EIR safeguards (i.e., the rebuttable presumption) works in practice.

2.2. Summary of the main findings of the data collected

In the following sub-sections, the findings presented have been taken from desk and field research conducted under Task 1. In particular, as explained in Section 1.4 the data collection activities under this task encompassed collecting information on available (and most relevant) national case law[98] in relation to the new safeguards brought in under Article 3 (International jurisdiction), Article 4 (Examination as to jurisdiction) and Article 5 (Judicial review of the decision to open main insolvency proceedings) of the EIR, as well as interviewing field lawyers, judges and insolvency practitioners, who offered insights gleaned from their own experiences with the new safeguards.

Perception of (abusive) forum shopping practices and related issues

It is worth mentioning from the outset that none of the stakeholders interviewed in the context of this Study considered abusive forum shopping to be an issue in their respective Member State. In fact, for the vast majority, abusive forum shopping was considered, at present, as a non-existent phenomenon. This was predominantly the case for Member States where the economy is dominated by small and medium-sized enterprises, for example, Portugal and the Czech Republic.[99] A stakeholder from the Czech Republic reasoned that debtors of this nature are far less prepared for insolvency and the procedure for effectively and legally shifting their COMI is too complex and burdensome. This point about the resources required to forum shop was echoed by a French stakeholder, who added that COMI shifts must be premeditated to be successful and only large firms would have such contingency plans in place.[100] This may explain why many of the stakeholders had no experience of abusive forum shopping. However, some interviewees did mention

[98] It should be noted that the desk research conducted focused on identification of relevant court cases rendered between 2017 and 2021.
[99] See Annex A, national country reports, PT and CZ interview reports.
[100] See Annex A, national country reports, FR interview reports.

that, in their opinion, the desire to forum shop has not subsided, particularly for those seeking to forum shop away from France where employees are the first group to be paid out.[101] Further, the UK's departure from the EU has also further disincentivised forum shopping to what was previously a desirable jurisdiction. [102]

The interviewees also raised some issues they have faced in working with the EIR with particular regards to the determination of when forum shopping is in fact to be considered *abusive*.[103] According to Recital 5 of the EIR, forum shopping (in the context of the EIR) is defined as "seeking to obtain a more favourable legal position to the detriment of the general body of creditors", though no specific reference to *abusive* forum shopping practices is found in the EIR. Stakeholders from Portugal, Germany and the Netherlands echoed this sentiment when offering their understanding of abusive forum shopping.[104] Similarly, the Romanian interviewee suggested that under Romanian law, there are no criteria to distinguish between abusive and beneficial forum shopping practices.[105] However, another Dutch stakeholder remarked that no form of forum shopping can be seen as abusive as far as they were concerned.[106] This Dutch stakeholder also included remarks about what makes certain jurisdictions attractive, stating that factors such as cost-efficiencies make defining what is abusive quite difficult.[107] In this context, it should also be mentioned that in none of the Member States were specific rules noted as having been put in place with the aim of distinguishing clearly between forum shopping practices that may be abusive from those that are not.[108]

Another issue that was noted by stakeholders from Member States such as Belgium and Luxembourg, was that groups of companies pose a dilemma for cross-border insolvencies. According to a Belgian stakeholder, groups of companies rarely rely on insolvency law when they have to restructure across jurisdictions.[109] An interview collected from Luxembourg similarly remarked that many holding companies are headquartered in Luxembourg and so can easily shift their COMI elsewhere without raising suspicion.[110] However, it is worth recalling that the COMI relocations falling under the scope of the provisions of the EIR (i.e., safeguards) which are analysed under the present Study only concern individual legal entities, and not groups of companies. This means that if the COMIs of the relevant companies are located in two or more Member States, insolvency proceedings would need to be started in each Member State with the appointments of different insolvency practitioners.[111] In this context, though it should be noted that such matter falls out of the scope of the present Study, as will be further explained in the following paragraphs, it is worth mentioning that groups of companies are considered in a dedicated chapter of the EIR, which provides for procedural rules on the coordination of the insolvency proceedings of members of a group of companies (i.e., Chapter V of the EIR), the goal of which is to enhance the efficiency of the coordination, while at the same time respecting the separate legal personality of each group member.

Effectiveness of new safeguards in the EIR (suspect periods) and national remedies

[101] See Annex A, national country reports, FR interview reports.
[102] Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (2019) 20 European Business Organization Law Review 547, 561.
[103] For more information on the concept of abusiveness please see Section 2.3.
[104] See Annex A, national country reports, PT, DE, NL interview reports.
[105] See Annex A, national country reports, RO interview reports.
[106] See Annex A, national country reports, NL interview reports.
[107] See Annex A, national country reports, NL interview reports.
[108] See Annex A, national country reports, interview reports, question 1.
[109] See Annex A, national country reports, BE interview reports.
[110] See Annex A, national country reports, LU interview reports.
[111] See also Judgment of 2 May 2006, Re Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0341&from=EN (last accessed on 25 November 2021), paragraphs 30 and 36.

Amongst the safeguards introduced in the EIR, particularly relevant are those concerning the so-called 'suspect periods'. Under Article 3(1), the presumption that a debtor's (legal entity) COMI is in the location of its registered seat does not apply where the COMI was shifted within 3 months of the opening of insolvency proceedings. The same 3-month suspect period applies to individuals exercising an independent business or professional activity, whilst for natural persons, the suspect period is 6 months. It should be noted that, though one of the interviewees from the Czech Republic considered the 6-month suspect period for individuals too long,[112] however, stakeholders' answers mainly concerned the effectiveness of the 3-month suspect period, as potential abusive forum shopping strategies seem most commonly associated with legal persons.

In this context, a number of the stakeholders interviewed stated that they would like to see the 3-month suspect period extended. In doing so, some referred to the fact that their national laws provide longer suspect periods which could be taken as an example for EU-wide implementation (though, as will be further described below, such longer national suspect periods only apply for the determination of territorial jurisdiction, or international jurisdiction with regard to third non-EU countries, and do not override the EIR rules when dealing with COMI relocations between Member States and where the application of the EIR presumption prevails over national legislation).

One stakeholder interviewed in the Netherlands was of the view that suspect periods only impact *bona fide* debtors, who may be prevented from achieving the best result for themselves and their creditors.[113] The same stakeholder also stated that whilst suspect periods are not an obstacle to a *mala fide* debtor, they do offer legal certainty. A Portuguese stakeholder was in favour of lengthening the suspect period, as a debtor generally knows about their impending insolvency long before the 3-month period.[114] Also, an Austrian lawyer mentioned that the suspect period of 3 months for business entities might be relatively short as insolvency builds up with time, and it is not a sudden process.[115] However, there did not seem to be a consensus on how long such suspect periods should be. In France, the national rules to determine territorial jurisdiction or international jurisdiction with regard to third non-EU countries (i.e., not applicable to cases of COMI relocations between Members States, to which the EIR suspect-period and presumptions apply) provide for a suspect period of 6 months[116] is and a national stakeholder explained how this French rule does not operate as a simple reversal of the presumption, but as a neutralisation of the effects of the change of registered office. A second French stakeholder indicated that a longer suspect period could give the courts the scope needed to identify abusive COMI shifts, echoed by another interviewee who suggested bringing the EIR in line with the approach taken in the French national rule on territorial and international (non-EU) jurisdiction, by extending the suspect period to 6 months, also for companies. Romania exhibits a similar approach to France, as Article 41 of the Romanian law 85/2014[117] assigns jurisdiction on the basis of the registered office presumption but applies a suspect period of 6 months for matters concerning territorial jurisdiction. Furthermore, an Italian judge interviewed reported that under Italian insolvency law, the rules to determine territorial jurisdiction provide that any transfer of an entity's or individual's principal place of business during the [1] year preceding the filing of a bankruptcy petition has no effect on the jurisdiction of the tribunal.[118] Similarly, an Estonian judge suggested extending the suspect

[112] See Annex A, national country reports, CZ interview reports.
[113] See Annex A, national country reports, NL interview reports.
[114] See Annex A, national country reports, PT interview reports.
[115] See Annex A, national country reports, AT interview reports.
[116] Article R. 600-1, French Code of Commerce.
[117] Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at https://sintact.ro/#/act/16941441/18?directHit=true&directHitQuery=legea%2085~2F2014, (last accessed on 15 September 2021)
[118] See Annex A, national country reports, IT interview reports. However, legal literature seems to have clarified that this provision does not apply if the COMI shift is made towards a Member State bound by the EIR.

period to 1 year.[119] Also, another Estonian stakeholder suggested lengthening the suspect period (but did not indicate how long an ideal suspect period would be).[120] The Austrian field research contained a similar point, with one stakeholder indicating that the 3-month suspect period is not only short but also overly determinative.[121] In other words, when a court is looking for a suspicious COMI transfer, it should take other factors into consideration from the start, not only when the suspect period is triggered. Similarly, interviewees from Spain mentioned that Spanish courts seem to not be concerned (length of) suspect periods too much, but rather focus on assessing the concrete factors that determine whether the COMI is located in Spain at the moment of the opening of the proceedings.[122]

In addition to extending the length of suspect periods, some stakeholders also felt that increased levels of transparency across borders would further protect creditors. For instance, a Polish stakeholder advocated for the introduction of an EU-wide insolvency registry[123], indicating that a formal announcement concerning the filing for the opening of insolvency proceedings could provide other stakeholders (especially creditors) a chance to bring their doubts about jurisdiction before the seized court, which could serve as an 'alert' to said court to further investigate the real COMI of the debtor. One stakeholder from Greece also welcomed the introduction of an online registry for insolvency proceedings there and felt if other Member States had one as well, this would increase cross-border transparency.[124]

Application of the EIR safeguards in national caselaw

Per Article 3 of the EIR, the jurisdiction required to open insolvency proceedings is determined by the debtor's COMI. A court's decision will be made more difficult if/when the debtor has so-called 'connecting factors' to other EU Member States. This requirement is further aided by the fact that national courts are obliged to check the status of their own jurisdiction under Article 4. Additionally, Article 5 provides a recourse to challenge a court's jurisdiction to open insolvency proceedings. However, the vast majority of the case law identified via the desk research conducted at national level concerned connecting factors. Some examples of main matters which national courts were found to have dealt with across the Member States are provided in the following paragraphs.

Several cases identified by the desk research at national level related to proceedings related to groups of companies. For instance, where a subsidiary company had its registered offices in one Member State, but the parent company was headquartered elsewhere, national courts were found to have still opened proceedings for the subsidiaries in the former Member State. In the Irish case of *New Look Retailers (Ireland) Limited*,[125] the debtor was a subsidiary of a company headquartered in the UK. The fact that the debtor had its registered offices in Ireland was sufficient for the court, which determined it had jurisdiction under Article 3. A case with similar facts arose in Finland for a debtor firm with its parent company headquartered in Germany.[126] Upon appeal, the court held that the lower District Court had jurisdiction to open proceedings as the debtor had registered offices in Finland, had been serving Finnish customers from a Finnish online shop and had been paying taxes based on this business activity.

The corollary has also proved sufficient, whereby the court is asked to open insolvency proceedings for the parent company when the activities of its subsidiaries might suggest its

[119] See Annex A, national country reports, EE interview reports.
[120] See Annex A, national country reports, EE interview reports.
[121] See Annex A, national country reports, AT interview reports.
[122] See Annex A, national country reports, ES interview reports.
[123] See Annex A, national country reports, PO interview reports.
[124] See Annex A, national country reports, EL interview reports.
[125] See Annex A, national country reports, IE case report; [2020] IEHC 514.
[126] See Annex A, national country reports, FI case report; *Finnish Tax Administration (Verohallinto) v WellStar Finland Oy*, Decision number 366, issue S 20/873.

COMI is elsewhere. The research in France identified a case where the court was asked to open proceedings for a debtor with two subsidiaries based in Belgium.[127] The Commercial Court of Paris held that it had jurisdiction to open proceedings, based on the fact that the holding company was headquartered in Paris and the subsidiaries were directed and financed from there.

The case-law mentioned above appears to reflect the application by national courts of the principle by which the determination of the COMI in the context of insolvency proceedings is to be done in respect of each distinct legal entity, irrespectively of the COMI of a subsidiary of a parent company. In particular, this case-law also appears in line with the principles set out by the CJEU in the *Eurofood IFSC Ltd* ruling according to which "*where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the EIR*", as "factors which are both objective and ascertainable by third parties" should be instead taken into consideration.

It is worth mentioning that the aforementioned findings reflect the policy choice taken by the EIR vis-à-vis multinational enterprise-group insolvencies. The basic approach, even after the recast of the EIR in 2015, is to focus on the legal entities instead of the economic units, thereby requiring the determination of the COMI for each member of the same group of companies separately, and not considering the group as a single economic unit. Consequently, on the basis of the EIR, the only possibility to concentrate the insolvency proceedings of the various members of the same group of companies in one jurisdiction is to convince the courts of a given Member State that all legal entities have their COMI there. While the recast EIR rejected the idea of consolidating insolvency proceedings at group level, it introduced new rules vis-à-vis the groups of companies: These rules on the coordination of a group of companies' proceedings are included in a dedicated Chapter V of the EIR, which falls outside the scope of this Study.

In cases where a court's jurisdiction was challenged, the case law demonstrates that national courts went into further detail in determining a debtor's COMI and whether they had the required jurisdiction. For instance, the Spanish Court of Appeal held that the debtor's COMI was in Spain due to the actual management structure of the company and its administrative location.[128] In a case from Luxembourg, the court's jurisdiction was successfully challenged due to the time that had passed since relocating to Belgium, the absence of any assets in Luxembourg and the debtor's business activity had since been carried out in Belgium.[129] Another example of a successful challenge was found in France, whereby the applicants' COMI was found to be in Germany instead.[130] In this instance, the Nimes Court of Appeal rejected an application to extend insolvency proceedings to two entities based in Germany. The Court held that just because the parties' assets had been intermixed with those of a French debtor, it does not have sufficient jurisdiction over them as their COMIs were both clearly in Germany.

In the Czech Republic, a debtor's appeal based on having its COMI in Austria was rejected.[131] The court held that because the debtor had no assets or employees in any other Member State when the proceedings were opened but did have use of a warehouse and head office in the Czech Republic, its COMI was ruled to be there. The courts in Austria have also had the opportunity to clarify how best they adjudicate a COMI location.[132] Factors

[127] See Annex A, national country reports, FR case report; Tribunal de Commerce de Paris, 2ème Chambre, 13 mars 2018, n°2019013204 and 2018013207.
[128] See Annex A, national country reports, ES case report; 2.Judgment of the Barcelona Court of Appeals (Section 15th), Number 27/2021, of February 25, 2021 (ECLI: ES:APB:2021:926A).
[129] See Annex A, national country reports, LU case report; Luxembourg Court of Appeal of 6 July 2021 (no. 96/21).
[130] See Annex A, national country reports, FR desk research questionnaire; Cour d'appel de Nîmes, 4ème chambre commerciale, 5 décembre 2019, n° 19/01123.
[131] See Annex A, national country reports, CZ case report; 29 NSCR 205/2016.
[132] See Annex A, national country reports, AT case report; Higher Regional Court Vienna on 10 July 2018, Case No. 6 R 173/18g.

such as the location of a company's creditors or where transactions may be concluded were not regarded as relevant. Instead, a court must determine the COMI based on where operational orders are carried out.

2.3. Analysis

Following the presentation of the data collected in Section 2.2., this section aims to analyse the findings and clarify whether there are inherent flaws in the application of the safeguards included in the EIR to mitigate (abusive) forum shopping, with specific regards to the suspect periods introduced by Article 3. As shown in the examples of case-law provided in Section 2.2., the majority of cases identified across the Member States mainly concerned the mere application of the provisions of the EIR when required, rather than revealing any incorrect functioning of the newly introduced safeguards.

More specifically, the research revealed a small number of cases where the insolvency jurisdiction was contested by either the debtor or the creditors.[133] Second, the limited national jurisprudence seems to suggest that when cross-border issues arise, the national judges consistently apply the definition, criteria and suspect periods related to the COMI set out by Article 3 EIR.[134]

The information collected at national level in the context of this Study provides scarce evidence on whether abusive forum shopping is currently practised within the European Union. Historically, there have been forum shopping trends where mainly individual debtors were seeking more favourable insolvency relocated from the Republic of Ireland to the United Kingdom, and from Germany to France.[135] However, thanks to national reforms (such as the reforms of the Irish rules on the debtor's relief period as will be explained in the following Chapter 3) and the modification of the rules on COMI in the current version of the EIR, the practical incidence of forum shopping seems diminished as to almost disappear.

To reiterate what was detailed above in Section 2.2, some interviewees commented on the length of the suspect period under Art 3 EIR. Amongst those interviewees that did feel a change was needed, many were of the opinion the suspect periods were too short. The reasons given include the fact that firms approach insolvency status over time, not all of a sudden, and the 3-month period does not provide courts with sufficient scope to find dubious COMI shifts. Only one of the stakeholders thought that the suspect periods were too long but this was in relation to the different treatment given to natural persons.[136]

With regards to the remedies introduced at national level, indeed, it was noted how the length of suspect periods applicable to matters of territorial jurisdiction and/or matters of non-EU international jurisdiction under some national legislation appears to be longer compared to the period set out in Article 3 of the EIR. It should be noted, however, that such national rules only apply for the determination of territorial jurisdiction (i.e., COMI relocations within the national territory, in order to define the venue of proceedings domestically), or international non-EU jurisdiction, whilst in the case of inter-Member State jurisdiction, the rules set out in Article 3 of the EIR are applicable and prevail over said national legislation. Though they do not impair nor overwrite the application of the 3-month-rule of the EIR, the

[133] See section 2.2 above for an overview. Examples of such cases include, Judgment of the Barcelona Court of Appeals (Section 15th), Number 27/2021, of February 25, 2021 (ECLI: ES:APB:2021:926A), Luxembourg Court of Appeal of 6 July 2021 (no. 96/21).
[134] See section 2.2 above for an overview and section 2.4 for a detailed example. Examples of other cases include, *New Look Retailers (Ireland) Limited* [2020] IEHC 514, *Finnish Tax Administration (Verohallinto) v WellStar Finland Oy*, Decision number 366, issue S 20/873.
[135] COM Impact Assessment accompanying the proposal leading to the recast (SWD/2012/0416 final), para 3.4.1.2. Available at: https://eur-lex.europa.eu/legal-content/HR/ALL/?uri=CELEX%3A52012SC0416 (last accessed 27 January 2022).
[136] See Annex A, national country reports, CZ interview reports.

data collected shed light on these longer national suspect periods applicable domestically with the aim of providing examples that may be considered at EU-level. This was noted for instance in Spain, where Article 45 of the Spanish Insolvency Act[137] ("SIA") repurposes the approach set out by the EIR for matters of territorial jurisdiction, but sets out a suspect period of 6 months. Specifically, Article 45(2) provides that for domestic relocations "the change of address registered in the Commercial Registry within the 6 months prior to the request for insolvency will be ineffective, whatever the date on which it was agreed or decided."

As detailed above, the suspect period for territorial jurisdiction under French law is also 6 months for legal entities, and the French approach adopts the presumption of correspondence between COMI and the registered office as put forward by the EIR. However, the French approach provides that in the event of a (domestic) change of seat of the legal person in the 6 months preceding the referral to the court, the court in which the initial seat was located remains solely competent.[138] Once again, it should be noted that the national rule does not impair the prevailing application of Article 3 of the EIR for EU international jurisdiction.

An extension of the suspect period under the EIR may catch more abusive practices. However, the length of the suspect period should be carefully considered so as not to impact disproportionately on the freedom of establishment. Indeed, an extension of the period would affect not only abusive forum shopping but also regular forum shopping practices of companies that take advantage of one of the fundamental freedoms of the EU.

As previously alluded to, many stakeholders struggle with finding a difference between legal and abusive forum shopping as laid down by national and EU regulations. Therefore, if the suspect periods under Article 3 EIR were to be extended for companies and legal persons, criteria that help to discern abusive practices from neutral or beneficial practices should be clarified in the EIR.

Although the EIR does not provide a definition of abusive forum shopping, the CJEU has dealt extensively with the concept of abuse of choice of law and more generally abuses of EU legislation.[139] Specifically, under EU law, a finding of abuse requires a combination of objective and subjective criteria. On the one side, the objective criterion requires that "*it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by Community rules, the purpose of those rules has not been achieved*."[140] On the other side, the subjective criterion applying to the abusive forum shopping debtor is proved when there is an intention to obtain an advantage from the European Union rules by artificially creating the conditions for obtaining that advantage.[141] Moreover, there cannot be proof of abuse when the subject's behaviour may have an explanation other than the mere attainment of the undue advantage.[142] However, in the context of (abusive) forum shopping in insolvency proceedings, as will be explained in the following paragraphs, it could be argued that the application of such criteria may have some

[137] Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/202o, of May 5, which approves the Recast Insolvency Act) (SIA) Spanish Official Journal 2020, No 127. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859 (last accessed on 27 October 2021).

138 Article 600-1, Code de Commerce, France (Commercial Code). Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2021-10-21/ (last accessed on 21/10/2021). Similarly, Romania applies a suspect period of 6 months, whilst in Italy courts disregard COMI shifts undertaken 1 year prior to the opening of insolvency proceedings (See national country reports, RO desk research questionnaire, IT desk research questionnaire).

[139] Case C-54/16, Vinyls Italia SpA v Mediterranea di Navigazione SpA ECLI:EU:C:2017:433 ; C-423/15, Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG ECLI:EU:C:2016:604; Case C-110/99, Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas ECLI:EU:C:2000:695; Case C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia ECLI:EU:C:2014:145; Case C-425/06, Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze v Part Service Srl, company in liquidation, formerly Italservice Srl ECLI:EU:C:2008:108.

[140] Case C-54/16, Vinyls Italia SpA v Mediterranea di Navigazione SpA ECLI:EU:C:2017:43, para 52.

[141] Case C-110/99, Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas ECLI:EU:C:2000:69, para 53.

[142] C-423/15, Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG ECLI:EU:C:2016:604, para 40.

drawbacks to the extent that they establish quite a high threshold to determine where there is “abusiveness”.

In fact, the evaluation of abusiveness of forum shopping practices according to the aforementioned criteria would require the court where the insolvency has been filed to carry out two assessments. First, the court should compare the potential outcomes of the proceedings opened in the shopped forum with the possible outcomes of proceedings that would have been opened in the Member State where the COMI was located before the transfer. This first assessment should seek to establish whether the purpose of the rules laid down in the EIR has been compromised. In particular, the court should evaluate whether the COMI led to a more favourable legal position of the debtor to the detriment of the general body of creditors.[143] This is already a complex evaluation as it requires a comparison with the possible outcomes of a procedure foreign to the judge making the assessment.

Second, the Court should assess whether the essential aim of the transfer of the COMI was to obtain the undue advantage of a more favourable insolvency forum for the debtor to the detriment of the general body of creditors. In this regard, it should be noted that any other legitimate reason to move the COMI would negate the abusiveness of the forum shopping practice. Ultimately, whether the COMI transfer should be considered abusive or not depends on the intention of the debtor. The reliance on the subjective criteria to determine the abusiveness of the transfer makes it difficult to ascertain with certainty when the forum shopping practice is abusive.

This evaluation has considerable drawbacks. First, the national judge would be required to understand the law of another Member State and to evaluate whether the choice of forum is abusive. Second, the comparison would most likely require expert advice on the foreign law that would increase the cost and time of the Court’s assessment of its own jurisdiction.

Nevertheless, the idea of abusiveness in forum shopping is still relevant in the context of insolvency. Though under the treaties the debtor is allowed to relocate his COMI as an expression of one of the fundamental freedoms (the freedom of establishment)[144], and though the Preventive Restructuring Directive encourages forum shopping by requiring that “the additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a discharge of debt should also be reduced”,[145] creditors should be safeguarded from detrimental relocations of the debtor’s COMI. Indeed, the problem is more acute in relation to insolvency proceedings seeking liquidation. Instead, in the realm of restructuring proceedings, the creditors are involved early on in the insolvency matter, even before the opening of the insolvency proceedings. As the success of the restructuring proceedings is dependent upon the creditors’ approval, abusive forum shopping is less likely to happen.

In conclusion, an extension of the suspect period for the relocation of the COMI would provide increased protection to the creditors in liquidating procedures. However, such an extension needs to be balanced with the freedom of establishment of the debtor and the procedural efficiency needs in relation to the assessment of jurisdiction carried out by the insolvency court. In particular, the EIR should formulate objective criteria to establish whether the forum shopping conducted within the suspect periods is abusive or not, with presumptions in support of the Court’s assessment.

[143] EIR, Recital 5.
[144] See art 49 TFEU.
[145] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on Preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Recital 9.

2.4. Case study

Anonymous Party (X) v. Apply Digital Systems Holding BV (ADSH)[146]

Background Information

The case detailed below demonstrates how the safeguard introduced in Article 3 of the EIR, namely the rebuttable COMI presumption for legal persons (3-month suspect period), works in practice and meets its objective of protecting creditors.

Facts of the case

The applicant, X, asked the District Court of Amsterdam to commence insolvency proceedings against a Dutch company ADSH on the basis of an unpaid loan. The District Court first held that ADSH's COMI must be presumed to be in the Netherlands and, therefore, deemed it to have jurisdiction to hear the application. However, as the applicant could not demonstrate that the loan in question was due and payable, the application was refused.

The applicant appealed arguing that the debt was due and payable. On appeal, the respondent claimed that its COMI was Spain and, as such, a Dutch court did not have jurisdiction to hear X's application. ADSH based its argument on the fact that its main address had been in Spain since its incorporation and its postal address in the Netherlands had been inactive since January 2020, approximately 9 months prior to the date of the hearing. ADSH further claimed that it did not conduct any business activity in the Netherlands and was merely a holding company for Spanish business entities. Additionally, the fact that ADSH processed payments in a Dutch bank was overly emphasised by the Court of First Instance.

Held by the Court

The Court of Appeal of Amsterdam restated the rule found in Article 3 of the EIR, which says that a debtor's COMI is presumed to be the location where it is registered. However, this presumption is rebuttable where the company's central administration is located in a Member State other than its registered office and where a comprehensive assessment, in a manner that is ascertainable by third parties, demonstrates that the company's actual centre of management and supervision of its interests is located elsewhere.[147]

In carrying out this assessment, the Court focused on the fact that ADSH concluded loan agreements in the Netherlands and made payments through a Dutch account. Because these activities took place where the applicant initially made the insolvency application, third parties would reasonably recognise that ADSH's COMI was in the Netherlands. The Court felt that such a conclusion was not impacted by the fact that ADSH was managed by an individual in Spain, nor by the fact that ADSH no longer had a visiting address in the Netherlands. As such, the presumption laid down in Article 3(1) has not been rebutted and the Dutch Court had jurisdiction to open the insolvency proceedings. Nevertheless, the Court of Appeal agreed with the District Court's initial reasoning on the absence of a due and payable claim and denied the application to open insolvency proceedings.

Significance of the Decision

The Court of Appeal applied one of the new Article 3 safeguards in a manner consistent with the objectives of the Regulation, namely, to ensure creditors are sufficiently protected whilst still respecting the principle of freedom of establishment. The Court proceeded on the basis that the debtor's COMI was presumed to be at its registered location and examined

[146] Court of Appeal Amsterdam, Judgement of 24 September 2020, ECLI:NL:GHAMS:2020:2646, available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2020:2646 (last accessed 24 November 2021).
[147] EIR, Recital 30.

the possible reasons that might undermine this presumption. The Court's careful examination of the debtor's genuine COMI adheres to freedom of establishment, and, in this instance, the creditor's interests would have been sufficiently protected had an insolvency proceeding been opened.

3. Potential forum shopping strategies and their underlying reasons in national insolvency laws

3.1. Introduction

The EIR does not harmonise the differing national substantive insolvency laws of the Member States. Consequently, there are still considerable differences between the domestic insolvency law regimes. To the extent that certain insolvency law regimes are more attractive than others, this could represent an incentive for debtors to shift their COMI to a different Member State in order to benefit from the application of a different and more favourable insolvency law regime. It is also possible that such differing levels of attractiveness could lead creditors to engage in forum shopping when seeking to initiate insolvency proceedings. Indeed, it may even be the case that both the debtor and its creditors prefer to initiate proceedings in a particular jurisdiction.

In this Chapter, the data collected via desk research and field research at national level is analysed in order to identify what aspects of divergent national insolvency law regimes may render certain jurisdictions more or less attractive. These main aspects of national insolvency laws are outlined and described in Section 3.2, and will be presented in two broad categories: the first deals with procedural or jurisdictional factors which may render a particular insolvency law regime more or less attractive; the second describes the substantive insolvency law factors. Furthermore, on the basis of the assessment of the data collected, Section 3.3 will present an assessment on the extent to which divergences may incentivise abusive forum shopping, and if so, whether the approximation or convergence of national rules in certain areas of insolvency would minimise the room for (abusive) forum shopping; Finally, Section 3.4 will present a case study concerning an existing forum shopping strategy selected amongst relevant jurisprudence which was identified in the desk research questionnaires.

3.2. Summary of the main findings of the data collected

It should be noted that, from the data collected at national level via the desk and field research activities (Task 1 and Task 2), no particularly significant and/or recurring (abusive) forum shopping strategies were identified or pointed out by relevant stakeholders. However, the data gathered in particular via the national field research (Task 1), allowed for the identification of a number of factors and aspects of insolvency regimes which, in the event that forum shopping strategies were to be sought out, could potentially be regarded by debtors or creditors as relevant 'forum shopping factors' (i.e., factors which may make a forum more attractive ('pull factors') or less attractive ('push factors') to debtors/creditors, depending on the specificities of each case).

Thus, the present section will outline the identified 'forum shopping factors' and provide a brief overview and examples of the divergences identified, for each potential forum shopping factor, across the rules governing insolvency proceedings in the Member States.

It should be noted that two main categories of 'forum shopping factors' related to divergences in the national frameworks across the Member States were identified, as follows:

- **Factors mainly related to jurisdiction/procedural aspects across the Member States**. As these factors relate more to the practical functioning of the legal system of the Member States, limited data was collected in relation to these factors during the national level desk research. Nonetheless, wherever relevant data are available, they have been combined with field research data and other literature in order to provide a brief understanding of the potential significance of each factor (see Section 3.2.1)
- **Factors related to aspects of national (substantive) insolvency laws**. As these factors relate to the substantive insolvency law regimes of the Member States, more data have been collected in relation to these. Thus, the Study Team has provided a more detailed appreciation of the divergences that exist among the Member States and the significance that these divergences may have in terms of rendering certain jurisdictions more attractive (pull) or less attractive (push) to creditors and debtors. The aim is not to single out a particular jurisdiction as being attractive or unattractive, but rather to show the aspects of national substantive insolvency laws which may have a pulling or pushing effect for these stakeholders (see Section 3.2.2).

Finally, data collected showed that the existence of favourable pre-insolvency proceedings that fall outside the application of the EIR could also act as a potential incentive to forum shop.[148] With this in mind, pre-insolvency workouts not falling within the scope of application of the EIR, as well as the aspects of the circulation of their effects across the Member States, will be described and analysed in a dedicated Chapter (Chapter 4).

3.2.1. Jurisdiction/procedural related factors

1. Speed of the procedure

According to Berends, the three foremost important factors in international insolvency proceedings are "speed, speed and more speed".[149] Achieving an increase in the speed of international insolvency proceedings was also one of the motivations behind the UNCITRAL Model Law on Cross-Border Insolvency.[150] Further, the Preventive Restructuring Directive explicitly cites shortening the duration of insolvency proceedings as an objective.[151] As such, it is unsurprising that stakeholders interviewed, such as a Greek lawyer, indicated that foreign creditors of Greek firms are often dissuaded from initiating insolvency proceedings there partly due to the duration of such a process.[152] Stakeholders interviewed in Lithuania and Latvia were of a similar view.[153] There are no official statistics available for the average time taken to go through an insolvency proceeding but anecdotal evidence gathered via desk research suggests it takes 1-3 years in Greece.[154] In Portugal, this figure

[148] See for instance, Annex A, national country reports, CZ interview reports. According to a CZ stakeholder: "*The divergences may off course trigger the attempts, especially regarding the types of pre-insolvency workouts which are different in different states. The missing legal framework in certain states that is available in another country is the main reason for using the forum shopping practices, in my opinion*"; see also DE interview reports, where a stakeholder noted the relevance of: "*looking for easier proceedings or other types of proceedings that aren't available anywhere else. We had the prominent example of the scheme of arrangement, where German companies used forum shopping"*.

[149] Andre Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309, 321.

[150] Matthew T Cronin, 'UNCITRAL Model Law on Cross-Border Insolvency Procedural Approach to a Substantive Problem (1999) 24 Journal of Corporation Law 709, 716.

[151] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law L 172/18, Recitals 1-6.

[152] See Annex A, national country reports, EL interview reports.

[153] See Annex A, national country reports, LT interview reports.

[154] See Annex A, national country reports, EL desk research questionnaire, question 8.

stood at approximately 5 years and 7 months, as of 2020.[155] By contrast, anecdotal evidence for Ireland puts the duration of the average insolvency proceeding at 12 months.[156] In Romania, an insolvency practitioner provided an example of a case handled where the proceedings began in 2006 but only came to an end in 2020.[157]

2. Simplicity and language of the procedure

A related factor, in efficiency terms, is the complexity of a Member State's insolvency regime. An Austrian stakeholder cited the simplicity of the debt relief procedure as a factor that would make a jurisdiction attractive. For instance, the conditions required to open bankruptcy proceedings in the Netherlands are straightforward and generally depend on there being at least two creditors and the debtor's debts remaining unpaid.[158] By contrast, Italy contains a great number of different types of proceedings, each of which requires a different list and different subjective and objective criteria to be met before such proceedings may be opened.[159]

Linked to the question of simplicity is the role that language plays in making a jurisdiction more attractive or not. As one German lawyer pointed out, creditors coming from an international background would not feel comfortable going through a proceeding in an unfamiliar language.[160] A stakeholder from the Czech Republic was of the opinion that the Netherlands, for instance, offered an advantage in this respect as its courts are capable of conducting proceedings in English.[161]

3. Cost of the procedure and experts

An obvious concern to all parties involved in an insolvency proceeding is the issue of cost. Many of the stakeholders interviewed cited how the cost may incentivise or disincentivise forum shopping. For instance, one Dutch stakeholder interviewed stated that when the UK Scheme of Arrangement procedure was a viable alternative for firms operating in the EU, the costs that were involved in pursuing this option were actually quite prohibitive.[162] Smrčka, Arltová and Schönfeld have observed that EU states and other countries with higher GDP per capita also have lower costs of insolvency proceedings.[163] As the authors suggest, assuming a high GDP per capita is a signifier of an efficient economy, an insolvency regime that can offer creditors high returns is a contributing factor to the overall business environment of a country.[164]

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[155] See Annex A, national country reports, PT desk research questionnaire, question 8; Trimestral statistic highlight - 4th trimester of 2020 – Trimestral statistics about insolvency proceedings, special revitalisation proceedings (PERs) and special proceedings for payment agreement (PEAPs) (2007-2020). Directorate General of Justice Policy ('Direção-Geral da Política de Justiça') Available at https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Destaques/20210430_D87_FalenciasInsolvencias_2020_T4.pdf (last accessed on 13 September 2021).
[156] See Annex A, national country reports, IE desk research questionnaire, question 8.
[157] See Annex A, national country reports, RO interview reports.
[158] See Annex A, national country reports, NL desk research questionnaire, question 4; Hoge Raad 11 July 2014, ECLI:NL:HR:2014:1681 (*Berzona*).
[159] See Annex A, national country reports, IT desk research questionnaire, question 4; See Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942, available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario (last accessed on 29 September 2021).
[160] See Annex A, national country reports, DE interview reports.
[161] See Annex A, national country reports, CZ interview reports.
[162] See Annex A, national country reports, NL interview reports.
[163] Luboš Smrčka, Markéta Arltová and Jaroslav Schönfeld, 'Quality of Insolvency Proceedings in Selected Countries – Analysis Focused on Recovery Rates, Costs and Duration' (2017) 28 Administratie si Management Public 116, 123.
[164] Ibid, 130.

4. *Predictability of the court decision*

As Eidenmüller sets out, creditors must first "know the rules that govern the administration and distribution of the debtor's assets [before] can they price their loans accordingly".[165] In other words, a lack of clarity about the applicable insolvency rules undermines one of the core objectives of insolvency law, that of encouraging investment. In discussing the relationship between forum shopping and decision predictability, one of the Swedish stakeholders noted that divergences in the predictability of a decision is particularly relevant in what makes certain jurisdictions attractive.[166] An interviewee from Finland made a similar observation, pointing out the importance of judicial consistency and legal certainty.[167]

5. *Experience and commercial awareness of the court, insolvency practitioner calibre and recognition*

The presence or absence of a specialised insolvency court or judges who deal only with insolvency matters is a further source of disharmony throughout Member States. For instance, in Germany, there is a dedicated insolvency court and all judges hearing insolvency cases are statutorily obligated to have demonstrable knowledge of insolvency law and related company and employment law matters.[168] Similarly, the Irish High Court has a specialist division that appoints examiners and another that manages personal insolvency.[169] However, corporate insolvency matters are typically dealt with by the Chancery division.[170] In many Member States, such as Finland, Luxembourg and the Netherlands, there are no specialist courts or chambers but rather certain regional courts or specific judges come to be specialists in an *ad hoc* manner.[171] In other Member States, such as Lithuania, there are no specialist courts or judges.[172]

A Finnish stakeholder also made the point that certain Member States have judges that are more accustomed to dealing with cases that have a cross-border dimension, which may be a reason for an insolvent firm to apply for insolvency there.[173] Two of the interviews conducted with German stakeholders include similar observations; one remarked that some jurisdictions can boast judges and lawyers that are fully aware of all the implications of ruling in a cross-border dispute.[174] Another made the point that in Germany there are approximately 140 insolvency courts with varying levels of expertise and resources and, as such, some are better equipped to hear complex insolvency proceedings compared to others.[175] A stakeholder from the Czech Republic indicated that, in their experience, forum shopping has occurred due to debtors seeking to avoid judges who do not have the necessary experience. Additionally, the Czech interviewees noted that predictable rules alone will not attract firms to a certain jurisdiction, there must also be a high concentration of practitioners capable of working with those rules.[176] The stakeholder mentioned that a country may appear to have an efficient regime on paper, but in practice may not match the expertise available in the likes of the UK or the Netherlands.

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[165] Horst Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 European Business Organization Law Review 423, 429.
[166] See Annex A, national country reports, SE interview reports.
[167] See Annex A, national country reports, FI interview reports.
[168] See Annex A, national country reports, DE desk research questionnaire, question 8.
[169] See Annex A, national country reports, IE desk research questionnaire, question 8.
[170] The High Court division that handles equitable remedies, which can cover commercial and civil matters.
[171] See Annex A, national country reports, FI, LU, NL, desk research questionnaire, question 8.
[172] See Annex A, national country reports, LT desk research questionnaire, question 8.
[173] See Annex A, national country reports, FI interview reports.
[174] See Annex A, national country reports, DE interview reports.
[175] See Annex A, national country reports, DE interview reports.
[176] See Annex A, national country reports, CZ interview reports.

3.2.2. Substantive insolvency law-related factors

The following paragraphs are aimed at providing an overview and examples of divergencies identified across the Member States in relation to the following areas of national insolvency laws: 1) conditions for insolvency proceedings; 2) creditor ranking; 3) avoidance actions; 4) directors' duties; 5) debt discharge; 6) creditors' influence and cramdown rules; and 7) asset tracing and recovery.

1. Conditions for insolvency proceedings

Considering that certain stakeholders mentioned the conditions for the opening of insolvency proceedings as being among the main divergences throughout the Member States,[177] this section sets out an appreciation of the conditions throughout the Member States for accessing insolvency proceedings. Within Member States, the conditions may vary depending on the type of proceeding. Thus, where the proceeding's purpose is to liquidate a company in order to satisfy the claims of shareholders, the conditions are often different to those for proceedings the purpose of which is to rescue or restructure the company. The latter ordinarily requires some hope of survival.

In the majority of Member States, a condition for insolvency proceedings that leads to liquidation is that the debtor is either insolvent, in the sense of not being able to meet certain obligations (**cash flow test**), or over-indebted, in the sense that its assets are not sufficient to cover its liabilities (**balance sheet test**), which may also be referred to as 'over-indebtedness'. In relation to procedures designed to rescue or restructure a company, the threshold may be lower, such as where the company can avail of a safeguarding procedure where it is solvent but facing difficulties that it cannot overcome,[178] or where insolvency is imminent.[179]

Within the two broad tests for insolvency, divergences exist among Member States. For example, in Austria, case law has developed conditions for triggering the **cash-flow test**: inability of the debtor to pay more than 95 % of due liabilities and inability to acquire the necessary funds in the near future (at most 5 months).[180] In Slovakia, the test is similarly clear, but the threshold seems lower: the debtor is unable to fulfil at least two monetary obligations to more than one creditor 30 days after the due date.[181] Similarly, in the Netherlands, there is required to be two or more creditors and debts remaining unpaid.[182] By contrast, in Estonia, where both the inability to pay debts and insufficiency of assets to cover liabilities are required to be "not temporary", case law has adopted a more holistic test for this permanence: all factors of importance affecting the financial state of the debtor would have to be assessed cumulatively, without focusing solely on any one factor. However, when assessing the financial state of the debtor, a factor as telling as the net

[177] The importance of the divergences of conditions was mentioned by stakeholders in Portugal, Romania and Slovakia.
[178] French Code of Commerce (L620-1 et seq.). Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2021-10-21/ (last accessed on 21 November 2021)
[179] Polish Ustawa z dnia 15 maja 2015 Prawo restrukturyzacyjne (Restructuring Law, 15 May 2015 with later amendments), Official Journal 2015 Item 978. Available at http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20150000978/U/D20150978Lj.pdf, (last accessed on 20 September 2021).
[180] Austrian Supreme Court, 22 November 2011, 8Ob118/11b, ECLI:AT:OGH0002:2011:0080OB00118.11B.1122.000, available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=89cd85e8-4c97-4475-99b1-c2d80e538ab1&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=8Ob118%2f11b&VonDatum=&BisDatum=27.10.2021&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JJT_20111122_OGH0002_0080OB00118_11B0000_000 (last accessed on 27 October 2021).
[181] Article 3 (2) of Zákon č. 7/2005 Z.z. z 9. decembra 2004 o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov v znení zákona (Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on amendments and supplement of certain acts, as amended) (Act on Bankruptcy and Restructuring). Available at: https://www.slov-lex.sk/static/pdf/2005/7/ZZ_2005_7_20210301.pdf (last accessed on 4 November 2021).
[182] Hoge Raad 11 July 2014, ECLI:NL:HR:2014:1681 (Berzona).

assets of the debtor and the doubts it raises on the solvency of the debtor can only be refuted by data indicating clear improvements in the debtor's financial state.[183] In Spain, the definition of the cashflow test includes an element of regularity rather than referring to permanence.[184] In France, insolvency is triggered by the fact of cessation of payments and the impossibility of meeting current liabilities with available assets.[185] In Hungary, the conditions which need to be satisfied in order for the debtor to be declared insolvent are laid down in some detail by legislation. These include a form of cash-flow test requiring certain steps to be demonstrated (debtor's failure to settle or contest his previously uncontested and acknowledged contractual debts within twenty days of the due date, and failure to satisfy such debt upon receipt of the creditor's written payment notice).[186] In Bulgaria, certain situations are set down in legislation which may give rise to insolvency, such as an inability to perform a public law obligation to the State and the municipalities, related to its commercial activity, or an obligation for payment of remuneration to at least one-third of the employees, which has not been fulfilled for more than 2 months.[187] In the Czech Republic, in determining insolvency, the debtor is considered to be unable to fulfil its obligations if it has stopped paying a substantial portion of its monetary obligations; has defaulted on its monetary obligations for more than 3 months after its due date; is unable to satisfy its due and payable debts in the course of enforcement proceedings; or has failed to comply with its obligation to submit a list of assets, liabilities, employees etc. imposed upon it by the insolvency court.[188] It is considered to be able to fulfil its obligations if the (expected) difference between the monetary obligations due and its available funds is less than 1/10 of the monetary obligations due (i.e., ability to pay 90%), according to an applicable liquidity statement or liquidity development outlook.[189]

A review of the **balance sheet test** applied throughout the Member States also shows examples of divergences. For example, in Poland, the liabilities of the debtor are required to exceed the value of its assets for a duration of at least 24 months,[190] whereas in Austria once the assets of the debtor are insufficient to satisfy all liabilities, an economic forecast may be used to show that the company will likely become insolvent in the near future (understood as the current or following business year), meaning it is not necessary to wait 24 months.[191] As noted above, in Estonia, while the court cautions against focusing on any one factor, it was held that a factor as telling as net assets and the doubts it raises on the insolvency of the debtor can only be refuted by data indicating clear improvements in their financial state. Thus, it seems possible for a debtor whose assets exceed its liabilities, even for an appreciable period of time, to be regarded as solvent if there are clear improvements

[183] Estonian Supreme Court judgement 3-2-1-143-16 of 28 February 2017; claims that have not fallen due are regarded as obligations for the purpose of the cash-flow test.
[184] Article 2 of the Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/202o, of May 5, which approves the Recast Insolvency Act) (SIA) Spanish Official Journal 2020, No 127. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859 (last accessed on 27 October 2021). The test is whether the debtor can regularly meet its obligations. This seems to be conceptually similar to a non-temporary inability to miss payments.
[185] Article L.631-1 of the French Code of Commerce
[186] A csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvény (Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings), available at: https://njt.hu/jogszabaly/1991-49-00-00 (last accessed on 14. October 2021)
[187] Article 608 of Търговски закон (Commerce Act of 01.07.1991 with later amendments) (Commerce Act) available at: https://lex.bg/laws/ldoc/-14917630 (last accessed on 01.10.2021).
[188] Section 3 para 2 of Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení, ve znění pozdějších předpisů (Act No. 182/2006 Coll., on bankruptcy and settlement of 30 March 2006, as amended) (Insolvency Act). Available at: https://www.zakonyprolidi.cz/cs/2006-182 (last accessed on 4 November 2021).
[189] Section 3 para 3 of the Insolvency Act.
[190] Anna Hrycaj, Andrzej Jakubecki, Antoni Witosz, 'Prawo restrukturyzacyjne i upadłościowe, System Prawa Handlowego tom 6'(2020), available at https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrtha4tamzomfrxilrtg4ytgmrygqzdo&tocid=mjxw62zogi3damrtha4tamzomfrxilrtg4ytgmrygqzdo&rowIndex=-1, (last accessed on 20 September 2021), p. 79
[191] Austrian Supreme Court, 19 February 2015, 6OB19/15k, ECLI:AT:OGH0002:2015:0060OB00019.15K.0219.000, available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=eb6dce9b-4314-4da6-b471-fe5d5f3ddcc8&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=6Ob19%2f15k&VonDatum=&BisDatum=27.10.2021&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JJT_20150219_OGH0002_0060OB00019_15K0000_000, (last accessed on 27 October 2021).

in its position. In Portugal, the balance sheet test is triggered by the debtor's liabilities clearly exceeding its assets.[192] In Hungary, the balance sheet test can be applied (in conjunction with a cash-flow test) in the situation where a proceeding has already been opened (by the debtor or the receiver). It requires the debtor's liabilities to exceed the debtor's assets, or that the debtor has been unable to and presumably will not be able to settle its debt on the date when they are due, and in proceedings opened by the administrator, the members (shareholders) of the debtor economic operator fail to provide a statement of commitment – following due notice – to guarantee the funds necessary to cover such debts when due.[193] In Germany, in addition to the issue of insolvency, a condition for insolvency is that there are sufficient resources to pay for the proceeding.[194]

In relation to **natural persons**, many Member States have specific procedures for insolvent or over-indebted individuals. Rather than restructuring, the procedures tend to aim to either establish a payment plan that can enable the debtor to service some or all of the debt over a prolonged period, along with the liquidation of any assets that the debtor may have. The conditions here differ among Member States. For example, in Italy, the debtor must be in a state of "over-indebtedness", defined as a situation of persistent imbalance between the obligations taken on and the assets that can be readily liquidated to meet them, which determines the significant difficulty of meeting one's obligations, or the definitive inability to meet them regularly.[195] As the test concerns the imbalance between the debtor's obligations and his liquid or readily liquidated assets (rather than assets simpliciter), it is essentially a cash-flow test, even though the notion of persistent imbalance between assets and liabilities is suggestive of over-indebtedness. In other Member States such as Bulgaria and Finland, the test to be satisfied is clearly a cash-flow test rather than over-indebtedness test.[196]

Aside from the test for insolvency or over-indebtedness, there are other conditions to access insolvency proceedings that may vary per Member State, and also differ depending on the type of proceeding. Below is an appreciation of the various conditions which may apply, divided by main types of procedure: firstly, we set out the conditions which tend to apply for bankruptcy/liquidation proceedings (where the aim is ultimately the winding up of the company in order to satisfy the claims of its creditors) and other proceedings such as safeguarding/rescue/restructuring (where the aim is ultimately for the company to continue as a going concern). Set out thereafter is an appreciation of the conditions for proceedings designed specifically for natural persons.

Liquidation proceedings

The application can usually be made either by the insolvent debtor or by a creditor.[197] Often, upon entering insolvency, the directors of the debtor are under an obligation to make such

[192] Article 3 (1) and (2) of the Código da Insolvência e da Recuperação de Empresas (CIRE); Lei 6/2018 de 22 de Fevereiro - estabelece o estatuto do mediador de recuperação de empresas; Lei 8/2018 de 2 de Março - Regime Extrajudicial de Recuperação de Empresas (Insolvency and business recovery code; Law 6/2018 of 22 February - establishes the business recovery mediator; Law 8/2018 of 2 March - Extrajudicial recovery procedure) (Insolvency and Corporate Recovery Code). Available at: https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/portugal-rescue-procedures-in-insolvency (last accessed 21 November 2021).

[193] A csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvény (Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings), available at: https://njt.hu/jogszabaly/1991-49-00-00 (last accessed on 14. October 2021)

[194] See Annex A, national country reports, DE desk research questionnaire, question 4.

[195] See Legge 27 gennaio 2012, n. 3 Disposizioni in materia di usura e di estorsione, nonche' di composizione delle crisi da sovraindebitamento. (Law No. 3 of 27 January 2012, Provisions on usury and extortion, as well as on the settlement of over-indebtedness crises), Official Gazette No.24 of 30 January 2012, available at www.gazzettaufficiale.it/eli/id/2012/01/30/012G0011/sg, (last accessed on 29 September 2021), Article 6 par. 2.

[196] The Bulgarian Commerce Act, Article 607a; Laki yksityishenkilön velkajärjestelystä 25.1.1993/57 (Act on the Adjustment of the Debts of a Private Individual 25.1.1993/57), in Finnish available at https://www.finlex.fi/fi/laki/ajantasa/1993/19930057#L3P9 (last visited 29 September 2021), an unofficial English translation (last updated 31 December 2000) available at: https://www.finlex.fi/en/laki/kaannokset/1993/en19930057_20000714.pdf (last visited 29 September 2021), chapter 1, section 3.

[197] In addition, applications may often be made by public bodies such as social security organs (such as in Spain, where default on tax or social security payments is explicitly included as a trigger for insolvency) where social security debt is not paid, or Corporate Enforcement Offices (such as in Ireland) where winding up the company is in the public interest. In the case of tax and social security organs, where debtors have unpaid obligations towards them, they are also creditors (see

an application. However, where such an obligation exists, the time limit for the performance of this obligation varies greatly. For example, in Austria and the Czech Republic, it is required "without undue delay", while Bulgarian law provides a 30-day period and Spanish law provides for 2 months.[198] In Germany, meanwhile, the requirement is "without undue delay" but in any event within 3 weeks.[199] In Estonia, the obligation is to apply "promptly, but not later than 20 days after insolvency becomes evident".[200] Greek law provides for filing "without delay, within 30 days from cessation of payments".[201] By contrast, in Cyprus, there is no such obligation on directors, although they can be held liable for certain actions during the period of insolvency. Whatever the obligation to file upon insolvency, debtors often have the right to file where insolvency is imminent.[202]

Where it is the creditor making the application, there are also divergences among national laws. Firstly, the divergences in the definition of insolvency may make it easier or more difficult for a creditor to file an application. As noted above, in some cases, there must be several creditors in order for a debtor to be regarded as insolvent. In others, certain thresholds may arise such as timelines (proving that inability to pay debts is non-temporary) or percentages of debt unpaid (such as proving that a certain percentage of debt that is due is unpaid). In Finland, in addition to the general condition of insolvency, the creditor may make an application if their claim against the debtor is (i) based on an enforceable judgment or is otherwise uncontested and clear, and, (ii) not insignificant nor inappropriate in view of the costs and benefits of the liquidation and the proper debt collection practices.[203] In Lithuania, creditors can make an application where the debtor has an overdue obligation towards them.[204] Alternatively, an out-of-court liquidation can be initiated by the creditors if creditors with 75% of all creditor claims approve it and provided the following conditions are satisfied: no court proceedings for property claims, including labour claims, are initiated in the courts and no advance out-of-court dispute investigation takes place; no enforcement is directed towards the property of the legal entity; and no tax investigation or inspection is initiated by the tax authorities. In Italy, where there are several liquidation-type proceedings, different conditions apply to access each proceeding. For example, the "fallimento" and the "concordato preventive" proceeding can only be availed of provided certain monetary thresholds in terms of assets, revenue or debt have been exceeded during the previous 3 year period.[205] In Greece, the application can be filled at the request of one or more creditors

ranking of creditors below regarding the treatment of such creditors). Furthermore, applications may be made by various insolvency practitioners. However, in the majority of the instances, the initiation of an insolvency proceeding is at the instigation of creditors (whose debt is not being paid) or debtors (upon imminent or actual insolvency). It is also these actors who have the possibility to forum shop (or in whose interest forum shopping is most likely to be attempted).

[198] See Annex A, national country reports, desk research questionnaires.

[199] Insolvenzordnung ("Insolvency Statute") of 5 October 1994 (BGBl. I p. 2866), as last amended by Article 35 of the Act of 10 August 2021 (BGBl. I p. 3436). Available at: https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed 27 October 2021), section 15a

[200] Estonian Commercial Code § 112, 180, 306 available in English at https://www.riigiteataja.ee/en/eli/511012021004/consolide (last accessed on 29 October 2021).

[201] Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις ("Debt Settlement and Facilitation of a Second Chance and further provisions"), Law No. 4738/2020 as published on 27 October 2020 on Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021), Article 79(5).

[202] Although it is notable that the French "liquidation judiciaire" is only available where recovery is manifestly impossible. Thus, where the company is in debt and has a possibility of survival, an alternative approach must be chosen – i.e., one of the 'sauvegarde' procedures or 'redressement judiciaire'.

[203] Chapter 2 Section 2 of the Bankruptcy Act

[204] The procedure is regulated by the Law on Insolvency of Legal Entities of the Republic of Lithuania (in Lithuanian Lietuvos Respublikos juridinių asmenų nemokumo įstatymas) of 13 June 2019 No XIII-2221 (the Law on Insolvency of Legal Entities). The version in Lithuanian including amendments as of 15/07/2021 is available at https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr (last accessed 4 November 2021).

[205] See Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942, available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario (last accessed on 29 September

representing at least thirty per cent (30%) of all claims against the debtor, including creditors holding guaranteed claims representing at least twenty per cent (20%) of the creditors holding guaranteed claims.[206]

For this type of insolvency proceedings (aimed at liquidating the company to satisfy the claims of creditors), the main substantive condition for a creditor to surmount is insolvency, whereas the debtor can usually make an application prior to insolvency.[207]

Other types of insolvency proceedings

There is also a wide array of proceedings throughout the Member States aiming to rescue or restructure the debtor. As the aim of this type of procedure is to keep the company going, rather than liquidate it to satisfy the claims of creditors, there are often different conditions for access, as there must be some way of filtering out companies who have no chance of survival. For example, in Bulgaria, "stabilisation proceedings" are available when the debtor is not yet insolvent but in imminent danger of insolvency, with imminent danger being viewed in terms of ability to pay maturing pecuniary obligations arising in the 6 months following the date of submission.[208] The French "sauvegarde" procedure requires the company to be solvent, but be facing difficulties it cannot overcome.[209] Alternatively, a "redressement judiciaire" is available if the company is insolvent but still operating and rescue seems possible.[210] In Germany, a rescue plan requires an illustrative part (financial position and results of operations; type of recovery; usually a comparison with what creditors would receive without the plan and which measures shall be executed once the plan is agreed upon) and a part consisting of all required legal actions.[211] Meanwhile, an application for the so-called "umbrella proceeding" requires certification on the financial situation and grounds for imminent insolvency to be provided by a qualified person: usually an auditor but it can also be a tax advisor or persons experienced in insolvency law.[212] The Irish examinership proceeding requires that the petition be accompanied by a report in relation to the company prepared by a person who is either the statutory auditor of the company or a person who is qualified to be appointed as an examiner of the company (independent expert) which opines that the company has a reasonable prospect of survival.[213] Thus, while a reasonable prospect of survival is required to be shown in an application for examinership, it is not necessary to show the impossibility of survival in order to proceed with winding up. In France, however, just as the "redressement judiciaire" is only available where the company is insolvent, but rescue seems possible, liquidation is only possible where recovery of the company seems manifestly impossible.[214] The difference between the

2021), Article 1, par.1. The Italian bankruptcy law will be replaced by the Business Crisis Code whose entry into force has been postponed to 15 May 2022. See Decreto Legislativo 12 gennaio 2019, n. 14 Codice della crisi d'impresa e dell'insolvenza in attuazione della legge 19 ottobre 2017, n. 155 (Legislative Decree No. 14 of 12 January 2019, Business Crisis and Insolvency Code), Official Gazette No.38 of 14 Feb 2019, available at www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg, (last accessed on 29 September 2021), Article 121.

[206] Articles 79 par. 1 and157 et seq. of Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις ("Debt Settlement and Facilitation of a Second Chance and further provisions") (Law No. 4738/2020) as published on 27 October 2020 on Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021)

[207] This is not always the case. See the case of France (footnote 170).

[208] Article 625 of the Commerce Act. Such pecuniary obligations may arise from commercial transactions, public law obligations to the State, private State receivables or employee remuneration.

[209] French Code of Commerce (L620-1 et seq.). A "sauvegarde accélérée" requires a conciliation procedure to be pending, provided that the company was either solvent or insolvent for less than 45 days at the time the petition for conciliation was made.

[210] French Code of Commerce (L631-1 et seq.).

[211] Bork, Insolvenzrecht, para. 366 f.

[212] Exner/Lebmeier in Beck/Depré, Praxis der Insolvenz, § 44 marg. no. 103.

213 Section 511 of the Companies Act 2014 https://revisedacts.lawreform.ie/eli/2014/act/38/front/revised/en/html (Last accessed on 26 November 2021)

[214] French Code of Commerce (L640-1 et seq.).

framing of the legislation in these two Member States is subtle, but the Irish approach would seem to provide a lower threshold for creditors seeking to wind up the company.

In Lithuania, a creditor may initiate the restructuring procedure where the debtor has overdue obligations towards it of an amount that exceeds 10 minimum monthly salaries, while the debtor may initiate the procedure if a mere 'possibility' of insolvency exists.[215] This can be contrasted with a Member State such as the Czech Republic it is required to show insolvency rather than imminent insolvency or possible insolvency.

Proceedings aiming to restructure or rescue the company often require some sort of agreement or acceptance by creditors. The nature of these procedures is that, by keeping the company afloat, the creditors may expect more of their debt to be repaid, but over a longer period of time. In some instances, the creditors may prefer to be paid less, but more quickly (as they may have their own obligations to meet, particularly in a time of economic instability). In Finland, for example, the "accelerated restructuring" procedure can be applied for all known creditors, whose total claims represent at least 80 % of the debtors' debts, and each creditor whose claim is at least 5 % of the total debts, accept the application.[216] Similarly, in Luxembourg, « concordat préventif de faillite (par abandon d'actif) » requires the agreement of the majority of the creditors representing 75% of the nominal amount of the claims.[217] In the Netherlands, however, the rescue procedure (suspension of payments) can be applied for unless there is a declaration against this either by holders of more than one-quarter of the amount of the debt or by more than one-third of creditors.[218]

For **natural persons** availing of insolvency proceedings, there are often further conditions than mere insolvency to be fulfilled. Such conditions often aim to ensure the good faith of the debtor. For example, in Finland the main reason for the insolvency must be an essential decline in the debtor's ability to pay due to illness, disability to work, unemployment or other change of circumstances not primarily the fault of the debtor, or, there must otherwise be a good reason for the debt adjustment in view of the proportion of the debts and other liabilities of the debtor to pay.[219] Likewise, in the Netherlands, to access debt restructuring the debtor must have acted in good faith in the running up of debts for a period of 5 years preceding the request, and none of the debtor's debts can have been incurred through crime.[220] Another interesting condition in the Netherlands is that the debtor is likely to comply with the requirements and will make an effort to realise as many assets for the estate as possible. This seems to go beyond merely looking at the ability of the debtor to hold to the debt restructuring agreement and look to their intention. Certain Member States also have clear residence requirements, such as Estonia, where the debtor must have resided in the country for a period of no less than 2 years before submitting the petition for debt

[215] The procedure is regulated by the Law on Insolvency of Legal Entities of the Republic of Lithuania (in Lithuanian Lietuvos Respublikos juridinių asmenų nemokumo įstatymas) of 13 June 2019 No XIII-2221 (the Law on Insolvency of Legal Entities). The version in Lithuanian including amendments as of 15/07/2021 is available at https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr (last accessed 4 November 2021).

[216] Chapter 13 of Laki yrityksen saneerauksesta 25.1.1993/47 (Restructuring of Enterprises Act 25.1.1993/47), in Finnish available at https://finlex.fi/fi/laki/ajantasa/1993/19930047, (last visited 29 September 2021), an unofficial English translation (last updated 1.4.2007) available at https://finlex.fi/en/laki/kaannokset/1993/en19930047_20070247.pdf (last accessed 21 November 2021).

[217] Loi du 14 avril 1886 concernant le concordat préventif de faillite (Law of 14 april 1886 concerning preventive composition in bankruptcy) : https://legilux.public.lu/eli/etat/leg/loi/1886/04/14/n1/jo

[218] Article 218 Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Fw) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act) (DBA), available on: https://wetten.overheid.nl/BWBR0001860/2021-01-01 (last accessed: 18 October 2021).

[219] Laki yksityishenkilön velkajärjestelystä 25.1.1993/57 (Act on the Adjustment of the Debts of a Private Individual 25.1.1993/57), in Finnish available at https://www.finlex.fi/fi/laki/ajantasa/1993/19930057#L3P9 (last visited 29 September 2021), an unofficial English translation (last updated 31 December 2000) available at: https://www.finlex.fi/en/laki/kaannokset/1993/en19930057_20000714.pdf (last accessed on 21 November 2021).

[220] Article 284 (1) Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Fw) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act) (DBA). Available at: https://wetten.overheid.nl/BWBR0001860/2021-01-01 (last accessed on 18 October 2021).

restructuring.[221] This naturally makes a COMI shift to Estonia very difficult. In Ireland, to be eligible for an insolvency arrangement, the debtor must be domiciled in the State or, within 1 year before the application date, has ordinarily (i) resided in the State, or (ii) had a place of business in the State. Thus, the procedures are open to non-residents who have their place of business in the State.[222] Furthermore, as the timeline is 1 year, rather than two, this makes a COMI shift easier than a shift to Estonia.

2. Ranking of creditors

Amongst the rules governing national insolvency frameworks across the Member States, divergences in those concerning the ranking of creditors in insolvency proceedings were indicated by several stakeholders amongst the potential forum shopping factors.

In fact, where certain jurisdictions set out different orders of priority for the satisfaction of creditors, this may incentivise certain debtors (companies or natural persons) to strategically relocate their COMI to seek the application of more favourable rules to their respective case; creditors may also have interest in opening of insolvency proceedings in a jurisdiction where their claim may be treated with priority and/or may have higher chances of being satisfied.[223]

For instance, in certain countries, the rules on ranking of creditors in insolvency proceedings are also informed by particular tax or labour legislation, which may be taken into consideration by certain categories of debtors/creditors when considering to forum shop. For instance, jurisdictions, where **super-priority rights are assigned to employee and/or tax claims,** may appear less attractive to certain categories of debtors and, therefore, act as a 'push factor' (i.e., debtors may seek to escape the opening of proceedings in such jurisdictions). This aspect was highlighted, for instance, by national stakeholders in France, according to which the incentives to escape French law are mainly related to labour and the fact that the French regime of insolvency law aims primarily at protecting the employees. Other factors noted by the French interviewees are the security rights, and the rules regarding the creditors' ranking as, according to the same interviewees, French insolvency law is not favourable to creditors.[224]

Similarly, debtors and creditors may also potentially attempt to escape jurisdictions where the satisfaction of certain claims, such as **shareholder loans**, is subordinated to the satisfaction of other claims. Such potential forum shopping strategies were highlighted, amongst others, by a stakeholder in the Netherlands, according to whom divergences in preference of creditors and the ability for a debtor to influence the outcome of the proceedings were considered to be a potential forum shopping factor, and also indicated that, when a court is assessing its jurisdiction, scrutiny is, in any event, warranted if a debtor moves its COMI to escape certain liabilities or to effectuate a change in the priority order of creditors (e.g. lack of subordination of shareholder loans in a certain country or the (in)applicability of fiscal preferences).[225]

Additionally, rules according to which **minimum thresholds of creditor satisfaction** have to be fulfilled for certain insolvency proceedings/restructuring processes, have also been indicated by some national stakeholders as a potential aspect that could be considered by debtors who may attempt (abusive) forum shopping practices. For instance, in Slovakia, some stakeholders have indicated that differences in legislation and, above all, the extent

[221] Võlgade ümberkujundamise ja võlakaitse seadus (Debt Restructuring and Debt Protection Act), RT I, 06.12.2010, 1, available in English at https://www.riigiteataja.ee/en/eli/501022021001/consolide (last accessed on 29 October 2021), sections 1 to 4.
[222] Personal Insolvency Acts 2012 to 2021, sections 26, 57 and 91. https://www.irishstatutebook.ie/eli/2012/act/44/enacted/en/print (last accessed on 26 November 2021)
[223] See, for instance, Annex A, national country reports, FR, NL, PL, PT, SK interview reports .
[224] See Annex A, national country reports, FR interview reports.
[225] See Annex A, national country reports, NL interview reports.

of what must be paid to creditors may be, in their opinion, a reason for abusive forum shopping. According to the same stakeholder, in the past, the legislative framework in Slovakia was more lenient and allowed the payment of unsecured receivables at the level of 1%, in extreme cases, which was to a large extent an attractive factor, especially for companies from neighbouring countries. However, following legislative reforms, unsecured creditors must receive under standard conditions at least 50% of their receivables in a maximum of 5 years, and this seems to have made "travelling for restructuring" to Slovakia unattractive.[226]

In this context, the data collected via national desk research has also shed light on the extent of the similarities and divergencies of the rules concerning creditor ranking in insolvency proceedings across the Member States. [227]

First of all, some common traits may be identified in respect of the main categories of claims or types of creditors which are taken into consideration across national insolvency frameworks if and when designing a particular order of priority. These broad categories mainly encompass the following:

- Claims/creditors incidental to insolvency proceedings (e.g., costs related to the opening of insolvency proceedings, such as court costs, costs of insolvency administrators, etc.).
- Preferential claims/creditors (which may encompass particular categories of claims/creditors which retain a status of 'super priority' or 'privilege' compared to other claims/credits, such as – but not always – statutory employee or tax-related claims);
- Secured creditor claims (e.g., credits secured by mortgages, pledges);
- Unsecured claims (either satisfied *pari passu*, or according to a pre-determined ranking order); and
- Deferred/subordinated claims (i.e., claims that have the lowest level of priority and will only be satisfied after all other claims).

Despite the aforementioned similarities identified, however, the landscape of national rules on creditor ranking is quite diverse when considering the specific (and different) order or priority which Member States attribute to each of said main categories of claims. Further to this, national rules seem to ascribe different types of credits/claims to each of the aforementioned main categories. In order to shed light on the similarities and complexities of national legal frameworks on the matter at hand, some illustrative examples of different national rules governing creditor ranking in insolvency proceedings across a selection of Member States are presented in the following paragraphs.

The first set of examples of such differences is provided by the Dutch and the French jurisdictions in respect of the position of **secured creditors** vis-à-vis other claims, specifically those relating to **taxes and/or employee rights**. In fact, in the Netherlands – historically known to be a 'creditor-friendly' jurisdiction[228] – secured creditors are granted a strong position in respect of their claims as (in principle) these outrank other creditors (including those with a right of preference).[229] Secured creditors in the Netherlands concern

[226] Besides mentioning "*Satisfaction of creditors / minimum level of satisfaction of creditors in restructuring processes*" amongst potential forum shopping factors, stakeholder in Slovakia also additionally noted that "*Slovak insolvency legislation can be compared, for example, with the Czech legislation, whereas differences in legislation may lead to abusive forum shopping. For example, Slovak legislation requires at least 50% satisfaction of creditors' claims during reorganisation, and this condition is absent in the Czech legislation. This difference can lead companies to apply abusive forum shopping practices*". See national country reports, Annex A, SK interview reports.

[227] See Annex A, national country reports, desk research questionnaires, where information on the main rules concerning creditor ranking across the Member States is provided in the answers to question 7.

[228] Brown Rudnick Trade Alert, Issue no.32/2020, the Netherlands, Available at: https://brownrudnick.com/wp-content/uploads/2020/12/Trade-Alert-The-Netherlands.pdf (last accessed 25 November 2021).

[229] Article 3:279 of the Dutch Civil Code (DCC) (Burgerlijk Wetboek van 1 januari 1992, Burgerlijk Wetboek (BW) (Dutch Civil Code (DCC)). Available at: https://wetten.overheid.nl/BWBR0005291/2021-07-01 (last accessed 18 October 2021)

in particular creditors with a right of pledge (*pandrecht*) or right of mortgage (*hypotheekrecht*). Only in specific exceptions may other claims take priority over secured claims. The most important example of this is the preference that is granted to the Dutch tax authorities for certain categories of tax debts over certain movable assets located on the premises of the debtor.[230] If there are multiple rights of pledge or mortgage on a certain asset, the older security right will have preference over the younger security right, unless the priority order has been contractually altered.[231]

Whilst in the Netherlands this is an exception, in turn in France – a jurisdiction historically known for being debtor-friendly[232] – secured claims are (in principle) outranked by other claims. First and foremost, a portion of **employees' pre-petition claims** benefits from a super-senior status ("*superprivilège des salaires*").[233] This essentially protects the last 60 days' wages in arrears before the judgment opening insolvency proceedings. Moreover, if the bankruptcy estate cannot pay these claims from its available estate, they are paid in advance by a national wage insurance body (i.e., the 'Association pour la Gestion du régime de garantie des créances de Salariés (AGS)')[234], which then replaces the employees' ranking as a creditor. Additionally, **pre-petition tax claims** also rank ahead pre-petition secured claims.[235]

In turn, though in Spain claims concerning salaries, taxes and social security withholdings are granted (in said order) a status of 'general privileged claims'[236], however, these are still outranked by 'insolvency' claims, and special privileged claims[237] (i.e., secured with *in rem* security over specific collateral (e.g., mortgage or pledge).

On the other hand, always in France certain categories of secured creditors – essentially those that were transferred ownership or title to the secured assets – do not fall within the aforementioned ranking order since they shall benefit from an exclusive right over the economic value of the assets and, in practice, rank ahead all other creditors. This is notably the case for creditors benefiting from a retention right (for example, French share pledges), or from a so-called "Dailly" assignment or a trust agreement ("Fiducie" in French) over the secured asset. A similar rule was identified in Germany, where creditors entitled to separate satisfaction are completely excluded from the concept of insolvency creditors: they are granted a priority right of satisfaction and have the possibility to pursue their claims outside the rules of the relevant insolvency legislation[238], i.e., in normal civil proceedings.

Additionally, in most jurisdictions, a higher ranking seems to be attributed to what is generically referred to as 'proceeding claims' (i.e., those claims incidental to the opening and carrying out of insolvency procedures). However, in some countries, such claims are directly attributed to a higher ranking in the order of creditor priority established by national

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[230] Wet van 30 mei 1990 inzake invordering van rijksbelasting (Invorderingswet 1990 (IW 1990), Act of 30 May 1990 on the collection of state taxes (Collection of State Taxes Act (CSTA)) Available at: https://wetten.overheid.nl/BWBR0004770/2021-01-01 (last accessed 18 October 2021), article 21.

[231] Article 3:298 of the Dutch Civil Code.

[232] However, the implementation of the EU Restructuring Directive in France may lead to a shift towards a more creditor friendly insolvency framework. On this matter, see G. Podeur, '*European Union: After The Implementation Of The EU Restructuring Directive, Does France Remain Debtor-Friendly*?'. Available at: https://www.mondaq.com/france/insolvencybankruptcy/1116378/after-the-implementation-of-the-eu-restructuring-directive-does-france-remain-debtor-friendly (last accessed 25 November 2021); and S. Golshani, A.A. Hojabr, A. Leonard, A. Rueda, A. Jungbluth, 'The Legal 500Country Comparative Guides, France, Restructuring & Insolvency', page 14. Available at https://www.legal500.com/guides/chapter/france-restructuring-insolvency/?export-pdf (last accessed 25 November 2021).

[233] Arts. L622-17, French Code of Commerce.

[234] Available at: https://www.ags-garantie-salaires.org/lessentiel.html (last accessed 25 November 2021).

[235] For more information on the national insolvency framework in France, see Paul Talbourdet and Joanna Gumpelson, 'Restructuring and Insolvency in France', Thomson Reuters, Practical law collection, 2021. Available at: https://uk.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectTo=%2f1-501-6905%3ftransitionType%3dDefault%26contextData%3d(sc.Default)%26firstPage%3dtrue#co_anchor_a302422 (last accessed on 25 November 2021).

[236] Article 280 of the SIA.

[237] Article 270 of the SIA.

[238] Sec. 47 of the Insolvenzordnung (Insolvency Statute) of 5 October 1994 (BGBl. I p. 2866), as last amended by Article 35 of the Act of 10 August 2021 (BGBl. I p. 3436). Available at: https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed 27 October 2021).

laws (this is the case for instance in the Czech Republic, Estonia, Spain, etc., where proceeding claims are listed before secured rights). In other countries, for instance in Finland, bankruptcy creditors whose claims are secured by specific asset security are granted a higher ranking compared to fees and financing expenses obtained during the administration of the bankruptcy estate (i.e., encompassing the administrator's fees and claims that have arisen during the administration of the bankruptcy estate). However, this order is compensated by the rule according to which enforcement costs are first reduced from the sales proceeds.

Other similarities and differences appeared in relation to the ranking of creditors secured by **floating charges,** i.e., a security interest or lien over a group of non-constant assets that change in quantity and value. For instance, in Cyprus, floating charges are to be satisfied not only after other secured creditors but are also outranked by winding-up claims and preferential debts (e.g., related to taxes or employees). In such instances, it was noted that creditors holding floating charges might benefit from receiving the payment of their claims outside insolvency proceedings, where no claims' hierarchy needs to be followed. Floating charges are ranked similarly in Finland (where they are listed after secured creditors and expenses linked to the proceedings), but such creditors are indicated as being entitled to 50 % of the net proceeds of the liquidated assets covered by floating charge. Floating charge holders that are not fully satisfied with such proceeds are treated as unsecured creditors for their remaining claim.

Additionally, Greece provides an example of a jurisdiction where no pre-set distinctions are made between different types of secured creditors (i.e., national legislation refers to secured creditors irrespective of their specific security). It is noteworthy that secured creditors are satisfied from the entire insolvency estate, only in the event that the specific security does not suffice for their complete satisfaction.

Furthermore, the vast majority of the countries seem to contain specific rules according to which the satisfaction of certain types of claims, such as those related to **shareholder loans**, are subordinated to all other claims (e.g., see Austria, Bulgaria, Cyprus, etc.). However, one exception appears to be the Netherlands, where national legislation does not contain any specific provisions on the ranking of shareholder loans, and no rules barring a shareholder from obtaining security rights for its claims were identified. However, it was noted that there is limited case law from lower Dutch courts that have ruled that special circumstances (e.g., unlawful acting by the shareholder in the financing of the company) can bring about that a shareholder is subordinated to other debts of the company.

On a final note, in certain instances, national rules provide for parts of the amounts recovered from claims of secured creditors to be devoted to the satisfaction of other unsecured claims. Commonly, these 'carve out' rules are set out in favour of claims arising from the insolvency proceedings. This is the case in Poland, where amounts generated from the liquidation of assets encumbered with a security interest (e.g., mortgage, pledge, registered pledge) are allocated to satisfy creditors whose claims were secured on such property or rights, though 10% of the amount can be used by the trustee to cover the bankruptcy costs. [239] A similar (limited) carve out was found in Portugal, where national legislation provides that 10% of the proceeds of the sale of assets subject to security *in rem* may be channelled to pay the insolvent estate's debts, unless (i) the mentioned proceeds are indispensable to fully pay the insolvent estate's debts or (ii) no harm is caused to the full payment of secured claims. [240] Carve-outs in favour of other types of unsecured claims

[239] Article 345 (1) of the Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535 (Bankruptcy Law). Available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf, (last accessed on 20 September 2021).

[240] Article 172 (2) of the Código da Insolvência e da Recuperação de Empresas (Decreto-Lei n.º 53/2004 - Diário da República n.º 66/2004, Série I-A de 2004-03-18) (Insolvency and Corporate Recovery Code) (Decree-Law no. 53/2004 of 18 March

do not appear common across the Member States. However, in Spain, it is worth noting that the privilege attributed to the so-called "special privileged claims" (i.e., secured with *in rem* security over specific collateral, e.g., mortgage or pledge) only comprises claims up to 90% of the collateral fair value.[241] The deficiency claim will be considered for all purposes an unsecured/ordinary claim.

Though the above paragraphs only provide a limited number of examples of similar and divergent aspects of national insolvency laws concerning creditor ranking, they should nonetheless be illustrative of the extent of such differences, which naturally could play a strong incentive for debtors and creditors to forum shop the most favourable law.

3. Avoidance actions

All national insolvency frameworks contain rules on avoidance actions, i.e., rules according to which previously valid legal acts are or may be declared void on the opening formal insolvency proceedings, the divergencies of which across the Member States have also been noted by some national stakeholders as a factor which could potentially incentivise (abusive) forum shopping practices.[242]

For instance, a stakeholder in Portugal[243] was of the opinion that differences between national insolvency laws on claw-back actions (rules in regard to the nullity, annulment or challenge of acts that harm the collective interest of creditors) may act as grounds and incentives of continued abusive forum shopping (and its scale). Moreover, a stakeholder from Sweden[244] noted that some transaction avoidance rules in other Member States have short suspect periods compared to Swedish law, and indicated harmonisation of the most important substantial rules on the matter amongst the possible legal remedies which could be applied in order to further disincentivise abusive forum shopping techniques.[245]

Relevant literature on insolvency matters has also focused on analysing similarities and divergencies of national approaches to transaction avoidance rules. For instance, in the 'CERIL Report 2017-1 on Transactions Avoidance Laws' (the "CERIL Report")[246], research conducted on avoidance action rules in a sample of countries[247] noted the existence of two fundamental principles of transaction avoidance laws, namely: i) the principle of equal treatment of creditors, and ii) the principle of protection of trust. According to the aforementioned report, these principles are enforced in all jurisdictions examined, albeit in different ways.

Thus, though some similarities are identified across the countries in relation to the principles behind and the aims of avoidance action rules (i.e., protecting legitimate expectations of creditors), it should nonetheless be noted that Member States may reflect the aforementioned principles in national insolvency laws in very different ways. In this context, the national desk research provided useful insight on how norms on transaction avoidance are structured differently across the Member States[248], examples of which are provided

2004), and later amendments. Available at https://dre.pt/legislacao-consolidada/-/lc/34529075/view (last accessed on 7 September 2021).

[241] Article 275 SIA.

[242] See, for instance, Annex A, national country reports, PT, SE and SI interview reports.

[243] See Annex A, national country reports, PT interview reports. Additionally, according to a PT stakeholder "*there are three categories of divergences to be highlighted: […] the annulment of acts with harmful effects over the insolvent estate, the declaration of invalidity of certain acts, the permeability of acts performed by the insolvent company before the declaration of insolvency* […]".

[244] See Annex A, national country reports, SE interview reports.

[245] *Ibidem.*

[246] Conference on European Restructuring and Insolvency Law (CERIL) - CERIL Report 2017-1 on Transactions Avoidance Laws - Clash of Principles: Equal Treatment of Creditors vs. Protection of Trust in European Transactions Avoidance Laws" and CERIL Statement 2017-1 on Avoidance Actions. Available at: https://www.ceril.eu/news/ceril-statement-2017-1-on-transactions-avoidance-laws (last accessed 15/11/2021).

[247] The CERIL REPORT covered the following jurisdictions: Czech Republic, the Netherlands, France, Germany, Malta, Portugal, Slovenia, Spain and Sweden; some reference to the legal situation in England and Wales are also included.

[248] See Annex A, national country reports, desk research questionnaires, question 5.

below. The following paragraphs, however, will focus on transaction avoidance in classical liquidation proceedings, as the aim of the section is to reveal the potential extent of divergencies across Member States' rules, by means of illustrative examples, rather than to provide an extensive description of all aspects of avoidance frameworks.

First of all, in some countries, the norms on transaction avoidance are found in insolvency-specific legislation (e.g., in Slovenia it was noted that with the commencement of the 'Bankruptcy Proceedings', the avoidance actions become available only on the basis of the 'Bankruptcy Act'[249] – the avoidance actions on the basis of general civil rules become non-applicable[250]). By contrast, in other countries, the more general rules set forth under civil or corporate legislation appear applicable also to insolvency matters (e.g., in France and Luxembourg the rules are contained in the respective Commercial Codes).

Types of transactions subject to avoidance laws:

Generically speaking, though in different manners and under different conditions, avoidance action rules across the countries seem to target similar types of acts, namely:

- Transactions which were detrimental to the creditor estate (and in particular those transactions which preferred a creditor over others);
- Gratuitous transactions and/or transactions at an undervalue (e.g., gifts, etc).
- Acts the debtor performed with related/close parties;
- Fraudulent transactions (e.g., transactions where intent and other mental/subjective elements play a role).

However, in Portugal, only transactions carried out by the debtor may be annulled by the Insolvency Administrator (IA) for the benefit of the insolvent estate, with retroactive effects[251]; in turn, under Swedish law, all transactions seem to fall within the scope of transaction avoidance law, no matter whether they are performed by the debtor (e.g., payment), a creditor (e.g., satisfaction by individual enforcement) or a third party (e.g., paying the debtors debt). The only prerequisite is that the transaction is to the disadvantage of the general body of creditors.

Moreover, in some countries, certain transactions may be voided only under the **condition that the debtor was in a state of 'insolvency' or 'over indebtedness'** at the time the transaction was carried out.[252] However, not all these countries require such condition, and those who do may not require it for all types of voidable transactions. For instance, in Finland, amongst others, a general condition for avoidance actions is that the debtor was insolvent at the time of the transaction, or the transaction contributed to the debtor's insolvency, or, in case of a gift or a gift-like transaction, the debtor was over-indebted at the time of the transaction, or the transaction contributed to debtor's over-indebtedness [253] In Spain, the status of insolvency of the debtor does not seem to be a requirement for the voidance of undervalued transactions entered into within 2 years prior to insolvency declaration and that is detrimental to debtor's estate; in turn, the preferential transactions (i.e., transactions where certain creditors are preferred to others) enacted within the same suspect period are voidable if carried out when the company is already insolvent (i.e.,

[249] Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act) (Bankruptcy Act), Official Gazette of the RS no 13/14, as amended, available at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735 (last accessed on 1 October 2021).
[250] Article 270 of the Slovenian Bankruptcy Act.
[251] The resolution of contracts in benefit of the insolvent estate is governed by Article 120 and subsequent articles of the Insolvency and Corporate Recovery Code.
[252] For more information on definitions of insolvency and over-indebtedness across the Member States, please refer to the beginning of this Section 3.2, where conditions to access insolvency proceedings are discussed.
[253] Laki takaisinsaannista konkurssipesään 26.4.1991/758 (The Act on the Recovery of Assets to Bankruptcy 26.41991/758) Chapter 2, Section 5. In Finnish available at: https://www.finlex.fi/fi/laki/ajantasa/1991/19910758 (last accessed 29 September 2021), an unofficial English translation (last updated 10.3.2021) available at: https://www.finlex.fi/fi/laki/kaannokset/1991/en19910758.pdf (last accessed 29 September 2021).

unable to regularly pay its debts as they come due).[254] However, it should be noted that Spanish law sets forth certain presumptions of detriment to the estate, namely: 1) **rebuttable presumptions**: (i) acts or transactions entered into with related parties to the debtor (e.g., significant shareholders or its legal or *de facto* directors); (ii) perfection of security interests in favour of antecedent debt (except for certain public claims); and (iii) payment of undue secured claims with maturity after insolvency declaration; and 2) **non-rebuttable presumptions:** (i) gifts and other acts without consideration; and (ii) payment of undue claims with maturity after insolvency declaration. There are also certain safe harbours (namely acts and transactions done within the ordinary course of business, security interests governed by the special regime on financial collateral, and certain ring-fenced out-of-court workouts). In Austria, though other conditions apply, the insolvency of the debtor does not seem to be a requirement for the voidance of: i) transactions undertaken with to disadvantage the creditors (if the other involved parties knew the purpose of the transaction); ii) squandering assets (‘*Vermögensverschleuderung*’); iii) gratuitous disposition of assets (with some exceptions, e.g., those for the fulfilment of a legal obligation, customary occasional gifts etc.); and iv) provision of collateral or payment of a creditor (under certain conditions).[255] However, the state of insolvency figures as a requirement only in relation to a residual category of voidable transactions, namely all legal acts after the debtor became insolvent (or where it is a reason for insolvency proceedings, over-indebted) and the other party knew or had to know that the debtor had been insolvent or over-indebted. In Sweden, as a main rule, the debtor’s state of insolvency appears relevant for avoidance of transaction whereby a creditor has been unfairly favoured in preference to others or whereby the property of the debtor has been concealed from the creditors or his/her debts have been increased.[256]

Additionally, with regards to the **right of action** in respect of transaction avoidance, generally this is found to be vested in the respective insolvency administrator/practitioner. However, in certain instances, creditors may also be entitled to the right of actions. For instance, Italian law provides for two types of avoidance actions: 1) ordinary avoidance actions[257] which under certain conditions, may be brought by: a) a creditor who claims to have been harmed by an act of disposition performed after the creation of his claim; b) a creditor who claims to have been harmed by an act of disposition performed before the creation of his claim but maliciously intended to prejudice the satisfaction of his claim;[258] and 2) Bankruptcy avoidance actions, which in turn may be brought only by the liquidator in the context of bankruptcy proceeding.[259] In Romania, for instance, in addition to the insolvency practitioner filing an avoidance action, the right to act is extended also to the so-called ‘creditor's committee’[260] where the insolvency practitioner neglected to act, and to the

[254] See Annex A, national country reports, ES desk research questionnaire, question 5.
[255] See Annex, national country reports, AT desk research questionnaire, question 5.
[256] Chapter 4, Section 5 of the Konkurslagen (1987:672). (Bankruptcy Act (1987:672)) (Bankruptcy Act). Available at: www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurslag-1987672_sfs-1987-672, last accessed 29/10/2021.
[257] See Codice Civile (Italian Civil Code), Article 2900.
[258] See Codice Civile (Italian Civil Code), Article 2901 par. 1. The actions contested remains valid between the parties who performed it but is unenforceable against the creditor or creditors who brought the action(i.e., the consequence is the so called ‘relative ineffectiveness’ – in Italian ‘inefficacia relativa’). As a consequence of ineffectiveness, the assets are attachable to satisfy the acting creditor.
[259] See Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell’amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942 (the ‘Bankruptcy Code’). Available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario, (last accessed on 29 September 2021), Article 64.
[260] Art. 118, par. 2 of Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2o14) Official Gazette of Romania, No. 466, 25.06.2014, available at https://sintact.ro/#/act/16941441/18?directHit=true&directHitQuery=legea%2085~2F2014, (last accessed on 15 September 2021) ,

majority creditor[261] (more than 50% of the claims). Similarly, in Spain, the insolvency administrator is entitled to bring claw-back actions, and creditors have alternative standing if they prompt the filing of a claw-back action and the insolvency practitioner does not bring it within 2 months. However, unlike Romania, the standing is given to any creditor and no particular threshold is required.

In this context, it should also be noted that in some countries certain transactions are void *ope legis*. This is the case for instance in France, where national rules list several types of transactions[262] (such as deeds entered into without consideration transferring title to movable or immovable property, or bilateral contracts in which the debtor's obligations significantly exceed those of the other party) which, if performed during the suspect period, are automatically void (that is, the court must declare these transactions void on petition by the administrator, the liquidator or the Public Prosecutor). Other transactions are instead subject to optional voidance (that is, subject to the court's discretionary decision on petition by the administrator, the liquidator or the Public Prosecutor) if proper evidence is brought before the court that, at the time of the payment or transaction, the contracting party knew about the company's insolvency. When dealing with intra-group transactions, this knowledge is presumed for companies belonging to the same corporate group.[263] The same rule applies in Italy to gratuitous deeds (excluding customary gifts and acts performed in fulfilment of moral duty or for public utility purposes)[264] and payments of credits due on the day of the declaration of bankruptcy or later if made by the bankrupt debtor in the 2 years prior to the declaration of bankruptcy.[265]

Two other relevant aspects of avoidance action rules are those related to the so-called ‘suspect periods’ or ‘hardening periods’. In fact, generally, the transactions which may subject to avoidance actions are those that have been entered into within a specific timeframe, set out in national rules. In particular, two main levels of divergencies arise in relation to suspect periods.

First of all, countries seem to establish different **starting points** as which the hardening period is considered to run. For instance, in some countries this is deemed to be the moment the insolvency proceedings are opened/declared (e.g., this seems to be the case in countries such as Austria, Portugal, Spain); in turn, in other countries such as France, the suspect period runs from the date when the debtor is deemed to be insolvent. In Luxembourg, acts are voidable when they have been made by the debtor since the time determined by the court as being that of “cessation des paiements” (suspension of payments), or in the ten days which preceded this time.[266] Similar starting points apply in Belgium (suspension of payments), whilst in Poland relevance is given to the date the petition for bankruptcy is filed.[267]

Secondly, the **overall length of the suspect periods** may not only vary from one Member State to another but also within the same jurisdiction, depending on the type of transaction subject to avoidance. For instance, in Portugal the suspect period is of 2 years for gratuitous acts; 6 months for the constitution of liens in relation to pre-existing debts, as well as sureties and guarantees provided in relation to operations with no real interest for the debtor, and also for payment or extinction of debts whose maturity date was after the date

[261] *Idem,* Art. 118, par. 3
[262] L632-1, French Code of Commerce.
[263] Paul Talbourdet and Joanna Gumpelson, ‘Restructuring and Insolvency in France’, Thomson Reuters, Practical law collection, 2021. Available at: https://uk.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectTo=%2f1-501-6905%3ftransitionType%3dDefault%26contextData%3d(sc.Default)%26firstPage%3dtrue#co_anchor_a302422 (last accessed on 21/10/21).
[264] Article 64 of the Italian Bankruptcy Law.
[265] Article 65 of the Italian Bankruptcy Law.
[266] Art. 445 of the Code de commerce Luxembourgeois (Luxembourgish Commercial Code). Available at: https://legilux.public.lu/eli/etat/leg/code/commerce/20160101 (last accessed on 28 November 2021).
[267] Article 127(1) of the Bankruptcy Law.

of commencement of the insolvency proceeding; 60 days for the constitution of mortgages or other securities *in rem* together with the constitution of secured debts.[268] Similarly, in Romania, the suspect period is of 2 years for transfers under 'free titles', as well as for certain related party transactions (e.g., transactions concluded with significant shareholders (at least 20% of voting rights) or the debtor's management members), whilst for undervalue transactions and preferences (i.e., prepayment of undue debts) the time is shortened to 6 months. In turn, in Poland, the hardening period for gratuitous and undervalued acts is of 1 year, and 6 months for legal acts carried out by with related parties to the debtors (including its shareholders, their representatives or their spouses, and with affiliated companies, their shareholders, their representatives or their spouses).[269] Transactions involving fraud or bad faith of the debtor and/or counterparties' knowledge of the debtor's intent or state of insolvency are often subject to longer suspect periods. For instance, in Austria, the suspect period is 10 years for any transaction the debtor undertook to disadvantage his creditors, as well as for 'Squandering assets (Vermögensverschleuderung)' if the other involved parties knew the purpose of the transaction; in other countries, such as Greece, Estonia, Finland and Poland, the suspect period for such types of transactions is of 5 years (in Poland, this period related to the so-called *action pauliana*),[270] whilst in Spain, the reach out period is 4 years in case of fraud.

Similar divergencies also emerged with regards to so-called **'limitation periods'.** Unlike suspect periods, limitation periods relate to the timeframe within which the avoidance action should be brought. For instance, in Portugal, it was noted that the insolvency administrator shall determine the annulment of the act within 6 months after the acknowledgement of the act, but never 2 years after the date on which the insolvency was declared, with the exception of pending contracts (that is to say, contracts that still have not been entirely executed), whose annulment may be declared at any time.[271] In Estonia, the bankruptcy trustee has 3 years after the declaration of bankruptcy to submit a claw-back claim.[272] In Romania, the limitation period[273] for avoidance actions is set at 1 year from the date set for the judiciary administrator's report[274] (on the possible causes that determined the debtor's insolvency, as well as the persons liable which have to be filed in max. 40 days since the insolvency practitioner was appointed in the procedure; in deemed necessary situations, the period can be extended for another 40 days), but no longer than 16 months since the opening of the procedure.

Once again, the examples provided, though not exhaustive, should nonetheless deliver relevant insight on the level of complexity and possible divergencies in national transaction avoidance rules, which in the context of forum shopping may be potentially exploited in consideration of the fact that an act that may be subject to annulment in a certain jurisdiction, may not instead be voidable under the national insolvency rules of a different country. However, as explained at the beginning of this section, the fact that common patterns and similarities have also been identified across the Member States, especially with regards to the underlying principles of national transaction avoidance rules and types of acts that are captured under these norms, could deserve further attention should a harmonisation path for such rules be pursued. The matter will be further elaborated in Section 3.3.

[268] Article 121 (1) of the Insolvency and Corporate Recovery Code.
[269] Article 127(1) of the Bankruptcy Law.
[270] Article 527 of the Polish Civil Code - Ustawa z dnia 23kwietnia 1963 Kodeks cywilny (Civil Code, 23 April 1963 with later amendments), Official Journal 1964 No 16 Item 93. Available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf , (last accessed on 20 September 2021).
[271] Article 123 (1) and (2) of the Insolvency and Corporate Recovery Code.
[272] § 118 of Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95. Available in English at: https://www.riigiteataja.ee/en/eli/511072014018/consolide (last accessed 4 November 2021).
[273] Law No. 85/2014, Art. 118, par. 1
[274] *Idem,* Art. 97, par. 1

4. Directors' duties

Divergencies across Member State's insolvency legislation were also noted in respect of the existing framework for directors' duties when insolvency is imminent and when insolvency proceedings have commenced. Directors' duties are intrinsically associated with directors' liability if those duties are not respected.

Before proceeding with the provision of examples of national rules on the matter at hand, it is worth recalling that directors' duties are intrinsically linked to company law and the structuring of companies. Within the EU there are various rules relating to the organisation of a company and the powers of directors. On the structure of the board of companies, there are two options: the so-called 'one tier' board or the 'two-tier' board.[275] The former concentrates all directors in one single body, with a division between executive and non-executive directors (executive directors being those who conduct the daily managing of the company whilst non-executive directors hold a supervisory role). The 'two-tier' system, instead, refers to the existence of two different organs responsible for directing the company, i.e., the management board that concerns itself with the daily activities and the supervisory board which is responsible for the monitoring of the decisions of the management board. In the case of two-tier boards, the duties of the directors may differ depending on which board they develop their activity.[276]

Moreover, national rules may differ in terms of whom directors owe their duties to, also taking into account that this element may also vary throughout the life of the company. For example, it may happen that the directors owe their duties to the company (as the totality of stakeholders – shareholders, employees, creditors…), but when insolvency is imminent or insolvency proceedings are ongoing, this may shift so that the creditors are strongly protected throughout this process. This is the case in, for example, Cyprus, Croatia, Hungary, and the Netherlands. In Cyprus, during the pre-insolvency period, when insolvency becomes imminent, directors have a duty to safeguard the interests of the company's creditors too. This translates into the duty not to tamper with the financials of the company, favour certain creditors over others, undertake obligations that the company could not honour, or commit any fraudulent acts.[277] In Croatia, directors must act in the best interests of the company's creditors, and they have the duty to exercise reasonable care, skill, and diligence in carrying out their functions.[278] Furthermore, under Hungarian law, in the event of imminent insolvency directors must consider the interests of the creditors in the first place. The court may examine the conduct of all the directors who have exercised management functions in the company in the 3 years preceding the liquidation.[279] Lastly, in the Netherlands, insofar as risk exists that a debtor will no longer be able to fully repay its creditors, when considering the interests of the relevant stakeholders, the directors must protect the interest of the company's creditors above the interests of the shareholders.[280]

In the context of potential (abusive) forum shopping strategies, it might happen that certain rules pertaining to directors' duties may be more or less attractive to debtors in the imminence of insolvency or insolvent. In order to appreciate the divergencies of these

[275] Gerard McCormack, Andrew Keay, Sarah Brown, Judith Dahlgreen, University of Leeds, 'Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices' (2016), available at: https://ec.europa.eu/info/sites/default/files/insolvency_study_2016_final_en.pdf (last accessed on 23 November 2021).
[276] For instance, in Germany the adoption of two-tier boards in public limited liability companies is mandated by Section 30 of the Aktiengesetz (AktG) ("German Stock Corporation Act") of 6 September 1965 (BGBl. I p. 1089), as last amended by Article 61 of the Act of 10 August 2021 (BGBl. I p. 3436). Available at: https://www.gesetze-im-internet.de/aktg/ (last accessed on 27 October 2021).
[277] Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed 13 October 2021), s. 311, 312.
[278] Zakon o trgovačkim društvima, na snazi od 20.04.2019. (Company law of 20 April 2019), available at https://www.zakon.hr/z/546/Zakon-o-trgova%C4%8Dkim-dru%C5%A1tvima (last accessed on 14 of October 2021), Article 251.
[279] See Annex A, national country reports, HU desk research questionnaire.
[280] See Annex A, national country reports, NL desk research questionnaire.

national rules, the following paragraphs provide an overview of such duties in the different phases of pre-insolvency and insolvency proceedings across the Member States.

Duties of directors in pre-insolvency

The assessment of the duties of directors in pre-insolvency varies greatly between the Member States. One of the main issues of the subject matter is pinpointing the concept of pre-insolvency and, hence, that of insolvency. As described at the beginning of this section (see 'Conditions to access insolvency proceedings'), some Member States associate pre-insolvency with the phase when insolvency has become imminent, others when the liabilities of the company are greater than the assets or even when the company can no longer fulfil its financial obligations.

Several directors' duties have been identified across the Member States in the phase where insolvency proceedings have not yet commenced but the company is at risk of bankruptcy. Though these will be further analysed in Section 3.3., the following three main duties will be described in the following paragraphs: (i) duty of care; (ii) duty to convene a general meeting of the shareholders; (iii) duty to file for insolvency. Nevertheless, other relevant duties will be pinpointed to ensure a clear contextualisation of the subject matter. The general duties which are commonly attributed to directors, i.e., **duty of good faith, duty of loyalty and duty of care**, normally encompass the notion that directors must **run the business in an orderly fashion** that avoids a situation of financial struggle and potential insolvency. For example, in the Czech Republic, the statutory body has the duty of care of a diligent business person and act in the interest of the company in order to avoid insolvency whilst knowing the financial situation of the company.[281] In Germany, the members of the management body shall continuously monitor developments that may jeopardise the continued existence of the company.[282] It may also happen that if a court finds that the directors did not act accordingly to the interests of the company (or to whichever stakeholder they owed their duties), directors may be held criminally liable or liable for the damages caused by their (in)action. In Romania cases of bad faith or premature filing for insolvency may lead to the accountability of the director.[283] In the context of insolvency circumstances, the (i) **duty of care** is central. In this scenario, the duty of care translates to, among others, the duty to be aware of the financial situation of the company and act accordingly in order to avoid an insolvency situation. As such, there is a duty of the director to be informed of the 'status quo' of the company as a corollary of the duty of care. As the representative of the company and responsible for the daily managing of the company, directors/board of directors must keep updated financial books of the company and be aware when there is a risk to the health of the company in which case, they might be impelled to adopt steps to avoid the insolvency outcome. This is the case in the Czech Republic where the standard for the duty of care is that of a diligent business person.[284] When the imminent insolvency of the company occurs, the statutory body is obliged to take all necessary and reasonably foreseeable steps to prevent the insolvency of the company. In the same line, directors might have the **duty to inform the relevant parties**, whether the shareholders (through the abovementioned convening of a general meeting), the employees, or even the authorities.

[281] Zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů (Act No. 89/2012 Coll., the Civil Code of 3 February 2012, as amended) (Civil Code), Section 159.
[282] Unternehmensstabilisierungs- und -restrukturierungsgesetz vom 22. Dezember 2020 (BGBl. I S. 3256), das durch Artikel 38 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist" (Corporate Stabilisation and Restructuring Act of December 22, 2020 (Federal Law Gazette I, p. 3256), which has been amended by Article 38 of the Act of August 10, 2021 (Federal Law Gazette I, p. 3436)), Section 1.
[283] Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2o14) Official Gazette of Romania, No. 466, 25.06.2014, available at https://sintact.ro/#/act/16941441/18?directHit=true&directHitQuery=legea%2085~2F2014, (last accessed on 15 September 2021), Art. 169, par. 1.
[284] Zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů [Act No. 89/2012 Coll., the Civil Code of 3 February 2012, as amended (Civil Code)], available at: https://www.zakonyprolidi.cz/cs/2012-89 (last accessed on 23 November 2021), Section 159.

For example, in France employees must be consulted when the directors are going to file for insolvency.[285]

In relation to the (ii) **duty to convene a general meeting**, Directive (EU) 2017/1132 established in Article 58 that directors must convene a General Meeting of the shareholders in case of serious loss of subscribed capital. Serious loss "shall not be set by the laws of Member States at a figure higher than half the subscribed capital."[286] This duty is then common across the Member States (considering the scope of the Directive).[287] Nevertheless, the threshold for the duty to convene a general meeting may differ from Member State to Member State. For example, in Belgium, it is only required that the net assets of the company will or have become negative or/and when the board of directors becomes aware that it may be that the company will not be able to pay its debts as they fall due for at least 12 months.[288]

Lastly, on the (iii) **duty to file for insolvency** the matter is somewhat more complex. Member States have various strategies and proceedings in place in national legal orders which subject directors to different duties. In voluntary proceedings there is no obligation to file for insolvency, this is mainly associated with mandatory national proceedings. The duty to file for insolvency requires directors to initiate court proceedings when insolvency is imminent, or a company is insolvent. As will be seen below, the definition of these concepts may vary among Member States. Moreover, some countries have noted the existence of a company directors' mandatory duty to file for insolvency proceedings. This duty can be found in Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. For example, in Poland, the directors of a company have 30 days to file a bankruptcy petition with the court from the date of the insolvency. If directors do not comply with this duty, they may be liable for the company's commercial and public debts. Furthermore, they may also be subject to criminal liability. It should be noted that every member of the management board is subject to the duty to file for insolvency in Poland.[289] In Spain, directors have the right to file for insolvency when the company is in a situation of imminent insolvency, however, this right turns into a duty when the company becomes indeed insolvent.[290] On the contrary, countries such as Cyprus or the Netherlands do not seem to impose the duty to file for insolvency.[291]

Differences can also be pinpointed when it comes to the opening of proceedings. Both the conditions which trigger the duty to file and the timeframe to comply with it vary among the Member States. Many Member States establish the timeline for initiation of insolvency proceedings within 1 month from the date in which the company ceased payments.[292] On one extreme, Slovenia and Lithuania establish that the period for filing is 3 and 5 business days respectively. In Lithuania, this period begins once it becomes known by the directors or should have become known that the agreement on assistance to overcome financial hardship is not performed or performed improperly.[293] In Slovenia, 3 business days since

[285] French Code ofCommerce (Commercial Code), L620-1 and following, L628-1 and following and L-628-8 to L28-10.
[286] Ibid.
[287] Ibid, Article 44(1) and Annex I.
[288] See Annex A, national country reports, BE desk research questionnaire.
[289] Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf, (last accessed on 20 September 2021), Article 21(2).
[290] See Annex A, national country reports, ES desk research questionnaire.
[291] See Annex A , national country reports, CY, NL desk research questionnaires.
[292] This is the case, for instance, in Belgium, Greece, Luxembourg, Poland, Portugal, Romania, Slovakia. See Annex A, national country reports, desk research questionnaires, question 6. See also Gerard McCormack, Andrew Keay, Sarah Brown, Judith Dahlgreen, University of Leeds, 'Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices' (2016).
[293] Lietuvos Respublikos juridinių asmenų nemokumo įstatymas of 13 June 2019 No XIII-2221 (the Law on Insolvency of Legal Entities), available at https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr (last accessed 4 November 2021), Article 6(2).

the insolvency for Bankruptcy Proceedings.[294] On the opposite extreme, Austria, for instance, established a 2-month timeline which counts from the date the directors knew or should have known about the insolvency,[295] meaning when the company became illiquid or over-indebted. Lastly, Latvia did not reportedly legislate on the timeframe applicable, and the national legislation only generally requires the debtor to 'immediately' submit an application for the insolvency proceedings.[296]

Common to most Member States is the civil liability of directors when their behaviour leads to unnecessary damages to the company. In the Netherlands, a director can be held jointly and severally liable vis-à-vis the company if the director can be blamed for serious instances of mismanagement.[297] Liability is limited to damage incurred as a result of serious mismanagement.[298]

The lack of compliance with this duty may lead to the civil and criminal liability of the directors. Common to most Member States is the civil liability of directors when their behaviour leads to unnecessary damages to the company. In the Netherlands, a director can be held jointly and severally liable vis-à-vis the company if the director can be blamed for serious instances of mismanagement.[299] Liability, in the Netherlands, is limited to damage incurred as a result of serious mismanagement.[300] In Ireland, civil liability may also arise if fraudulent behaviour and mismanagement are at the source of the damages.[301] Namely, a court has the power to make a director personally liable for the debts of an insolvent company if that director traded 'recklessly' or for 'any fraudulent purpose'. A company director will be found to have acted recklessly if (i) they were party to the carrying on of business which they ought to have known, having regard for their general knowledge, skill and experience, would cause loss to the creditors of the company, or any one of them; or (ii) they were party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt as it fell due.[302]

Also, the failure to file insolvency may give rise to criminal liability as it happens in Poland where proceedings may be commenced to disqualify the directors from their position, depriving them of the right to conduct business from 1 to 10 years.[303] Criminal liability may also arise in Bulgaria and Italy, among others.[304] Another duty which was identified in most Member States is that once companies become insolvent it sometimes happens that directors are under the **duty to stop making payments**, excepting those required for the continuation of the business of the company. For example, this is the case in Estonia[305] and

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[294] Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju – ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act), available at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735 (last accessed 4 November 2021), Article 38(1).

[295] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) StF: RGBl. Nr. 337/1914 [Federal Act on Insolvency Proceedings (Insolvency Code - IO)], available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736 (last accessed on 23 November 2021), Section 69(2). Only available when there is a attempt to reach an agreement with the creditors.

[296] Section 60 (3) of the Maksātnespējas likums (Insolvency Law) Publication: Latvijas Vēstnesis, 124, 06.08.2010. Available https://likumi.lv/ta/id/214590-maksatnespejas-likums (last accessed on 19 October 2021).

[297] Burgerlijk Wetboek van 1 januari 1992, Burgerlijk Wetboek (BW) (Dutch Civil Code (DCC)), available at: https://wetten.overheid.nl/BWBR0005291/2021-07-01 (last accessed 18 October 2021), Article 2:9.

[298] Ibid.

[299] Burgerlijk Wetboek van 1 januari 1992, Burgerlijk Wetboek (BW) (Dutch Civil Code (DCC)), available at: https://wetten.overheid.nl/BWBR0005291/2021-07-01 (last accessed 18 October 2021), Article 2:9.

[300] Ibid.

[301] Companies Act 2014, available at: https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/print (last accessed on 23 November 2021), Section 610.

[302] Ibid.

[303] Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf , (last accessed on 20 September 2021).

[304] See Annex A, national country reports, BG, IT, desk research questionnaires, question 6.

[305] Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95. Available at: https://www.riigiteataja.ee/en/eli/511072014018/consolide (last accessed on 4 November 2021), §-s 85 – 92.

Germany,[306] among others. In Germany, directors may be requested to reimburse the legal entity for any payment made throughout that period that does not comply with the due diligence standards.[307] Also, it might be established that directors may no longer distribute the company's assets, as is the case in Finland.[308]

Duties of directors during insolvency proceedings

Once proceedings to address the situation of distress of the company are ongoing, the duties of directors might shift. Depending on which proceedings are at stake the scenario will be different. Proceedings aimed at restructuring or rescuing the debtor normally do not imply a transfer of the management of the company to a court-assigned entity (either a trustee, insolvency practitioners, administrator, or other), which means the directors remain in their position and must keep on fulfilling their daily responsibilities in which case the general duties remain applicable.

However, when courts are involved, it mostly happens that directors are no longer in charge of the business of the companies and most of their general duties as directors subside. For example, in proceedings such as the "Fallimento" (i.e. bankruptcy) and the "Liquidazione Coatta Amministrativa" (i.e., compulsory administrative liquidation) in Italy, the functions of directors cease at the opening of the insolvency. [309] On the contrary, insolvency proceedings in Portugal require that directors remain in their positions even though they shall restrain from performing any management acts or acts of disposition of assets, the responsibility of which has been attributed to an insolvency practitioner.[310] They remain in function without remuneration until the submission of the financial documents required by the proceedings.

Among the duties that arise in insolvency scenarios, there is a **duty to cooperate** with the court and the appointed administrator. This translates into the duty to share the necessary information and documents. Furthermore, it also happens that directors have the duty to facilitate the transition of the assets of the company and its managing to the trustee. The Hungarian insolvency law illustrates this by imposing on directors various disclosure obligations as well as the duty to prepare inventories, documents, financial statements, among others.[311] In the Czech Republic, a key duty of a company's statutory body – made up by the company's directors – is to cooperate with the insolvency administrator and follow his instructions during the ascertainment of the insolvency estate. The statutory body of the company shall also cooperate with the insolvency court and the creditors' bodies.[312]

Such duty is inherently linked with the **duty of transparency** under which directors must disclose the relevant information to the court and insolvency practitioner. Both the duty to cooperate and the duty of transparency apply somewhat consistently among Member

[306] Insolvenzordnung ("Insolvency Statute") of 5 October 1994 (BGBl. I p. 2866), as last amended by Article 35 of the Act of 10 August 2021 (BGBl. I p. 3436). Available at: https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed 27 October 2021).
[307] Ibid.
[308] Osakeyhtiölaki 21.7.2006 (Limited Liability Companies Act 21.7.2006). Available at https://www.finlex.fi/fi/laki/ajantasa/2006/20060624#O4L13P2 (last accessed on 29 September 2021), Chapter 13 Section 2.
[309] Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento,del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942, available at: https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario (last accessed on 29 September 2021), Article 1, par.1. See the forthcoming Decreto Legislativo 12 gennaio 2019, n.14 Codice della crisi d'impresa e dell'insolvenza in attuazione della legge 19 ottobre 2017, n. 155 (Legislative Decree No. 14 of 12 January 2019, Business Crisis and Insolvency Code), Official Gazette No.38 of 14 Feb 2019, available at www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg, (last accessed on 29 September 2021), Article 121.
[310] Article 82(1) if the Insolvency and Corporate Recovery Code.
[311] A csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvény (Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings), available at: https://njt.hu/jogszabaly/1991-49-00-00 (last accessed on 14. October 2021).
[312] Section 210 of the Insolvency Act.

States. Even though these duties may adopt different contours, their applicability is transversal.

Interestingly, some Member States were found to impose duties relating to the geographic localisation of the debtor. In Denmark, for instance, the debtor is required to remain within the Danish territory throughout the insolvency proceedings.[313] In Portugal, directors, as representatives of the companies are obliged to respect the domicile fixed in the insolvency declaration ruling.[314] Lastly, in Estonia, under the Bankruptcy Act, there is the obligation not to leave Estonia.[315]

As such, during insolvency proceedings, directors may remain in function which implies they comply with the same duties as applicable before the commencement of the proceedings in addition to insolvency-specific duties. If they are removed from their position, mostly duties of cooperation and transparency apply.

5. Discharge from remaining liabilities

Debt discharge is **the cancellation of the outstanding debts following the closure of insolvency proceedings**. When a debt is discharged, the debtor is no longer liable for the debt and the lender is no longer allowed to make attempts to collect the debt. However, not all jurisdictions set forth the same rules and conditions for debt relief in the context of insolvency proceedings, which can be particularly relevant for individuals and natural persons.

In fact, according to some national stakeholders, differences in this area of insolvency law have triggered forum shopping strategies in the past towards countries having more favourable debt discharge rules for the debtor. For instance, a national stakeholder in Germany highlighted having had knowledge of debtors' sham relocations of their COMI to other countries (e.g., the UK, or France) in order to take advantage of the much shorter time limit for residual debt discharge. It was also noted that after this practice became evident, debtors were forced to actually move their COMI in order to still make use of the possibility, though one is then back in the realm of permissible legal structuring.[316] The same was confirmed by a stakeholder in France, according to whom the closure of liquidation for lack of assets in France allows the debtor to be released from the proceedings of its creditors, whilst in Germany, this would not seem to be the case.[317] A similar position was also held by stakeholders in Estonia[318] and Ireland[319], who also underlined the shorter and therefore more favourable term for release obligations in the UK (however in Ireland, as will be explained below, the term for release obligations has been shortened following a legislative reform).

In this context, when looking at national insolvency laws, it is indeed true that formal personal insolvency rules differ as regards the length of the discharge period. France, for instance, may appear to be an attractive insolvency venue due to its debtor-friendly regime, according to which discharge immediately follows the pronouncement of the so-called 'clôture de la liquidation" (closure of liquidation). According to Article L643-9 of the French Code of Commerce, in fact, the closure of the judicial liquidation is pronounced by the court when there are no more due liabilities or when the liquidator has sufficient sums to pay off

[313] Konkursloven, LBK nr 11 af 06/01/2014 (Danish Bankruptcy Act). Available at: https://pro.karnovgroup.dk/b/documents/7000873645?tab=rulings#LBKG2021775_KAP3 (last accessed on 4/11/2021), Part 11. It should however be recalled that the EIR (recast) does not apply to Denmark.
[314] Decree-Law no. 53/2004 of 18 March 2004 [Insolvency and Corporate Recovery Code], and later amendments, available at https://dre.pt/legislacao-consolidada/-/lc/34529075/view (last accessed on 7 September 2021), Article 36(1)(c).
[315] Pankrotiseadus (Bankruptcy Act), *RT I 2003, 17, 95*, available at: https://www.riigiteataja.ee/en/eli/511072014018/consolide (last accessed on 4 November 2021), §-s 85 – 92.
[316] See Annex A, national country reports, DE interview reports.
[317] See Annex A, national country reports, FR interview reports.
[318] See Annex A, national country reports, EE interview reports.
[319] See Annex A, national country reports, IE interview reports.

the creditors, or when the continuation of judicial liquidation operations is made impossible due to insufficient assets, or when the interest of this lawsuit is disproportionate compared to the difficulties of realisation of the residual assets; and according to Article L643-11, with some exceptions mentioned in the same provision, the judgment closing judicial liquidation for insufficient assets does not allow creditors to recover the individual exercise of their actions against the debtor. Hence, looking at the average length of insolvency proceedings in France[320] and relevant literature on the matter[321], the discharge period in France seems to be relatively short (on average about 18 months). In turn, in other countries such as Germany, which also foresees a procedure for discharge of residual debt[322], the average discharge period seems to be considerably longer, i.e., 6 years.[323] However, in the case of Germany, it should be noted that in the context of the COVID-19 pandemic, an important act reforming insolvency law in Germany recently came into force, namely the 'Law on the Further Shortening of the Residual Debt Relief Procedure'[324], which applies retroactively to all insolvency proceedings filed after October 1, 2020. According to this new act, over-indebted entrepreneurs and consumers are given the opportunity to get a fresh start more quickly, as it provides for a reduction of the residual debt discharge procedure to 3 years instead of the current 6 years.

A similar reform concerning the shortening of the discharge period was carried out in Ireland. In fact, as also noted by a national stakeholder, the Irish period for personal bankruptcy was reduced from 12 years to 1 year, and the amount of bankruptcy tourism decreased since these changes in Irish law.[325] In fact, according to Section 85(1) of the Bankruptcy Act 1988 (as amended)[326] "[…] *every bankruptcy shall, on the 1st anniversary of the date of the making of the adjudication order in respect of that bankruptcy, unless prior to that date the bankruptcy has been discharged or annulled, stand discharged*". The same stakeholder indicated that prior to this reform, the UK and the USA had a much more favourable regime, and individuals moved abroad to avail of such regimes, though noting that opinion this is a permissible procedure, not abusive forum shopping. In other countries, such as Greece, the term for discharge could reach up to 10 years.[327] In fact, as a general rule Greek legislation mentions that "debtor natural person is completely released from any debt to the bankrupt creditors, regardless of whether they have been announced or not, thirty-six (36) months from the date of declaration of bankruptcy".[328] However, according to

[320] Ministère de la justice, 'Les Entreprises En Difficulté', rapport 2019. Available at: http://www.justice.gouv.fr/art_pix/6-PARTIE5_References_stastiques_justice_2019_16x24.pdf (last accessed on 21/10/21). See also Annex A, national country reports, FR desk research questionnaire, question 8.

[321] Ringe, Wolf-Georg, Forum Shopping Under the EU Insolvency Regulation (August 1, 2008). Oxford Legal Studies Research Paper No. 33/2008. Available at SSRN: https://ssrn.com/abstract=1209822 or http://dx.doi.org/10.2139/ssrn.1209822 (last accessed 22 November 2021);

[322] Insolvenzordnung ("Insolvency Statute") of 5 October 1994 (BGBl. I p. 2866), as last amended by Article 35 of the Act of 10 August 2021 (BGBl. I p. 3436), Part 8 - Discharge of Residual Debt. Available at: https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed 27 October 2021).

[323] Ringe, Wolf-Georg, Forum Shopping Under the EU Insolvency Regulation (August 1, 2008). Oxford Legal Studies Research Paper No. 33/2008. Available at SSRN: https://ssrn.com/abstract=1209822 or http://dx.doi.org/10.2139/ssrn.1209822 (last accessed 22 November 2021); See also CRIF news 2019 'Personal bankruptcy in Germany: fewer and fewer consumers achieve debt discharge after three years' according to which "[…] many people worked towards the first discharge of residual debt after three years. However […] most of those affected are only debt-free after six years". Available at: https://www.crif.com/news-and-events/news/2019/february/personal-bankruptcy-in-germany-fewer-consumers-achieve-debt-discharge-after-three-years/ (last accessed 22 November 2021).

[324] Gesetz zur weiteren Verkürzung des Restschuldbefreiungsverfahrens und zur Anpassung pandemiebedingter Vorschriften im Gesellschafts-, Genossenschafts-, Vereins- und Stiftungsrecht sowie im Miet- und Patentrecht _ Law to further shorten the residual debt discharge procedure and to adapt pandemic-related regulations in company, cooperative, association and foundation law as well as in tenancy and lease law (Federal Law Gazette 2020, Part I No. 67, issued on December 30, 2020, page 3328). Available at: https://media.offenegesetze.de/bgbl1/2020/bgbl1_2020_67.pdf (last accessed 22 November 2021).

[325] Personal Insolvency Act 2012. Available at: https://www.irishstatutebook.ie/eli/2012/act/44/enacted/en/html (last accessed 4 November 2021).

[326] Bankruptcy Act 1988 (as amended) https://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_1988_0027.PDF (last accessed on 26 November 2021).

[327] For an overview of debt discharge rules across the Member States, see Gerard McCormack, Andrew Keay, Sarah Brown, Judith Dahlgreen, University of Leeds, 'Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices' (2016).

[328] Art.192(1) of Law 4738/2020.

the third paragraph of the same provision "In case the deadline expires within 5 years from the previous exemption of the debtor […] then the exemption according to this article occurs on the fifth anniversary of the previous discharge."

Though the aforementioned examples are aimed at creating awareness with regards to the existence of divergencies and do not of course provide the full picture of the various national rules of debt discharge, it should also be recalled that, however, further harmonisation within the landscape of debt discharge rules may be brought forward following the implementation of the Preventive Restructuring Directive. In fact, Article 21 of this Directive sets out that the discharge of debt shall take place within 3 years, though Member States are nonetheless left with the discretion to set out shorter discharge periods.

6. Creditors' majorities and cramdown rules (restructuring)

Finally, in the context of restructuring proceedings, another notable area where divergencies across the national insolvency frameworks may appear as potential forum shopping factors, is that related to the rules which determine the level of influence that certain creditors or groups of creditors have on the approval of a restructuring plan in certain countries. Most specifically, divergences appear with regards to the majorities required to adopt restructuring plans, as well as the extent to which dissenting creditors may be 'crammed-down', i.e., meaning that when certain majorities of creditors – or majorities within classes of creditors – approve a plan, the plan becomes binding on the other class members, or another dissenting class in its entirety.[329]

In this context, in certain countries, simple majorities of each class of creditors are required for the adoption of a plan and the consequential imposition of the plan on the dissenting creditors of each class.[330] This is the case in Italy, for instance, for the adoption of the so-called '*concordato preventivo*'[331]; in Austria, the desk research findings noted that a restructuring plan must be approved by a majority of creditors who are present at the meeting and who are entitled to vote approve, and the total amount of the claims of the consenting insolvency creditors must be more than half of the total amount of the claims of the creditors with voting rights present at the meeting.[332] In some countries, higher qualified majorities are required. For instance, in the Bulgarian 'stabilisation proceeding' the plan shall be considered adopted if the creditors who own more than 3/4 of the receivables have voted[333] and the plan must be accepted by each class of creditors, by a majority of more than half of the claims in each class.

In the Spanish '*homologation proceeding'*,[334] national legislation requires the agreement to be approved by creditors representing at least more than 50% of the financial debt – the

[329] Gerard McCormack, Andrew Keay, Sarah Brown, Judith Dahlgreen, University of Leeds, 'Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices' (2016).
[330] Though the desk research questionnaires completed in the context of this study were not specifically targeted to collect detailed information on the existence and specificities of majorities and cram down rules for restructuring across the Member States, nonetheless some relevant data was incidentally collected on the matter at hand and is therefore be considered in the following paragraphs.
[331] See Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942,available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario , (last accessed on 29 September 2021), Article 177.
[332] Section 147 of the Austrian Insolvency Code (Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Insolvenzordnung) available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736 (last accessed 31 October 2021).
[333] Article 789(4) of the Commerce Act.
[334] Article 605 and following of Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/202o, of May 5, which approves the Recast Insolvency Act), Spanish Official Journal 2020, No 127, available at https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859 (last accessed on 27 October 2021).

majorities are to be calculated according to the rules set out in the same law.[335] These majorities to be reached across classes of creditors, which depend on the workout content and type of creditors, vary from 65% to 80% (for secured creditors) and 60% to 75% (for unsecured creditors).[336] In case certain majorities are reached, homologation can cram in holdouts (non-signatories or dissidents within a syndicate).

In Finland, in the context of the '*Restructuring of Enterprises'* (´Yrityssaneeraus/ företagssanering´), it was noted that an accelerated restructuring proceeding can be commenced, if all known creditors, whose total claims represent at least 80% of the debtors' debts, and each creditor whose claim is at least 5% of the total debts, accept the application.[337]

Another element that is worth mentioning is that in certain countries restructuring proceedings not only require the approval of particular majorities for the adoption of a plan, but it is also necessary that the plan provides the satisfaction of certain percentages of creditors in order to be approved by a court (i.e., simple approval by majorities is not sufficient, but the content of the plan must also be reviewed in view of ensuring the satisfaction of certain creditors). The first example of this rule appears in Italy, where 'Debt Restructuring Agreements' not only must be concluded with creditors representing at least 60% of the credits, but the restructuring plan must also foresee the full satisfaction of dissenting creditors in order to be approved by a court.[338] However, it should be noted that under the forthcoming reform of the Italian insolvency legislative framework, the percentage of 60% will be reduced to 30% in certain circumstances.[339] A different rule appears in Slovakia, where, besides the restructuring plan having to be adopted by an absolute majority of votes – calculated according to the recognised amount of their receivables recognised in terms of legal reason and enforceability – additional requirements consist, for instance, in the fact that the restructuring plan must foresee the satisfaction of at least 50% of the claims of unsecured creditors. It should be noted that this particular Slovak rule was outlined also by a national stakeholder from the Czech Republic[340], who indicated these types of thresholds as potentially representing a 'push-factor' for debtors, who may seek to restructure in jurisdictions where no minimum percentage of satisfaction of unsecured claims is required to access and carry out restructuring proceedings.

7. Asset tracing and recovery

Finally, another field of law in relation to which national rules and systems appear significantly varied is that of the extent of the powers, tools and means available in each Member State to trace and preserve assets in the context of insolvency proceedings. In particular, it is worth noting that potential divergences across Member States appear in respect of three main areas. First of all, Member States' rules differ with regards to the type and the extent of the powers that are granted to insolvency practitioners across the EU to trace and preserve assets. Such powers may or may not include, for instance, the possibility

[335] *Idem.* Articles 607 and 608
[336] *Ibidem.*
[337] Chapter 13 of the Laki yrityksen saneerauksesta 25.1.1993/47 (Restructuring of Enterprises Act 25.1.1993/47), in Finnish available at https://finlex.fi/fi/laki/ajantasa/1993/19930047, (last visited 29 September 2021), an unofficial English translation (last updated 1.4.2007) available at https://finlex.fi/en/laki/kaannokset/1993/en19930047_20070247.pdf (last visited 29 September 2021).
[338] Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942,available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkIA0gcIbJNTbg9T2KA__.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario , (last accessed on 29 September 2021), Article 182-bis.
[339] Article 182 *novies*, introduced by Law-decree 24 August 2021, n. 118, converted into law 21 October 2021,n. 147 (LEGGE 21 ottobre 2021 , n. 147 . Conversione in legge, con modificazioni, del decreto-legge 24 agosto 2021, n. 118, recante misure urgenti in materia di crisi d'impresa e di risanamento aziendale, nonché ulteriori misure urgenti in materia di giustizia). Available at: https://www.gazzettaufficiale.it/eli/id/2021/10/23/21A06353/sg (last accessed 27 January 2022).
[340] See Annex A, national country reports, CZ interview reports.

of the insolvency practitioners to request search or freezing orders for certain types of assets, or the possibility to conduct audits or compel the production of books and records etc. Secondly, Member States appear to use different systems to record the existence and ownership of specific assets, leading to a very diverse landscape in terms of types of asset registers available across the different countries and information contained therein. For instance, though all Member States are traditionally known to hold records of land, real estate or vehicle ownership, not all registers may contain the same level of information with regards to such assets (e.g., the existence of specific security rights, etc). What is more is that some countries may lay down particular access conditions or limitations for insolvency practitioners to obtain information on certain assets, especially when looking at data that may be subject to secrecy, such as information held by banks, financial institutions, taxation authorities, etc. Finally, besides avoidance actions extensively analysed above, Member States may layout different national tools for creditors to trace and preserve assets (before and/or after the commencement of insolvency proceedings).

3.3. Analysis

Following the presentation of the data collected in Section 3.2, this section aims to analyse the findings and clarify whether an approximation of national rules in certain areas of insolvency would minimise abusive forum shopping. The data collected in the context of the present Study showed that most interviewed stakeholders positively appreciated the idea of approximation of national rules in insolvency as a tool to remove the risk of forum shopping altogether.

As the existing harmonised EU rules on abusive practice appear to be adequate and to work satisfactorily, this section will focus on whether it would be feasible to harmonise the following areas of law: 1) conditions that need to be met when filing for insolvency; 2) conditions for determining avoidance actions and effects of claw-back rights; 3) directors' duties related to handling imminent/actual insolvency proceedings; 4) position of secured creditors; 5) court capacity; and 6) rules on asset tracing and recovery; In doing so, it will consider the benefits, drawbacks, and possible obstacles in harmonising these areas of law.

1. Conditions that need to be met when filing for insolvency

The EU Member States present two types of conditions to file for insolvency: objective and subjective criteria. Objective criteria refer to the debtor's financial situation where a level of financial distress is required to file for insolvency. As explained in Section 3.2, this distress can be assessed either with the so-called balance sheet test or the so-called cash flow test (where under the balance sheet test, a debtor's liabilities exceed their assets, while under the cash-flow test, a debtor is unable to pay their debts as they fall due).[341] The majority of the Member States was found to adopt both tests alternatively and cumulatively, whilst others exclusively adopt the cash flow test. [342]

The preference between the balance sheet test and the cash flow test is a policy decision of the Member States. It can be motivated by a variety of reasons. In the case of creditors filing for insolvency, the cash flow test is easier to fulfil than the balance sheet test. Creditors will be able to assess whether the debtor has stopped fulfilling their obligations. In contrast, it may be challenging to evaluate the company's financial status for creditors that have no connection with the corporate structure. Indeed, the accessibility to this type of information may vary from country to country according to accounting rules and transparency duties

[341] Julie Margaret, 'Insolvency and test of insolvency: an analysis of the balance sheet and cash flow test' (2002) 12(2) Australian Accounting Review 59.
[342] See Annex A, national country reports, desk research questionnaires.

under the national law. Furthermore, the courts applying the balance sheet test required an in-depth financial understanding of the matters displayed in the balance sheet.

Moreover, certain countries that adopt the cash flow test, such as Spain and Cyprus, include in the test specific types of debts such as debts against the State,[343] or against their employees.[344] The preference given to these types of debts to determine the insolvency of a debtor once again feeds into policy choices and public interest of the Member States.

Instead, the subjective criteria that need to be met when filing for insolvency are more various. These subjective criteria relate to the specific characteristic of the debtor. Simple subjective criteria may refer to whether the debtor is a sole trader, corporate entity, or consumer (e.g., Bulgaria and Poland). More complex criteria may refer to the number of employees or the amount of a company's revenues (e.g., Italy). These criteria may also be utilised in different ways. On the one hand, subjective criteria are adopted to regulate the accessibility of a debtor to specific types of insolvency proceedings, and this is the case in Italy. On the other hand, subjective criteria may determine the use of one test over the other. For example, in Bulgaria, sole traders are subject to the cash flow test, and corporate entities are subject to the balance sheet test. [345]

As outlined in Section 3.2, the differences in the conditions that need to be met when filing for insolvency are a potential risk factor for forum shopping. A debtor may seek to move their COMI to a Member State where they do not fulfil the criteria for opening an insolvency proceeding. However, this most likely will not be the only factor that a debtor will consider when moving their COMI. Indeed, the possible exclusionary effect from insolvency proceedings of certain criteria would need to be coupled with other factors for the successful continuation of the business so as to incentivise the debtor to move their COMI to that Member State (for example a beneficial tax regime or a less employee-friendly legal system).

The harmonisation of the conditions to access insolvency proceedings across Member States does not seem feasible currently. The lack of feasibility of harmonisation is justified on the basis of a considerable variety of procedures, a substantial diverge in the criteria applied to open such procedures and the diversity of values and interests intertwined with insolvency policies.

2. Conditions for determining avoidance actions and effects of claw-back rights

Avoidance actions allow insolvency practitioners to set aside transactions that are detrimental to the general body of creditors.[346] These actions seek to reverse a great variety of opportunistic and value-destroying behaviours of the insolvent debtor, such as assets dilution or substitution and debt dilution.[347] As noted in Section 3.2, the data collected showed that all Member States have rules that address the validity of transactions entered by a debtor in the period immediately antecedent to the commencement of the insolvency proceeding.[348]

In the context of the provisions of the EIR, it is worth mentioning that Article 7(m) provides that the law of the state of the opening of the proceedings defines the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors. In other words, the court of the Member State that has jurisdiction over the

[343] See Annex A, national country reports, ES desk research questionnaire.
[344] See Annex A, national country reports, CY desk research questionnaire.
[345] See Annex A, national country reports, BG desk research questionnaire.
[346] INSOL International, 'Avoidance Provision in a Local and Cross-border Context: A Comparative Overview' 2008 Technical Series Issues No. 7, 1.
[347] Aurelio Gurrea-Martinenz, 'The avoidance of Pre-Bankruptcy Transaction: An Economic and Comparative Approach' (2018) Chicago-Kent Law Review 711, 716.
[348] See Annex A, national country reports.

insolvency proceedings – whether main or secondary – will apply its national law in relation to the insolvency transaction avoidance claims.

At the same time, Article 16 EIR grants a defence against an avoidance claim to the counterparty of the detrimental transaction. Specifically, the person who benefits from the transaction may plead that the transaction is exempted from the application of the law of the insolvency proceedings. In order to do so, the defendant has to prove that the transaction is subject to the law of another member state. At the same time, they have to prove that the law governing the transaction does not allow the transaction to be challenged by any means in the relevant circumstances. An interesting example of a case where national courts were called to apply the aforementioned rules of EIR concerning avoidance actions is presented below in Section 3.4.

Looking at the possibility of approximating national rules on avoidance actions, recently, there have been studies addressing the issue of creating uniform avoidance rules applicable across the EU in substitution to the present national rules.[349] First, a 2010 INSOL Europe study addressed the harmonisation of insolvency law at the EU level, and it included avoidance actions among the areas where harmonisation is deemed worthwhile, necessary, and attainable.[350]

Second, Professor Roel J. de Weijs has addressed the topic of harmonisation of transaction avoidance in a comparative study between the English, German and Dutch regimes.[351] The study attempts to elaborate rules on transaction avoidance predominantly based on objective criteria. The objective approach is suggested to reduce the time for judicial examination of avoidance claims, increase the certainty of the outcomes of the proceedings and avoid moral reproaches of the parties. This study, however, is limited to the formulation of a blueprint for harmonised rules at the EU level. At the same time, it does not assess the feasibility of such a harmonisation in practice.

In contrast, Professor Andrew Keay addresses the option of harmonisation and its feasibility in more concrete terms.[352] In his paper, Keay weighs the advantages and drawbacks of harmonisation as follows. Accordingly, harmonised rules might:

- Reduce conflicts and diverges, enhancing the development of the internal market.
- Facilitate access to credit because it increases the predictability of the outcomes of legal disputes.
- Foster equality among creditors as the same rules apply to all insolvency proceedings opened within the European Union.
- Overcome some peculiarities of individual national systems that allow avoidance claims in limited circumstances.
- Increase procedural efficiency both in terms of time and costs. Indeed, the insolvency practitioner would need to know only one set of rules to challenge any transaction regardless of the law applicable to the transaction.
- Prevent forum shopping if the reason for moving the centre of main interest of a company is to take advantage of more favourable avoidance rules.

On the other hand, Keay also discussed the possible drawbacks of a harmonised system. Harmonised rules might:

[349] Eva J. Lohse, 'The Meaning of Harmonisation in the Context of European Union Law - A Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation* (Edward Elgar 2011) 282.
[350] INSOL Europe, 'Harmonization of Insolvency Law at EU Level' 18-20.
[351] Roel J. de Weijs, 'Towards an objective European rule on transaction avoidance in insolvencies' (2011) *International Insolvency Review 20*(3) 219.
[352] Andrew Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.

- Have a negative impact on the cost of credit (the cost of credit is presumed to decrease due to the improved predictability of the legal disputes. However, it might also be that creditors attempt to protect themselves from the risk of avoidance by increasing interest rates).
- Benefit powerful creditors more than small ones.
- Have the drawback that any modification would have to be made at a centralised level. The procedural times of the EU legislator are longer than the average national ones. This, in addition to a 'one size fits all' approach, may end up damaging local interest.

More relevant points for assessing the feasibility of a full harmonisation emerge, looking at possible obstacles to the harmonisation process. Among them, Keay first points out that there are relevant differences among the member states concerning the avoidance regimes in general, and the responses to particular issues.

The present research demonstrates a considerable variety of actions, suspect periods, and subjective criteria. These differences, however, should not be considered as an obstacle to the harmonisation process but rather its logical precondition. The purpose of harmonisation is to bring uniformity where this is lacking. If the national provisions were similar to begin with, the process of harmonisation would not be necessary. The peculiarities of each legal system, however, might reflect local instances. A full harmonisation that obliterates such differences may negatively impact the national insolvency systems. In these cases, the harmonisation may create legislative gaps regarding local issues. This is also highlighted by Keay, who suggests that harmonisation may prevent Member States from dealing with local concerns and abuses.

To overcome such drawbacks, two possible alternatives can be considered. On the one side, harmonisation could take place on a principle-based approach suggested by Professor Reinhard Bork within the Conference on European Restructuring and Insolvency Law (CERIL) and outlined in the CERIL Report. In this pilot study, research conducted on avoidance action rules in a sample of countries[353] sought to prove the existence of two fundamental principles of transactions avoidance laws, namely: i) the principle of equal treatment of creditors; and ii) the principle of protection of trust. According to the aforementioned report, these principles are enforced in all jurisdictions examined, albeit in different ways.

The CERIL report focuses on commonalities rather than differences among the Member States, with focus on the aforementioned principles. However, the study's focus is limited to only these two principles, and it does not provide a complete overview of all the common principles underlying avoidance actions. Second, the study addresses nine countries so it is questionable whether the two principles at stake are truly common among all Member States and whether more principles can be found to be common among the twenty-seven Member States.

On the other side, an alternative that is more respectful of the principle of proportionality could be a partial harmonisation of transaction avoidance. This idea has been put forward by Dr. Oriana Casasola who suggests enacting a Regulation that unifies avoidance rules only for transactions that are characterised as cross-border.[354] Under this proposal, a transaction should be deemed cross-border (i) when at least one of the parties of the transaction have their habitual residence or centre of main interest in a member state other than one of the proceedings; or (ii) when the law applicable to the transaction is different from the law of the opening of the proceedings. Once the transaction is qualified as cross-

[353] The CERIL REPORT covered the following jurisdictions: Czech Republic, the Netherlands, France, Germany, Malta, Portugal, Slovenia, Spain and Sweden; some reference to the legal situation in England and Wales are also included.
[354] Oriana Casasola, 'The Harmonization of Transaction Avoidance: A Compromise Solution' (2020) 29(5) Norton Journal of Bankruptcy Law and Practice 3.

border, European Union avoidance rules created *ex novo* shall apply.[355] This could be a compromise that respects the local instances of the Member States while minimising the risk of avoidance forum shopping. Indeed, cross-border creditors would be protected by harmonised rules, while creditors of the forum where the proceeding are open would be protected by their national law.

3. Directors' duties related to handling imminent/actual insolvency proceedings

The section considers the directors' duties related to handling imminent and actual insolvency. Within the EU jurisdictions, directors play an important role at the eve of the insolvency and during the insolvency proceedings as they decide the company's course of action and have access to relevant information.[356] For this reason, as outlined in Section 3.2, Member States are found to provide two types of duties: (i) directors duties at the eve of insolvency; and (ii) directors' duties during the insolvency proceedings. [357]

Concerning the directors' duties in place before the formal commencement of insolvency proceedings, it seems accepted that at the eve of insolvency, directors' duties shift their function from the protection of the shareholders' interests to the protection of the interests of the creditors.[358] Under the umbrella of pre-insolvency duties, the Member States developed a variety of duties, including: duties of proper management of financial supervision of the company and duties under the company statute, duty to file for insolvency, duties to act in good faith; duties not to distribute assets and stop payments; duties of timely detection of business crisis; duties to convene shareholders' meeting to inform them of the financial distress, etc. [359]

These duties not only vary from country to country but also the consequences of the breach of these duties varies significantly. Some countries provide for personal liability for damages caused by negligence or mismanagement, unpaid debts, unpaid taxes, and social security debts. Others include criminal penalties including the disqualification of the directors from their role.[360] The rationale of these directors' duties is two-folded. First, these rules seek to protect the creditors against mismanagement of the company and value-destroyer behaviours.[361] Second, they seek to protect the public trust over the insolvent company that is fundamental for effective trade.[362]

The rules concerning directors' duties and corresponding liabilities at the eve of insolvency might be a potential risk factor for forum shopping. Indeed, directors may seek to move the company's COMI where the rules affecting directors' liability are more lenient.

On the other hand, concerning the directors' duties that take effect after the petition for insolvency, directors are expected to collaborate with the insolvency practitioner and the court, and they generally have a duty to disclose relevant information.

In the context of the EIR, it should be noted that Recital 47 provides that courts of the secondary proceedings can sanction the directors' violations of their duties under their national law. In contrast, the EIR does not provide any specific rule concerning the application of the directors' duties.[363] Article 7 EIR provides that "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects

[355] Should the unification of such rules be taken into account, however, certain issues should also be considered, such as the relationship with Article 16 of the EIR.
[356] Gerard McCormack, Andrew Keay and Sarah Brown, European Insolvency Law: Reform and harmonisation.
[357] See Annex A, national country reports, desk research questionnaires, question 6.
[358] *Ibidem.*
[359] *Ibidem.*
[360] See Annex A, national country reports, DE desk research questionnaire.
[361] Gerard McCormack, Andrew Keay and Sarah Brown, European Insolvency Law: Reform and harmonisation (Edward Elgar 2017) 27
[362] Tom Reker, 'Unqualified Directors in Insolvency: A Comparative Study on the Desirability of Civil Law directors' Disqualification in the Netherlands' (2014) 23(2) International Insolvency Review 144.
[363] EIR, Recital 47

shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings')."[364]

In theory, therefore, the directors should be sanctioned by the law of the Member State opening the proceedings (either main or secondary). In practice, however, the rules concerning directors' liability applicable to the director should be the rules of the place of incorporation of the company (*lex societatis*), which does not always correspond with the law of the opening of the proceedings (*lex fori concursus*).[365] In this context, it is worth noting that in Case C-594/14,[366] the CJEU ruled that Article 4 of Council Regulation (EC) No 1346/2000 (Article 7 of the EIR) "must be interpreted as meaning that an action directed against the managing director of a company established under the law of England and Wales, forming the subject of insolvency proceedings opened in Germany, brought before a German court by the liquidator of that company and seeking, on the basis of a national provision such as the first sentence of Paragraph 64(2) of the Law on limited liability companies, reimbursement of payments made by that managing director before the opening of the insolvency proceedings but after the date on which the insolvency of that company was established, falls within its scope". It seems to follow from this case law that matters concerning directors' duties in the context of insolvency proceedings are to be considered as "actions "deriving directly from insolvency proceedings and closely linked with them" (see Article 6 of the EIR).

Directors' duties create an intricate system of law where insolvency law interacts with company law, torts, and criminal law. On the one side, this complexity coupled with lack of uniform guidance on private international rules applicable to directors' duties may foster the proliferation of abusive forum shopping practices.[367] Additionally, these systems reflect local legal tradition and cultural components that might constitute an obstacle to a full efficient harmonisation.[368] Indeed, a full harmonisation of the directors' duties would not be able to take into consideration the local peculiarity of private law, company law and criminal law. The only feasible harmonisation on the topic would be a so-called "minimum harmonisation" that sets outs certain minimal European standards but at the same time, fully safeguards the national autonomy of Member States.

The Preventive Restructuring Directive addresses the duties of directors in Article 19. Under the latter provision, the Member State shall ensure certain directors' duties at the eve of insolvency. First, directors shall protect the interest of creditors, equity holders and other stakeholders. Second, directors are required to take steps to avoid insolvency. Third, directors are liable for gross mismanagement that threatens the viability of the business.[369]

Although the Preventive Restructuring Directive is a first step towards the harmonisation of directors' duties, the attempt is very general. As Member States are still free to regulate the topic and the consequences of the breach of these duties, the current level of harmonisation does not limit regulatory competition. Consequently, the variety of the national approaches to directors' duties is still a risk factor for abusive forum shopping.

Two possible alternatives can be implemented to harmonise the topic: (i) harmonise the rules of private international law on the topic to clarify whether the law applicable is the *lex societatis* or the *lex fori concursus*; (ii) attempt a minimum harmonisation of the liability of the directors in the event they breach their duties.

4. Position of secured creditors

[364] EIR, Article 3.
[365] Study on the Law Applicable to Companies 190. It should be noted that the directors' liability is not listed at article 7(2), which only covers the conditions for the opening of those proceedings, their conduct and their closure
[366] Judgment of the Court of 10 December 2015, *Kornhaas v Dithmar*, C-594/14, ECLI:EU:C:2015:806, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62014CJ0594 (last accessed 23 March 2022).
[367] Gerner-Beuerle, Study on directors' duties and liability.
[368] Study on the Law Applicable to Companies 190.
[369] Article 19, Preventive Restructuring Directive.

The position of secured creditors in the ranking of the creditors in the distribution phase of insolvency is a significant risk factor for forum shopping, in particular in agreement with large creditors. Indeed, the position of the creditors in the distribution determines what percentage of their original debts will get paid.

The study findings outlined in Section 3.2 demonstrate how the approach to the position of secured creditors reflects Member States' policy consideration. Some countries give preference to taxes, social securities, and employees; others give preference to contractually secured creditors.[370] The harmonisation in this sector seems unlikely achievable at the current stage due to lack of policy agreement among Member States and differences in the Member States' security rights.

In the context of the EIR (recast), it is worth mentioning that said Regulation already acknowledges that:

"*As a result of widely differing substantive laws, it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the state of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different*"[371]

Furthermore, the European Commission has recognised that a full harmonisation is ambitious given the interplay with other national policy objectives, values and national traditions. If feasible, it would inevitably be a project for the long term.[372]

Although extensive comparative research has been conducted on the topic of secured creditors and security rights, to further the harmonisation of the rules on the topic, two further studies are suggested: i) an in-depth study on the common principles underpinning the security rights and; ii) an in-depth investigation of the policy reasons supporting the legislative choices concerning the position of secured creditors in the distribution ranking.

5. Court capacity

Article 2(6)(ii) EIR states that the concept of 'court' refers to 'the judicial body or another competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or take decisions in the course of such proceedings.[373]

Court capacity refers to the ability to deal with insolvency proceedings and issues in an efficient manner. The previous section has dealt with the overall efficiency of the insolvency proceedings as possible risk factors for forum shopping. In particular, the stakeholders were asked to discuss the speed, the simplicity, the cost of the procedure and of the expert, as well as the specialisation of the courts.

These elements are interconnected, but not all depend exclusively on the court capacity to deal with the matter. The speed and the simplicity or complexity of the insolvency procedure are determined first and foremost by the national procedural rules. At the same time, the cost of the procedure and experts depends both on procedural rules and market variations.

In contrast, the court capacity to deal with the insolvency matter efficiently is affected by different factors, among others:

- The role of the judiciary with national legal traditions.
- The educative paths and qualification requirements.

[370] Annex A, national country reports, desk research questionnaires, question 7.
[371] EIR, Recital 22.
[372] Directorate-General Justice & Consumers of the European Commission, Inception Impact Assessment,available at: http://ec.europa.eu/justice/civil/files/insolvency/impact_assessment_en.pdf (last accessed 2 December 2021).
[373] EIR, Article 2(6)(ii).

- The judicial organisation.
- Practical experience with company and insolvency law.

The first factor to consider is the role of the judiciary within different legal traditions, namely civil and common law. Traditionally, in common law systems such as Ireland and Cyprus, the role of the judge is to create the law, and it is permeated with a higher level of discretion than in civil law traditions. In contrast, in civil law tradition, the role of the judge is to apply the codified rules to the dispute. Nowadays, the distinction between common law and civil law countries is fading. Nevertheless, there is still a dichotomy between the rule-making judiciary and the rule-applying judiciary. The legal systems of the member states place themselves on a scale between these two extremes in a variety of positions.[374]

The second factor affecting the court capacity is the educative paths and qualification requirement to access the judiciary. These vary considerably among the Member States, in particular concerning the amount of practice that the judge candidates must acquire before the appointment.[375] Moreover, the Member States provide different standards of continuing education, training programs and evaluations for judges once in post.[376] The differences in formation and practice are most likely greatly influencing the capacity of courts to deal efficiently with insolvency matters.

The third factor concerns the national organisation of the judiciary and, in particular, whether the legal system provides for specialised insolvency courts. The specialisation of the courts improves the efficiency of the judiciary.[377] The data available in regard to the EU member states depicts a vastly various picture from country to country. Only Denmark presents specialised insolvency courts.[378] Some countries have specialised insolvency courts within the commercial courts or within the generalised courts.[379] Other countries present no specialisation[380] or a de facto specialisation, where judges become experts on the subject because exposed repeatedly to insolvency proceedings.[381] Moreover, the level of specialisation may also depend on the dimension of the court. For example, in Poland, there are insolvency chambers, but in smaller courts, the insolvency matters are dealt with by the commercial chambers.[382] Similarly, in Romania, there are only three specialised insolvency courts, while in smaller courts, the business chambers will cover the insolvency matters.[383]

Currently, it is hard to foresee harmonisation of these factors that determine court capacity, particularly because some of these factors are deeply rooted within the national legal culture and tradition. Nevertheless, few options can be available. First, a recommendation concerning the development of national specialised chambers in commercial, corporate and insolvency matters would be a welcomed step to foster court capacity. Second, a unified European training program for judges to deal with EU insolvency matters would improve both internal court capacity and the ability to cooperate with other courts.

6. Asset tracing and recovery

Asset tracing and recovery is a complex phenomenon that is not exclusive of insolvency law but that is pivotal to achieving the purposes of insolvency law to maximise the value of the insolvency estate and the returns to creditors. Asset tracing includes the powers and tools available to the insolvency practitioner and creditors to search for the debtor's assets.

[374] Seon Bong Yu, The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries (1999) 2(2) International Area Review 35, 42.
[375] Irene Lynch Fannon, Jennifer LL Gant, Aoife Finnerty, and Molly O'Connor, 'Report on Judicial Co-operation and European Harmonisation and Integration in Preventive Restructuring', 80.
[376] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' 2006.
[377] Dr. Heike Gramckow and Barry Walsh, 'Developing Specialized Court Services International Experiences and Lessons Learned' 2013 The World Bank Report
[378] See Annex A, national country reports, DK desk research questionnaire.
[379] See Annex A, national country reports, CZ, DE, FR, HU, LU, PL, SI desk research questionnaires.
[380] See Annex A, national country reports, FI, SK desk research questionnaires.
[381] See Annex A, national country reports, AT, EE, SE, SK research questionnaires.
[382] See Annex A, national country reports, PL desk research questionnaire.
[383] See Annex A, national country reports, RO desk research questionnaire.

As mentioned in Section 3.2, at national level, several powers are available to the insolvency practitioners across the Member States, in particular, the powers to i) compel the production of books and records; ii) conduct audits; iii) request the issuance of a search order; iv) requests the issuance of a freezing order; v) examine corporate officers; vi) report suspicious transactions to law enforcement authorities; vii) access registers of assets; viii) launch any other civil or administrative proceedings for the purpose of tracing and preserving assets; and ix) in the cross-border context, request mutual assistance or to turn to a judicial authority of his/her Member State to request mutual assistance in another Member State.

These powers vary considerably among Member States and often mirror national approaches in relation to conflicting interests such as privacy, procedural efficiency, cooperation among national institutions and attitude towards cross-border cooperation. Such a complexity might hinder a harmonisation proposal on the topic. Nevertheless, few steps could be taken to foster regulatory convergence among Member States. First, a unified database for assets located in the European Union could be developed. Second, more stringent rules on cross-border cooperation among insolvency practitioners and courts could be developed in relation to asset tracing.

3.4. Case study

Alteco Gestión y Promoción de Marcas S.L. v. Banking syndicate: Eliseo Finance S.à.r.l., Bankia S.A., Goldman Sachs International Bank, Tiber Spain Fondo de Titulización de Activos, Caixa General de Depositos S.A. Sucursal en Francia, Merril Lynch International Bank Limited, London Branch and Bank of America Securities Limited[384]

Background Information

This particular case is highlighted because it demonstrates the effectiveness of the mechanism concerning transaction avoidance, as found in Articles 7 and 16 of the EIR and Articles 4 and 13 Council Regulation (EC) 1346/2000. Although the case was decided prior to the entry into force of the 2015 Recast, its relevance is unchanged due to the consistencies between the two versions of the EIR.

Facts of the case

Alteco opened an insolvency proceeding before the Provincial Court of Madrid. Alteco's main assets consisted of a number of shares in a French company, Gecina S.A. Alteco financed this acquisition through a credit facility arranged by the respondent banking syndicate. As part of the financing arrangement, the banking syndicate were given a pledge on Alteco's shares in Gecina. The shares were deposited in Luxembourg, with the pledge agreement subject to Luxembourgish law. Subsequently, the pledge agreement was amended so that the pledge could be enforced in the event of final expiration of the term of the agreement, as well as in the event of early termination.

When Alteco commenced insolvency proceedings, the banking syndicate enforced the pledge agreement. Alteco's insolvency practitioner sought a suspension of the extrajudicial enforcement of the pledge. The insolvency practitioner also filed a clawback action against the banking syndicate on the grounds that, firstly, the pledge agreement was not made in accordance with formal requirements of Spanish law and, secondly, the agreement was made within the 2-year prior to the declaration of insolvency and was detrimental to the rest of creditors since the banking syndicate was preferred to others when Alteco was already insolvent.

[384] Resolution of the Provincial Court of Madrid (28th section), number 39/2014, of March 3 (ECLI: ES:APM:2014:10A), available at: https://refor.economistas.es/Contenido/REFor/JSE/ATS_1394_2021.pdf?_t=1614769011 (last accessed 22 November 2021)

Held by the Court

The first instance Commercial Court of Madrid granted the stay on the enforcement of the pledge. Per Articles 4(2), 5(1) and 5(4) of Council Regulation (EC) 1346/2000, the security interests subject to the law of a State other than the State where the insolvency proceedings were opened could be challenged by avoidance actions under the *lex fori concursus*. The insolvency practitioner's application met the two requirements under Spanish law: the appearance of good faith and danger of procedural default.

The banking syndicate challenged the avoidance action on the basis that these two requirements were not met. On the first point, regarding the appearance of good faith, the syndicate argued that the collateral was registered and therefore located in Luxembourg. Consequently, under Article 5 (1) of Council Regulation (EC) 1346/2000 the pledge agreement was subject to Luxembourgish law, which does not allow for clawback actions. As Article 13 of Council Regulation (EC) 1346/2000 provides, the court charged with opening proceedings cannot apply the transaction avoidance rules of the *lex fori concursus* if the benefitting creditor can show that the act in question (the pledge agreement) is subject to the laws of another Member State and that State does not permit such challenges.

The Court ruled in the practitioner's favour, concluding that the pledge agreement did not satisfy the requirements under Spanish law and, as such, did not meet the standard of appearance of good faith.

Appeal

The banking syndicate appealed this decision on the basis that the two requirements under Spanish law were not met but also, the Court of first instance had not paid due attention to the syndicate's arguments under Articles 5 and 13 of Council Regulation (EC) 1346/2000.

The Madrid Court of Appeals ruled in the banking syndicate's favour. First of all, the Court reasoned that the appearance of good faith requirement had been undermined by evidence from a Luxembourgish expert who informed the Court that the pledge was not subject to any action or remedy under Luxembourgish law. As such, the pledge agreement could not be challenged in a Spanish insolvency proceeding on the basis of Article 13.

Significance of the Decision

The mechanism provided by the European Insolvency Regulation (as is found in both Council Regulation (EC) 1346/2000 (and therefore, the EIR) has proved to work as intended in this example. As is set out above, Article 13 of Council Regulation (EC) 1346/2000 (Article 16 of the EIR) contains what Verwey and Bos have labelled a "double test".[385] An act, in this instance the pledge agreement may only be annulled due to the prejudicing of certain creditors if the law permits as such in both the *lex concursus* (law of the Member State where insolvency proceedings were opened) and *lex causae* (the law applicable to the transaction).

[385] Evert Verway and Erwin Bos, 'Article 13 of the EIR: The double test' (*Eurofenix,* Summer 2015) https://www.insol-europe.org/download/documents/718 (last accessed 23 November 2021).

4. The circulation of effects of pre-insolvency workouts

4.1. Introduction

Pre-insolvency workouts (or 'schemes of arrangement') allow a debtor, in financial distress, to restructure its debt in a debtor-friendly environment. The debtor does so by reaching an agreement with the stakeholders (creditors and shareholders). Throughout the EU, there are legal orders which also accept arrangements only agreed with some creditors. In some instances, agreements reached within the scope of pre-insolvency workouts require the homologation by a judge to have legal effects and possibly binding creditors who disagreed with the agreement or were not consulted.

Pre-insolvency workouts are relevant when discussing (abusive) forum shopping because these might allow the debtor to circumvent national insolvency laws without relocating its COMI. A debtor in distress might make an agreement for restructuring of its obligations which will eventually bind all creditors, hence, preventing the application of insolvency law of the Member State where the COMI is located. It might be that these schemes are for the benefit of all parties involved and their circulation[386] throughout the EU would be advantageous. The matter of jurisdiction is then central to the operation of pre-insolvency workouts.

The EIR has rules which harmonise jurisdiction relating to insolvency proceedings, mainly by referring to the COMI of the debtor as the connecting factor. However, the rules on jurisdiction are only applicable where the relevant proceeding is laid down in Annex A of the EIR. This implies that many pre-insolvency workouts, which are normally regulated by company law or contract law, may fall outside of the scope of the EIR. Hence, COMI is not, necessarily, the connecting factor relevant when a court sanctions a pre-insolvency workout. Furthermore, courts in other Member States are not required to recognise and enforce the arrangements where these are not part of Annex A.

Section 4.2 sets out a summary of the findings on pre-insolvency workouts identified during the data collection phase of this Study. This section is broken down to present firstly an overview of these pre-insolvency workouts available in the EU Member States, and secondly a description of the circulation of foreign pre-insolvency workouts in the EU Member States. Section 4.3 provides an analysis on the circulation across the EU of pre-insolvency workouts set up under insolvency laws or company laws of other Member States. Section 4.4 provides an appreciation of the UK scheme of arrangements and restructuring plans, while Section 4.5 presents two case studies, concerning respectively the Irish and the UK schemes of arrangements.

4.2. Summary of the main findings of the data collected

4.2.1. Overview of pre-insolvency workouts

Pre-insolvency workouts are not dealt with directly in the EIR. Nor are they dealt with directly in any other EU legislative instrument. The EIR deals with issues of jurisdiction to open insolvency proceedings, the applicable law in respect of such proceedings and recognition and enforcement of insolvency proceedings opened in other EU Member States. In light of this consideration, data were collected in the context of this Study in view of shedding light on if and to what extent pre-insolvency workouts falling out of scope of the EIR (i.e., not

[386] This chapter deals with the circulation of effects of pre-insolvency workouts in other Member States. It should be noted that for the purpose of the present report, the use of the term 'circulation' in respect of court judgments, where applicable, may be intended in the sense of EU 'recognition [and enforcement] of a foreign judgment'; in turn, when contractual arrangements are concerned, the term 'circulation' shall mean the possibility of such arrangements to produce effects in another Member State (i.e., create rights and obligations in compliance with the applicable law).

listed in its Annex A) are available across the Member States, as well as on the if and how these workouts may be circulated in other Member States.

As explained in Section 1.2, it is worth recalling that on 9th of January 2022, Annex A of the EIR was amended by Regulation (EU) 2021/2260, following the requests of certain Member States to update Annex A, in order to include novel insolvency arrangements which fulfil the requirements of the EIR for this effect as explained in Section 1.2.2.

The following subsections will, first of all, provide an overview of the landscape of pre-insolvency workouts as identified at the time of the desk research at national level conducted for the present Study (which took place before the enactment of Regulation (EU) 2021/2260).

Further, the Study Team assessed the recent amendments to Annex A of the EIR following the enactment of Regulation (EU) 2021/2260. Specifically, an overview of the countries in relation to which modifications/additions were made to Annex A is provided in this section in Table 1. In this context, it should be noted that for those pre-insolvency schemes that Member States have decided (or may decide in the future) to include in Annex A of the EIR (provided they fulfil the conditions for this effect explained in Section 1.2.2), any initial issues or doubts on their recognition across the Member States are now dissipated (i.e., the rules of the EIR apply with no limitation).

Pre insolvency workouts across the Member States

At the time of the desk research conducted for the present Study, several Member States were found to have in place pre-insolvency workouts, i.e., pre-insolvency schemes which, were found to fall out of the scope of the EIR. Such schemes were noted for instance in Austria, Belgium, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal and Romania.[387] It should be noted that, throughout the EU, in certain instances, national legal experts and stakeholders reported a lack of reliance on pre-insolvency tools. For example, an insolvency practitioner from Cyprus reports that, in his experience, pre-insolvency workouts are rarely, if ever, deployed and businesses are almost invariably led to dissolution and liquidation of their assets.[388]

The COVID-19 pandemic also pushed Member States to rapidly enact or amend legislation in view of preventing the mass bankruptcy of affected businesses. The Czech Republic,[389] Poland[390] and Portugal[391] are examples of countries having introduced frameworks that target the prevention of insolvency of companies struggling due to COVID-19.

Also in consideration of the fact that an extension of the deadline to transpose the Preventive Restructuring Directive has been granted to the Member States until 17 July 2022, it should be clarified that the landscape of pre-insolvency workouts (as well as that of

[387] It should be noted that some of the reorganisation and restructuring proceedings noted in the national desk research questionnaires (Annex A) may fall within the scope of the Preventive Restructuring Directive. The interplay between the EIR and the Preventive Restructuring Directive is analysed in Section 4.3.
[388] See Annex A, national country reports, CY interview reports.
[389] Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení, ve znění pozdějších předpisů [Act No. 182/2006 Coll., on bankruptcy and settlement of 30 March 2006, as amended (Insolvency Act)], Section 127a.
[390] Ustawa z dnia 19 czerwca 2020 r. o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19 (the Act on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19, 19 June 2020 with later amendments), Official Journal 2020 Item 1086, available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200001086/U/D20201086Lj.pdf (last accessed on 20 September 2021). In Poland the so-called 'Simplified restructuring proceeding' ('Uuproszczone postępowanie restrukturyzacyjne'), which was temporarily introduced in response to the Covid-19 pandemic, is no longer in force.
[391] Lei n.º75/2020 Processo extraordinário de viabilização de empresas (Law no. 75/2020 of 27 November 2020 on Extraordinary business viability process), available at https://dre.pt/pesquisa/-/search/149861977/details/maximized (last accessed on 22 September 2021).

insolvency proceedings listed in Annex A) is expected to undergo further changes in the future compared to the that described in the present Chapter.

Where noted in the desk research findings, several rules and aspects of pre-insolvency workouts were found to differ between the Member States. A relevant element that allows for the comparison of the existing arrangements is the intervention of the court in these proceedings. In some Member States, or within the scope of certain pre-insolvency proceedings, it is up to the debtor and the creditors to reach an agreement under which they become bound. For example, within the Portuguese RERE,[392] a debtor in a situation of imminent insolvency or economic distress may negotiate with some of its creditors an agreement for its recovery. When a Memorandum of Understanding ('MoU') is reached it must be filed with the Commercial Registry Office to produce legal effects, e.g., modification of credit rights and collaterals, ending of lawsuits relating to credits (only applicable for the creditors that are parties to the restructuring agreements) as well as money inflows, and attached guarantees explicitly provided for in the MoU or restructuring agreement are ringfenced from clawback actions. On the contrary, in-court proceedings can be found in Cyprus.[393] The Cypriot scheme of arrangement,[394] established under company law, offers the option of a court-sanctioned debt restructuring. Accordingly, companies may promote an arrangement between the creditors (or classes of creditors) that if agreed in line with the required majority is brought before the court for sanctioning where it becomes binding to all parties. The implementation of the plan itself is also supervised by the court.

Another relevant element characterising these agreements can be found in their binding capacity. Some pre-insolvency workouts allow for an agreement to be reached between a certain number of creditors. Under Cypriot law,[395] the consensual restructuring and workout process refers to the contractual arrangement whereby the debtor and creditors agree on the restructuring of the debt. This agreement requires the consent of all parties. Other agreements do not even require the consent of the debtor. For example, in Greece,[396] the rehabilitation agreement may be reached by creditors without the consent of the debtor under certain conditions (including where the debtor is in general and permanent state of cease of payments).

In order to provide a clearer picture of existing pre-insolvency workouts, the Greek, French, Cypriot and Maltese procedures will be described as an example here below:

Greek law provides for an out-of-court debt settlement process under which an entity in a situation of imminent insolvency may file an application with the Digital Solvency Registry for the out-of-court settlement of their debts.[397] Interestingly, certain creditors, such as financial institutions, the State and social security funds may initiate this process by inviting the debtor to apply for such settlement within a set deadline of up to 45 days. In case the

[392] Lei n.º8/2018 Regime Extrajudicial de Recuperação de Empresas (Altera o Código do Imposto sobre o Rendimento das Pessoas Coletivas e o Código do Imposto sobre o Valor Acrescentado), [Law no. 8/2018 on Extrajudicial Regime for the Recovery of Companies], Diário da República n.º 44/2018, Série I de 2018-03-02, páginas 1148 – 1155, available at https://dre.pt/home/-/dre/114796179/details/maximized (last accessed on 22 September 2021).

[393] For example: Scheme of Arrangement, Examinership; see Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed on 13 October 2021).

[394] Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed on 13 October 2021), s. 198-201.

[395] Ibid.

[396] Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020 on Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020 Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021), Articles 31-69.

[397] Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις ("Debt Settlement and Facilitation of a Second Chance and further provisions"), Law No. 4738/2020 as published on 27 October 2020 on Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021), Article 7-12 the law

debtor does not comply with the request, the proceeding ends, however it may impact negatively on the debtor in case it intended to file a subsequent application for this settlement proceeding.

The reason why debtors might find this proceeding appealing is because enforcement actions and measures are automatically suspended. Were the proposal to be approved by the debtor – whose consent is a requirement[398] – and the majority (in terms of debt nominal value) of participating creditors which are financial institutions and at least the participating secured creditors, the debt settlement agreement may be executed.

The timeline to reach such an agreement on a debt settlement plan is 2 months from the application submission date. Otherwise, the application will be rejected.[399]

Should a debt settlement agreement not be executed by the debtor and the participating creditors within 2 months of the application submission date, the application will be rejected. Should the proposal provide for a write-off of a debt owed to the Greek State or social security institutions and provided that specific procedural safeguards are met, creditors will be deemed to have accepted the proposal.

Lastly, if the debtor is yet to make any payments of an aggregate amount equal to (i) three payment instalments or, (ii) 3% of the total amount due under the settlement agreement, the debt settlement agreement may be terminated by any participating creditor. Termination of the debt settlement agreement will result in the reinstatement of the debtor's liabilities to the terminating creditor to the pre-settlement debt amount less any amount already paid under the settlement to that date.[400]

In **France**, the Code de Commerce provides for a Conciliation proceeding (Conciliation)[401] according to which the company and its creditors will negotiate to reach a workout agreement under the supervision of the court-appointed agent. A workout agreement sets out any loans extended by creditors or shareholders, and any consents by creditors to grant waivers, rescheduling and/or cancellation of existing debts. The distinguishing features of this proceeding are that it is flexible, as the outcome of the agreement depends on the needs and will of the parts and, to some extent, is confidential.

The company's legal representative may voluntarily and within its discretion file a petition for conciliation proceedings with the president of the court if the company faces or is in the imminence of facing legal or financial difficulties. The conciliation is only available to insolvent companies provided that they have been insolvent for less than 45 days before the petition is filed. Unless otherwise specified in the company's articles, no specific consent or approval is required to petition for conciliation.

The debtor benefits from this scheme as the court officials do not have any management responsibilities, hence, the directors of the company remain in office and may continue to conduct the activity of the company whilst negotiating the agreement with the creditors. As for the creditors, the opening of conciliation does not trigger any automatic stay. However, at the request of the debtor, the judge who had jurisdiction to open conciliation proceedings can impose on dissenting creditors that attempt to enforce their rights while conciliation is pending, a moratorium for up to 2 years. An advantage for creditors is that a plan accepted by some creditors cannot be imposed on other dissenting creditors unless accelerated financial safeguard or accelerated safeguard proceedings are opened which leaves a margin for creditors to enforce their rights. Within this proceeding, creditors benefit from a certain degree of protection against the risk of future clawback and new money injected in

[398] Ibid, Article 14.
[399] Ibid, Article 16.
[400] Ibid, Article 27.
[401] Code de Commerce (Commercial Code), available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2021-10-21/ (last accessed on 21 October 2021), Article L611-6.

the framework of such workout agreement benefits from a statutory super-senior status if the debtor subsequently files for insolvency.

Similarly, **Cypriot law** provides for 'Examinership' which is essentially a rescue process aiming at the financial reorganisation of a viable company with liquidity problems under the supervision of a court.[402] This procedure is available to all Cyprus-registered companies besides banks and insurance companies. The examinership order can be issued by the court, if the company, as a whole or part of it, has a reasonable prospect of survival.

The company, a creditor, a member holding not less than 10% of the paid-up voting share capital or a guarantor of the company's obligations can present a petition for examinership. The petition must be accompanied by a report by an independent expert delineating that the company has a viable future. The report may also outline a tentative recovery plan. For examinership to be ordered, the company must cumulatively meet the following criteria:

i) the company is or is likely to be unable to meet its debts;

ii) no resolution on the liquidation of the company has passed or been published in the Official Gazette of the Republic of Cyprus; iii) no court order has been issued for the liquidation of the company;

iv) no receiver has been appointed for more than 30 days; and

v) there is a reasonable prospect of survival for both the company and all parts of its undertaking as a going concern.

The court can then order the appointment of an examiner, dismiss the petition or make any other appropriate order, e.g., company winding-up. If the choice of the court is to appoint an examiner, the company enters court protection for a period of 4 months, which can be further extended to 6 months.

Throughout the examinership period, the company continues operating, nevertheless, under the supervision of the leadership of the examiner and supervision of the court. Importantly, during this period, no winding-up proceedings can be instated against the company without court permission, furthermore, the company cannot be put in receivership or under liquidation any pending receivership ceases. Furthermore, no legal action, attachment or execution may be put in motion to recover any debt or against the property of the company. Where any claims against the company are secured, no action may be taken to realise that security, except with the consent of the examiner. In like manner, no steps may be taken to repossess goods in the company's possession without the examiner's consent. Any pending proceedings against the company may be stayed by the court. This protection extends to the company's guarantors too, who are protected from legal actions for guaranteed company debts.[403]

The payment of debts, besides utility bills, is subject to the authorisation of the court.

The proposal for a voluntary arrangement by the examiner is then subject to the approval of the court, in which case the examinership proceeding is concluded. If the examiner finds that they cannot make any viable and reasonable proposals, they can apply to the court for instructions. The court can either give such instructions or make an order as it deems appropriate, including an order for the winding-up of the company.

The Cypriot proceeding offers the debtor the possibility to reorganise its debt and seek a financially viable future rather than having its assets liquidated by the court. Moreover, a successful examinership will culminate in the full satisfaction of the creditor's claims. However, creditors are deprived of any legal action pending the examinership.

[402] Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at: http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed 13 October 2021).
[403] Annex A, national country reports, CY desk research questionnaire.

As will be outlined at the end of this section (Table 1), the Cypriot examinership proceedings have been recently added to Annex A of the EIR following the enactment of Regulation (EU) 2021/2260.

Lastly, **Maltese** legislation[404] provides for Company Reconstructions. This proceeding, which is only open to insolvent companies, also depends on the compromise between the creditors and the company. The proceeding adopts the following structure: a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them. This may be followed by an application to the court by either the company itself or any creditor or member. The request is made for the court to order a meeting of the creditors (or class of creditors), or meeting of the members (or class of members), as the case may be. If that is the case, the meeting serves to reach the compromise or arrangement which must secure the agreement of the majority in number representing two-thirds in value of the creditors (or class of creditors), or members (or class of members) present and voting at the meeting.

If and once approved at the relevant meeting, an application must be made to the court to sanction the compromise or arrangement. The law does not prescribe any conditions, and the court is afforded full discretion. If the court ascertains the request and sanctions the compromise or arrangement, it shall be binding on all creditors (or class of creditors) or members (or class of members), as the case may be, as well as the company in all cases. "If the compromise or arrangement is sanctioned while the company is in the course of being wound-up, it shall also be binding on the liquidator and contributors of the company."[405]

It has been reported that the Company Reconstruction has never been used in its history, and thus there is no case law one might rely upon for reference

Some conclusions may be reached when looking into the practice of pre-insolvency in Member States. All Member States allow for a certain degree of restructuring. While some Member States do so by regulating the existing pre-insolvency procedures, others refer to contractual liberty as the mechanism under which parties can negotiate and celebrate agreements. Another relevant aspect is the diversity relating to in-court and out-of-court proceedings. Whereas some procedures are supervised or mandated by the court, others attribute to the court a mere sanctioning power. As described above, the case exists where the court has no intervention at all.

Finally, as was mentioned above, even prior to the enactment of Regulation (EU) 2021/2260, some countries had already decided to list in Annex A of the EIR national insolvency proceedings having a restructuring and rescuing nature, which also fulfils the requirements for being considered an insolvency proceeding in the context of the EIR, as described in Section 1.2.2. This was the case, for instance, in the Spanish homologation proceeding (which will be further described in Section 4.3), the French '*saveguarde*' proceedings, or the Croatian pre-bankruptcy proceedings (*Predstečajni postupak*). As an example, in order to access a pre-insolvency procedure in Croatia,[406] the following conditions have to be met:

(i) Account blocked for up to 60 days, delay in payment of salary for more than 30 days and the existence of threatening insolvency[407];

[404] Article 327 of the Maltese Companies Act (Chapter 386 of the Laws of Malta). Companies Act to regulate, in place of the Commercial Partnerships Ordinance, limited liability companies and other commercial partnerships, Chapter 386, available at: https://meae.gov.mt/en/Public_Consultations/MJCL/Documents/Chapter%20386.pdf (last accessed on 26 November 2021).
[405] Annex A, national country reports, MT desk research questionnaire.
406 Stečajni zakon na snazi od 02.11.2017. godine (Insolvency law), available at https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon , (last accessed on 13 October 2021), Article 2.
[407] Ibid, Article 4.

(ii) The applicant for the opening of pre-insolvency proceedings is obliged to submit with the proposal for opening pre-insolvency proceedings: a) financial statements in accordance with the Accounting Act[408] that are not older than 3 months from the date of submission of the proposal for opening pre-insolvency proceedings, provided that comparative data in the financial statements are shown as the date of annual financial statements of the previous year, with tax regulations if the debtor is liable to income tax; b) a statement on the number of employees on the last day of the month preceding the day of submission of the proposal; c) proposal of the restructuring plan;[409]

(iii) The proposal of the restructuring plan contains the relevant requirements.[410]

Lastly, the applicant is obliged to pay an advance for the costs of the pre-insolvency proceedings in the amount of 5,000.00 *kunas*; if two or more proposals have been submitted, each of the applicants is obliged to pay an advance for the costs of the pre-insolvency proceedings in the same amount.[411] Relying on this procedure allows for the debtors to continue to perform their activities unhindered[412] , i.e., continue to operate.

Court's jurisdiction and COMI

As mentioned above, in those scenarios in which a proceeding with pre-insolvency nature is mentioned in Annex A of the EIR, e.g., the Spanish homologation proceeding, the rules of the EIR apply and courts are required to assess their own jurisdiction in light of the COMI. However, the same jurisdictional rules do not apply to the pre-insolvency workouts available across the Member States which fall out of the scope of the EIR. Therefore, the question arises on how jurisdiction is dealt with across the different countries with regards to such arrangements.

The research conducted showed that in most Member States the court analyses its own jurisdiction. Whilst this might not be only for insolvency and pre-insolvency workouts, national legal orders on a stable basis require the courts to assess their jurisdiction. However, the relevant connecting factors may differ from Member State to Member State.

The vast majority of Member States where a pre-insolvency workout not falling under the scope of the EIR existed at the time of the present research, use the COMI as a connecting factor. In Portugal, to define whether the court has jurisdiction, the legislation on PEVE, one of the pre-insolvency proceedings, provides that the court with jurisdiction is the same that would have jurisdiction over the insolvency proceedings.[413] Therefore, in Portugal, the COMI is the relevant connecting factor where the PEVE is concerned. In Hungary, the Budapest-Capital Regional Court has jurisdiction in all cases if the COMI of the listed debtors is in Hungary and the issue falls under the scope of the Government Decree.[414]

Nevertheless, some Member States do not refer to the COMI for there to be jurisdiction. In the Netherlands, if the COMI is located within national territory, national courts will have

[408] Zakon o računovodstvu (Accounting Act), available at https://www.zakon.hr/z/118/Zakon-o-ra%C4%8Dunovodstvu (last accessed on 13 October 2021).
[409] Stečajni zakon na snazi od 02.11.2017. godine (Insolvency law), available at https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon (last accessed on 13 October 2021) Article 26.
[410] Ibid, Article 27.
[411] Ibid, Article 28.
[412] Ibid, Article 2.
[413] Lei n.º75/2020 Processo extraordinário de viabilização de empresas (Law no. 75/2020 of 27 November 2020 on Extraordinary business viability process), available at https://dre.pt/pesquisa/-/search/149861977/details/maximized (last accessed on 22 September 2021), Article 7(1).
[414] A vállalkozások reorganizációjáról, valamint a csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvény, továbbá a cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról szóló 2006. évi V. törvény eltérő alkalmazásáról szóló 345/2021. (VI. 18.) Korm.rendelet (345/2021. (VI. 18.) [Government Decree on the different application of Act XLIX of 1991 on the reorganisation of undertakings, bankruptcy and winding-up proceedings and Act V of 2006 on company registration, court proceedings and winding-up], available at https://net.jogtar.hu/jogszabaly?docid=a2100345.kor (last accessed on 8 November 2021).

jurisdiction.[415] Yet, the COMI is not a requirement for there to be jurisdiction. In this context, further information on the Dutch schemes of arrangement will be provided in the following paragraphs. Romania established that all insolvency proceedings shall be heard by the specialised court situated in the circumscription where the debtor has its registered office for at least 6 months before the opening of the procedure.[416] Where the court has a specialised insolvency chamber, it will have competence over the proceedings. It results from this that under Romanian law, the jurisdiction of the court depends on the place of the registered office of the debtor and not the COMI. Such would also be the case with Cyprus which only requires for the company to be registered in Cyprus.[417] It so happens that in order to apply for a court proceeding a company must be registered with the Registry of Companies. Hence, it may be that the COMI coincides with the place of registration but this is not necessary. Lastly, Bulgaria reports that the COMI is not directly addressed under national law and would only apply where the matter concerns EU law.

As mentioned above, courts are not always directly involved in the pre-insolvency workout proceeding. However, where the court does intervene in the proceeding, creditors seem to be given the right to raise objections or oppose the existence of jurisdiction. This was noted, for example, in Germany, where any party affected by the plan has the right of immediate appeal against the decision confirming the restructuring plan. However, when looking at Greece, it can be observed that Greek law (or case law) does not seem to provide space for objections or challenges with regards to jurisdiction where a pre-insolvency workout was brought before a court and where foreign creditors are locally represented.[418]

To illustrate the matter being examined, the jurisdiction of Dutch courts in pre-insolvency workouts will be described. As will be seen in the subsection below, only the so-called public Dutch pre-insolvency arrangement (openbare akkoordprocedure buiten faillissement) has recently been added to the list of Annex A of the EIR, whilst the confidential agreement, i.e., the confidential arrangement ("Wet Homologatie Onderhands Akkoord")("WHOA"), still falls out of the scope of the EIR.[419] Jurisdiction in respect of the latter is defined in line with the Dutch Code of Civil Procedure.[420] Under the relevant legal provisions, the court may assume jurisdiction if: (i) the debtor, creditor, shareholder or other affected third party is situated in the Netherlands; or (ii) if the WHOA has sufficient nexus to the Netherlands. Hence, the COMI is relevant to establishing jurisdiction of the Dutch court, but the case may be that the court has jurisdiction if the COMI of the debtor is not in the Netherlands. The court will examine its own jurisdiction, taking into account the petition filed under WHOA and the grounds provided for the court's jurisdiction. Until the court has assumed jurisdiction, creditors and other interested parties may challenge jurisdiction of the Dutch court. No appeal can be instituted against a judgment in which the court assumes (or does not assume) jurisdiction.

In conclusion, national courts will normally assess their own jurisdiction (no exception has been identified). To do so, most Member States, where pre-insolvency workouts are part of the legal framework, somehow consider the COMI to establish jurisdiction, even though it might not be determinant. With regard to the rights attributed to creditors in the form of

[415] Wet van 28 maart 1828 met betrekking tot de burgerlijke rechtsvordering (Wetboek van Burgerlijke Rechtsvordering (Rv) [Act of 28 March 1828 on civil procedure (Dutch Code of Civil Procedure (DCCP))], available at https://wetten.overheid.nl/BWBR0039872/2021-07-01 (last accessed on 18 October 2021), Article 3.
[416] Legea nr. 85/2014 privind procedurile de prevenire a insolvenţei şi de insolvenţă, publicată în Monitorul oficial al României nr. 466 din 25 iunie 2014 (Law no. 85/2014 on insolvency and insolvency prevention procedures, published in the Romanian Official Gazette no. 466 of 25 June 2014), available at https://www.avocatnet.ro/articol_37739/Legea-nr-85-2014-procedurile-de-prevenire-a-insolventei-si-de-insolventa.html (last accessed on 15 November 2021), Article 41, par. 1.
[417] Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at: http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed on 13 October 2021), s.209.
[418] See Annex A, national country reports, EL desk questionnaire.
[419] Please see Section 1.2.2 describing the EIR requirements for an insolvency scheme to be eligible to inclusion in Annex A (e.g., publicity, collectiveness of proceedings).
[420] Wet van 28 maart 1828 met betrekking tot de burgerlijke rechtsvordering (Wetboek van Burgerlijke Rechtsvordering (Rv) [Act of 28 March 1828 on civil procedure (Dutch Code of Civil Procedure (DCCP))], available at https://wetten.overheid.nl/BWBR0039872/2021-07-01 (last accessed on 18 October 2021), Article 3.

influence over the declaration of jurisdiction by a court, Member States differ in their approaches. It is then not possible to establish clear trends as some Member States confer this right only to involved creditors (e.g., Hungary), others to all interested parties (e.g., Poland).[421] Nevertheless, it seems that most (if not all) Member States allow creditors to object or officially question the court's jurisdiction.

Recent updates to Annex A of the EIR brought by Regulation (EU) 2021/2260

The following Table 1 provides an overview of the most recent updates to Annex A of the EIR brought forward by Regulation (EU) 2021/2260. It should be noted that for some countries (i.e., Italy and Lithuania) the amendments to Annex A did not entail an introduction of new pre-insolvency workouts in said annex, but rather reflect general amendments to the national insolvency legislative framework (e.g., in the case of Italy some names of proceedings have been amended and renamed by virtue of a recent legislative reform that will come into effect as of 16 May 2022). In other instance, such as the case of Austria, Cyprus, Germany, Hungary, the Netherlands, Annex A was amended in view of specifically incorporating therein new proceedings having a pre-insolvency nature. As a consequence, such proceedings are now officially 'insolvency proceedings' under the EIR, for which matters of connecting factors, COMI and jurisdiction will be directly addressed by the EIR rules. If anything, their introduction may simply add to the level of complexity of divergent rules applicable to the several types of insolvency proceedings as described in Chapter 3.

Table 1: Recent updates to Annex A of the EIR

Country	Annex A – EIR Prior to Regulation (EU) 2021/2260	Updates to Annex A – EIR After Regulation (EU) 2021/2260
Austria	• Das Konkursverfahren (Insolvenzverfahren) (The bankruptcy proceedings - insolvency proceedings) • Das Sanierungsverfahren ohne Eigenverwaltung (Insolvenzverfahren) (The reorganisation procedure without self-administration- insolvency proceedings) • Das Sanierungsverfahren mit Eigenverwaltung (Insolvenzverfahren) (The reorganisation procedure with self-administration - insolvency proceedings) • Das Schuldenregulierungsverfahren (Debt settlement process) • Das Abschöpfungsverfahren (Withdrawal procedure)	• Das Konkursverfahren (Insolvenzverfahren) (The bankruptcy proceedings - insolvency proceedings) • Das Sanierungsverfahren ohne Eigenverwaltung (Insolvenzverfahren) (The reorganisation procedure without self-administration- insolvency proceedings) • Das Sanierungsverfahren mit Eigenverwaltung (Insolvenzverfahren) (The reorganisation procedure with self-administration - insolvency proceedings) • Das Schuldenregulierungsverfahren (Debt settlement process) • Das Abschöpfungsverfahren (Withdrawal procedure) • **Europäische Restrukturierungsverfahren (the European Restructuring Procedure)**

[421] See Annex A, national country reports, HU, PL, desk research questionnaires.

Cyprus	• Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory settlement by the Court) • Εκούσια εκκαθάριση από μέλη (Voluntary liquidation by members) • Εκούσια εκκαθάριση από πιστωτές (Voluntary liquidation by creditors) • Εκκαθάριση με την εποπτεία του Δικαστηρίου (Settlement under the supervision of the Court) • Διάταγμα παραλαβής και πτώχευσης κατόπιν Δικαστικού Διατάγματος (Order of receipt and bankruptcy following a Court Decree) • Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (Management of the property of persons who died insolvent)	• Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory settlement by the Court) • Εκούσια εκκαθάριση από μέλη (Voluntary liquidation by members) • Εκούσια εκκαθάριση από πιστωτές (Voluntary liquidation by creditors) • Εκκαθάριση με την εποπτεία του Δικαστηρίου (Settlement under the supervision of the Court) • Διάταγμα παραλαβής και πτώχευσης κατόπιν Δικαστικού Διατάγματος (Order of receipt and bankruptcy following a Court Decree) • Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (Management of the property of persons who died insolvent) • **Διορισμός Εξεταστή (Appointment of Examiner)** • **Προσωπικά Σχέδια Αποπληρωμής (Personal repayment plans)**
Germany	• Das Konkursverfahren (Bankruptcy proceedings) • Das gerichtliche Vergleichsverfahren (Judicial settlement procedure) • Das Gesamtvollstreckungsverfahren (General enforcement procedure) • Das Insolvenzverfahren (Insolvency proceeding)	• Das Konkursverfahren (Bankruptcy proceedings) • Das gerichtliche Vergleichsverfahren (Judicial settlement procedure) • Das Gesamtvollstreckungsverfahren (General enforcement procedure) • Das Insolvenzverfahren (Insolvency proceeding) • **Die öffentliche Restrukturierungssache (Public restructuring arrangement)**
Hungary	• Csődeljárás (Bankruptcy proceedings) • Felszámolási eljárás (Liquidation proceedings)	• Csődeljárás (Bankruptcy proceedings) • Felszámolási eljárás (Liquidation proceedings) • **Nyilvános szerkezetátalakítási eljárás (Public restructuring procedure) [as of 1 July 2022]**
Italy	• Fallimento (Bankruptcy) • Concordato preventivo (Preventive arrangement) • Liquidazione coatta amministrativa (Compulsory administrative liquidation) • Amministrazione straordinaria (Extraordinary administration) • Accordi di ristrutturazione (Debt restructuring agreements)	• Fallimento (Bankruptcy) **[until 15 May 2022]** • **Liquidazione giudiziale (Judicial liquidation) [as from 16 May 2022]** • Concordato preventivo (Preventive arrangement) • Liquidazione coatta amministrativa (Compulsory administrative liquidation)

	• Procedure di composizione della crisi da sovraindebitamento del consumatore (accordo o piano) (Consumer overindebteness procedeengs – plan or agreement) • Liquidazione dei beni (Asset liquidation)	• Amministrazione straordinaria (Extraordinary administration) • Accordi di ristrutturazione (Debt restructuring agreements) • Procedure di composizione della crisi da sovraindebitamento del consumatore (accordo o • piano) (Consumer overindebteness procedeengs) **[until 15 May 2022]** • Liquidazione dei beni (Asset liquidation) **[until 15 May 2022]** • **Ristrutturazione dei debiti del consumatore (Consumer debt restructuring agreement) [as from 16 May 2022],** • **Concordato minore (Minor arrangement) [as from 16 May 2022]** • **Liquidazione controllata del sovraindebitato (Overindebteness supervised liquidation) [as from 16 May 2022]**
Lithuania	• Įmonės restruktūrizavimo byla (Company restructuring) • Įmonės bankroto byla (Company bankruptcy) • Įmonės bankroto procesas ne teismo tvarka (Out-of court company bankruptcy) • Fizinio asmens bankroto procesas (Bankruptcy proceedings of a natural person)	• **Juridinio asmens restruktūrizavimo byla (Restructuring of a legal entity)** • **Juridinio asmens bankroto byla (Bankruptcy proceedings of a legal person)** • **Juridinio asmens bankroto procesas ne teismo tvarka (Out-of-court insolvency proceedings of a legal person)** • Fizinio asmens bankroto procesas (Bankruptcy proceedings of a natural person)
Netherlands	• Het faillissement,(Bankruptcy) • De surséance van betaling (Suspension of payments) • De schuldsaneringsregeling natuurlijke personen (Debt rescheduling scheme for natural persons)	• Het faillissement,(Bankruptcy) • De surséance van betaling (Suspension of payments) • De schuldsaneringsregeling natuurlijke personen (Debt rescheduling scheme for natural persons) • **De openbare akkoordprocedure buiten faillissement (The public pre-insolvency plan procedure)**

For those pre-insolvency workouts still falling outside the scope of the EIR (either due to a Member State's decision to not list a scheme in Annex A, or due to the scheme not being eligible for incorporation in said annex, to begin with – see Section 1.2.2.), the question of whether they may circulate and produce effects in other Member States, e.g., via the Brussels Ia Regulation or the Rome I Regulation, still remains unclear and will therefore be further analysed in the following sections. Whilst this matter will be addressed in further detail in Section 4.3, the following Table 2 provides a summary of the Member States that

have been identified as still having pre-insolvency workouts regulated in national legislation not falling under the scope of the EIR. It is worth recalling that this situation may still vary in the future in view of the full implementation of the Preventive Restructuring Directive. Finally, the desk research findings for some countries (such as Finland and Sweden) showed that, though no specific pre-insolvency workouts appear to be regulated in national legislation, nonetheless private composition agreements between the debtor and the creditors are possible. Such a consideration may be deemed to be applicable to other Member States.

Table 2: Pre-insolvency workouts falling out of the scope of the EIR

Country	Pre-insolvency workouts (out of the scope of the EIR)	Main aspects / court involvement
Austria	Reorganisation proceeding[422] (Restrukturierungsverfahre)	**Court involvement (sanctioning)** - The proceeding is initiated by the debtor and requires its consent; - The required majority for the approval of the agreement is a simple majority of the creditors in each class that also represent 75 % of the claims in each class; - The court needs to sanction the agreement (Restrukturierungsplan) - If there are dissenting creditor classes, cross-class cram-down is available; - These agreements are not published.
	Simplified reorganisation proceeding[423] (vereinfachtes Resturkturierungsverfahren)	**Court involvement (sanctioning)** - The proceeding is initiated by the debtor and requires its consent; - The debtor has (upon filing for these proceedings) to prove that creditors representing 75 % of the claims in each class approved the Restrukturierungsplan; - The court needs to sanction the agreement (Restrukturierungsplan) - No cross-class cram-down is available; - These agreements are not published.
Belgium	Amicable Procedure[424]	**Court involvement**

[422] Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung – ReO) (Austrian Restructuring Code), available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011622 (last accessed 31 October 2021).
[423] Ibid.
[424] Article XX.39/1 Economic Law Code as amended by 21 Mars 2021, Loi modifiant le livre XX du Code de droit économique et le Code des impôts sur les revenus 1992 (Act amending Book XX of the Economic Law Code and the Income Tax Code 1992), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2021032102&table_name=loi (last accessed on 27 January 2022). Consolidated version of the Economic Law Code available at: http://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel#LNK0725

		- Court appoints a trustee (at the request of the debtor) - Trustee negotiates with some creditors an amicable agreement - If an agreement is possible, trustee sends case to the Court to open a faster judicial reorganisation procedure by amicable collective agreement
Cyprus	Scheme of arrangement[425]	**Court involvement (sanctioning)** - Judge will preliminarily consider the arrangement, address issues of jurisdiction and creditors' classification, and authorise the convening of the creditors' meetings - Affected creditors must be invited to vote for the arrangement - If a simple majority in value of the creditors present and voting for each class of creditors is secured, the arrangement may be brought before a judge for sanctioning. At this stage, the judge will assess the fairness of the scheme and will take into account the position of opposing creditors who will be invited to attend the hearing.
Estonia	Reorganisation proceeding[426] (saneerimise menetlust)	**Court involvement (sanctioning)** - Reorganisation proceedings are commenced by a court - The reorganisation adviser will prepare a reorganisation plan describing the reorganisation measures to be implemented and submit it to the creditors of the company to be adopted by a vote - At least one-half of all the obligees who hold at least two-thirds of all the votes vote in favour - Plan must be submitted to the court for approval - Court may approve even if creditors did not agree
France	Ad Hoc proceedings[427] (Mandat- ad-hoc)	**Court involvement** - President of the court appoints an agent - Informal negotiations with creditors

[425] Ο περί Εταιρειών Νόμος (Κεφ. 113) [Companies Law (Cap. 113)], available at: http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html (last accessed 13 October 2021), Sections 198 – 201

[426] Saneerimisseadus (Reorganisation Act), RT I 2008, 53, 296, available in English at https://www.riigiteataja.ee/en/eli/ee/511012021006/consolide/current (last accessed on 29 October 2021).

[427] Code de Commerce (Commercial Code), available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2022-01-27/ (last accessed on 27 January 2022), Article L611-3.

	Conciliation proceedings[428] (Conciliation)	**Court involvement (sanctioning)** - Facilitating negotiations and reaching a workout agreement between a company and its creditors under the supervision of a court-appointed agent - Agreement needs to be court-approved
Germany	Private Restructuring Plan[429] (StaRUG)	**Court involvement (sanctioning)** - Restructuring agreement like this must be ratified by the court through a simplified short procedure - There are situations where there is no need for debtor consent
Greece	Pre-insolvency business recovery process (Rehabilitation)[430]	**Court involvement (sanctioning)** - Restructuring agreement like this must be ratified by the court through a simplified short procedure - There are situations where there is no need for debtor consent
	Out-of-court debt settlement process[431]	**No court involvement** - Eligibility to be declared insolvent - Extrajudicial settlement of monetary liabilities to the Greek State or financial and social security institutions - Consent of the debtor, participating creditors which are financial institutions and at least the participating secured creditors

[428] Code de Commerce (Commercial Code), available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2022-01-27/ (last accessed on 27 January 2022), Article L611-6.

[429] Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG) (Act on the Stabilisation and Restructuring Framework for Companies (Corporate Stabilization and Restructuring Act - StaRUG), available at https://www.gesetze-im-internet.de/starug/BJNR325610020.html (last accessed 21 October 2021).

[430] Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις ("Debt Settlement and Facilitation of a Second Chance and further provisions"), Law No. 4738/2020 as published on 27 October 2020 on Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021), Articles 31 to 69.

[431] Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις ("Debt Settlement and Facilitation of a Second Chance and further provisions"), Law No. 4738/2020 as published on 27 October 2020 on Government Gazette volume A', no. 207, available at http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SIuSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz (last accessed on 30 September 2021), Articles 7-12

Hungary	Private/confidential restructuring proceeding[432] [*as of 1 July 2022*]	**Court involvement (sanctioning)** - If confidential, the moratorium will be known only to those creditors that the company invites to negotiate a reorganisation plan. - If confidential, the company needs the consent of all the creditors involved. - The private procedure only applies to creditors involved in the reorganisation. - Court sanctioning
Ireland	Scheme of arrangement[433]	**Court involvement (sanctioning)** - A special majority must approve the scheme - Court sanctioning - Dissenting shareholders or creditors can be crammed down if the scheme is approved by the requisite majorities
Italy[434]	Reorganisation Plan (Piano attestato di risanamento) [435]	**No court involvement** - The agreement with the creditors shall be based on a restructuring plan reviewed by an expert accountant who shall issue an opinion that shows the reasonableness of such plan in terms of the ability of the debtor to fulfil its payment obligations and reasonable assumptions. - The agreement may be confidential or public.
	Assisted crises settlement of the crisis[436] (Composizione assistita della crisi avanti all'OCRI) [as of 16 May 2022].	**No court involvement** (proceeding brought before a specific 'Body for the Composition of the Enterprise Crisis' (OCRI)) - Out-of-court, pre-insolvency restructuring procedure that takes place within the "Body of Composition of the Enterprise Crisis – So-called 'OCRI';[437]

[432] For more information on the Hungarian private and public reorganisation proceedings see INSOL Europe – Inside Story (December 2021) – Insolvency Proceedings in Hungary: the New "Reorganisation" Model Zoltan Fabok, Mark Seres. Available at: https://www.insol-europe.org/download/documents/2134 (last accessed 28 January 2022).
[433] Part 9 of the Companies Act 2014.
[434] It should be noted an extensive reform of the Italian insolvency legislative framework will have effect as of to 16 May 2022. See Decreto Legislativo 12 gennaio 2019, n. 14 Codice della crisi d'impresa e dell'insolvenza in attuazione della legge 19 ottobre 2017, n. 155 (Legislative Decree No. 14 of 12 January 2019, Business Crisis and Insolvency Code), Official Gazette No.38 of 14 Feb 2019, available at www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg, (last accessed on 29 September 2021).
[435] Bankruptcy Law, Articles 67 par. 3, lett. d. See the forthcoming Business Crisis and Insolvency Code, Article 56.
[436] Legislative Decree No. 14 of 12 January 2019, Business Crisis and Insolvency Code, Article 16.
[437] The OCRI is an institutional body created within the Commercial Chambers, which seeks to assist the debtor in the debt composition.

		- Procedure has two autonomous phases: (i) the alert phase; (ii) the assisted composition of the (financial) crisis (which entails the development of a restructuring plan agreed with the creditors).
Latvia	Out-of-court legal protection process (ārpustiesas tiesiskās aizsardzības procesu)[438]	**Court involvement (sanctioning)** - The debtor in financial difficulties agrees on the legal protection proceedings plan and the identity of the supervisor with the majority of creditors, prior to making a request to the court to initiate proceedings. - Final agreement must be approved by the court - If approved, the plan becomes binding on all creditors, including those who voted against it.
Luxembourg	Sursis de paiement (suspension of payments)[439]	**Court involvement** - Enables debtor to obtain a stay of enforcement proceedings - The suspension of payment is granted only to the merchant who, following extraordinary and unforeseen events, is forced to temporarily cease his payments, but who, according to his duly audited balance sheet, has sufficient assets or means to satisfy all its creditors in principal and interest. The suspension of payment may also be granted if the merchant's situation, although currently in deficit, contains serious elements for restoring the balance between assets and liabilities.
Malta	Company Reconstructions[440]	**Court involvement (sanctioning)** - The compromise or arrangement must secure the agreement of the majority in number representing two-thirds in value of the creditors (or class of creditors), or members (or class of members) present and voting at the meeting. - An application must be made to the court to sanction the compromise or arrangement.

[438] Maksātnespējas likums (Insolvency Law), available at https://www.vestnesis.lv/ta/id/214590-maksatnespejas-likums (last accessed on 24 February 2022), Chapter V. See also 'Guidelines, Out of court debt restructuring in Latvia', available at https://www.tm.gov.lv/lv/media/7364/download (last accessed on 24 February).

[439] Code de commerce Luxembourgeois (Luxembourgish Commercial Code), available at https://legilux.public.lu/eli/etat/leg/code/commerce/20160101 (last accessed on 29 november 2021), Articles 593 – 614.

[440] Companies Act, Chapter 386 of the Laws of Malta, available at https://legislation.mt/eli/cap/386/eng (last accessed 1 December 2021), Article 327.

Netherlands	Confidential arrangement (WOHA)[441]	**Court involvement (possible but not mandatory)** - Only the creditors and shareholders whose rights are amended under the proposed restructuring plan are entitled to vote - All creditors and shareholders or only specific ones - Voting: a group of creditors that together represent two-thirds of the total amount of the claims of the creditors which cast a vote in that class votes in favour thereof - Debtor can request the court to approve the plan
Portugal	Extra-Judicial Regime for Corporate Recovery[442]	**No court involvement** - Creditors representing at least 15% of the total unsubordinated claims may, alongside the debtor, start negotiations and sign a memorandum of understanding [MoU] to be deposited before the Commercial Registry Office - Confidential - Agreements that do not involve all creditors
	Extraordinary Proceedings for Corporate Recovery (PEVE)[443]	**Court involvement (sanctioning)** - Homologation by the Court of agreement reached between the company and its creditors - The homologation decision is binding for the company, the subscribing creditors of the agreement and the creditors on the creditors' list, even if they did not take part in the extrajudicial negotiations, with respect to the credits constituted up to the date of the decision of appointment of the PA
Romania	Ad-hoc mandate (Mandatul ad-hoc)[444]	**Court involvement**

[441] Wet van 7 oktober 2020 tot wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (WHOA) [Act of 7 October 2020 for the amendment of the Dutch Bankruptcy Act in connection with the implementation of the possibility of the court confirmation of an extrajudicial reorganisation plan (CERP)].

[442] Law no. 8/2018 of 2 March 2018 [Law no. 8/2018], available at https://dre.pt/home/-/dre/114796179/details/maximized (last accessed on 22 September 2021).

[443] Law no. 75/2020 of 27 November 2020 [Law no. 75/2020], available at https://dre.pt/pesquisa/-/search/149861977/details/maximized (last accessed on 22 September 2021)

[444] Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2o14), Official Gazette of Romania, No. 466, 25.06.2014, available at https://sintact.ro/#/act/16941441/18?directHit=true&directHitQuery=legea%2085~2F2014, (last accessed on 15 September 2021), Article 13, par.2

		- Entails a contract between the debtor and one or more creditors - Confidential - Ad-hoc attorney appointed by the court - Debtor will benefit from the protections provided for in an ad-hoc mandate agreement but only with respect to the creditors that have signed such an agreement

4.2.2. Circulation of pre-insolvency workouts

The circulation of decisions on pre-insolvency workouts refers to the way in which agreements emanating from a pre-insolvency workout are received in other Member States. When assessing this matter, many variables must be considered. The desk research conducted at national level in most Member States has not noted particular cases or rules specifically dealing with the direct effects of pre-insolvency workouts, including of those from non-EU countries. The parties might operate in practice, however, on the basis of the state of affairs established in the workout. As a consequence, this question seems to remain largely hypothetical in most Member States.[445]

Preliminary notes

First of all, in order to analyse the circulation of the effects of a foreign (EU) arrangement, it is wise to make a preliminary distinction between out-of-court agreements and those where the court had a role. Where the court had no intervention, meaning there is no sanctioning of the agreement by the court, Member States normally attribute contractual value to the arrangement.[446] On the other hand, where there is a court order or homologation procedure, diverse rules to ensure effects to those decisions may apply.[447] Based on this preliminary distinction, Section 4.3 will delve further into whether, independently of national rules on the matter, the former types of workouts may circulate under legislative instruments such as the Rome I Regulation, and whether the latter types of workouts may fall within the scope of the Brussels Ia Regulation. In turn, the following paragraphs of this section will focus on providing an overview of the information collected on the matter via the desk research at national level. It should be noted that, in the absence of quantitative case-law on the matter and of specific private international rules identified across the countries, the answers to the questions on circulation of effects of foreign pre-insolvency workouts are mainly based on the practical experiences of national legal experts on the topic at hand.[448]

Desk research findings on the effects of foreign pre-insolvency workouts

When it comes to arrangements that have been sanctioned by a foreign court, no national experts reported these to be directly ensured effects in their Member State. In Cyprus, for example, the desk research findings noted that pre-insolvency workouts from other jurisdictions (…) have no effects in the Republic of Cyprus until and unless a court decision

[445] In consideration of the lack of specific legislation and/or case-law on the matter across the countries, the findings of the desk research questionnaires and interview reports concerning the circulation of pre-insolvency workouts which will be outlined below, mainly stem from the national legal expert's or stakeholders' practical knowledge and experience in the fields covered by the present Study.
[446] See Annex A, national country reports, desk research questionnaires.
[447] Ibid.
[448] Ibid.

of the foreign jurisdiction is issued abroad, which is subsequently recognised and enforced in Cyprus.[449] Nevertheless, by undergoing the existing national procedures in place for this purpose, the decisions of the foreign courts would eventually have effect. On the contrary in Austria, besides no data being identified on whether any foreign pre-insolvency workouts have been ensured effects in this country, the national legal expert for Austria also opened the possibility of this country not accepting these decisions. This was corroborated by a national stakeholder contacted in the context of the field research, namely by a judge responsible for insolvency proceedings at an Austrian Regional Court, who also advanced that '*such pre-insolvency workouts would not be recognised in Austria*'.[450] Basically, the same position obtains for the Czech Republic.[451]

Nevertheless, Austria and the Czech Republic are not the only Member States where legal experts doubted the circulation of effects of foreign decisions. Several Member States rely on national rules and mechanisms for the circulation of such decisions and it might happen that the requirements for such circulation are not met. The Finnish and Swedish legal experts reported the lack of rules in their respective Member States in relation to this matter.[452]

When looking specifically at EU foreign schemes of arrangements, most national experts reported that courts would rely on European rules for the circulation of effects of the decision. From among these rules, besides the EIR, the Brussels Ia Regulation and the Rome I Regulation was mentioned. Nevertheless, as is further analysed in Section 4.3, the scope of these EU-level instruments might not encompass the pre-insolvency workouts. The Spanish national legal expert pointed out that the path to ensure the circulation of effects of decisions on arrangements which are not included in Annex A is not clear, namely this could be done pursuant to the Brussels Ia Regulation, the Rome I Regulation, or local private international law rules if the pre-insolvency workout is found to fall within the exceptions to the scope of the former regulations.[453] As such, in some countries, bilateral treaties and private international laws were noted as applicable in their legal orders, where EU rules are not applicable. In France, it seems that pre-insolvency proceedings are subject to the verification and confirmation mechanism known as '*exequatur*' which is intended to verify that the foreign court had proper jurisdiction; international public policy has been complied with and no fraud has taken place.[454] UK schemes of arrangement are also subject to the *exequatur* proceeding.

When the pre-insolvency workouts are out-of-court and their outcome is not judicially sanctioned, the matter becomes more complex. In some countries, doubts were shed on whether such contractual agreements may be considered valid and have direct effects in other Member States. As mentioned above, Member States seem to be permeable to these agreements as manifestations of contractual liberty. However, in the case of Germany, for example, it was noted that the foreign law cannot influence national substantive law without being recognised in any form and that in literature a similar case was considered not to have an effect (i.e., a contract concluded under foreign law would not be effectively part of a national pre-insolvency workout).[455] Interestingly, Luxembourg's national legal expert indicated that this would be a matter of choice of applicable law.[456] Hence, where a contract is at stake, the court would assess the applicable law and apply it to determine the effects the contract may produce. Portuguese law does not contain specific rules on the validity of foreign pre-insolvency workouts. To determine the effects in Portugal of a pre-insolvency workout concluded abroad under foreign law, it would also be necessary to (i) determine

[449] See Annex A, national country reports, CY desk research questionnaire.
[450] See Annex A, national country reports, AT interview reports.
[451] See Annex A, national country reports, CZ interview reports.
[452] See Annex A, national country reports, FI, SE desk research questionnaires.
[453] See Annex A, national country reports, ES desk research questionnaire.
[454] See Annex A, national country reports, FR desk research questionnaire.
[455] See Annex A, national country reports, DE desk research questionnaire.
[456] See Annex A, national country reports, LU desk research questionnaire.

the applicable law and (ii) analyse the effects of the pre-insolvency workout in accordance with the applicable law.[457]

On the other hand, the Estonian national legal expert claims that such an agreement between the parties would be considered as evidence in national proceedings.[458] For example, to confirm a claim or lack thereof in a potential bankruptcy matter. In Italy it was noted that they could potentially be considered as private agreements and, as such, they may have effects on the recognition of the existence of a debt/credit and on the possibility for the party to challenge the agreement initially made.[459] Member States also consider the possibility of pre-insolvency arrangements falling within the scope of Rome I. As for Poland, it seems that pre-insolvency workouts can be considered as regular agreements between the parties who willingly entered into the agreement.[460] It does not create legal effects for creditors who object to such an agreement.

Focusing on the specific case of the circulation of agreements under the UK 'Scheme of Arrangements', national legal experts report having no direct practical experience with this matter. The Cypriot national legal expert claims that pre-insolvency proceedings in the UK would have no legal effect in Cyprus until and unless sanctioned by a court decision, which needs to be recognised and enforced in the Republic of Cyprus. Moreover, it was noted that UK schemes of arrangements have indirectly circulated in Spain through the homologation of standalone Spanish refinancing agreements which replicate the terms of the foreign pre-insolvency workouts. These pre-insolvency proceedings do not have immediate effects in Spain but would be recognised so long they comply with certain prerequisites. Recognition in Spain requires filing a prior *exequatur* procedure, where a Spanish court will have to verify the fulfilment of all the recognition prerequisites (including the basis of the foreign court's jurisdiction, which should be COMI or similar).

In the case of Luxembourg, the desk research noted that the issue of the circulation of effects of pre-insolvency workouts does not seem to have been addressed by Luxembourg courts (though the public databases do not include all judgments rendered by Luxembourg courts). In particular, it does not seem that the UK cases where Luxembourg companies participated in UK schemes of arrangements (*Re Algeco Scotsman PIK SA*;[461] Re Lecta Paper UK Ltd;[462] *Re Gategroup Guarantee Ltd*)[463] were subsequently litigated in Luxembourg. In these UK cases, experts on Luxembourg law wrote reports for English courts opining that UK schemes of arrangement would have legal effects in Luxembourg, though the content of these reports is not public. A comprehensive analysis of the scheme of the arrangements in the UK is provided in Section 4.5.

Hence, in relation to this topic, it is difficult to pinpoint patterns among Member States as there is no empirical data considering Member States are yet to deal with matters of foreign pre-insolvency workouts. It seems to be common across Member States that decisions from foreign courts need to go through the national mechanisms of recognition which are not direct or immediate. When the pre-insolvency arrangements culminate in an agreement that is not sanctioned by a court, national experts seem to support the notion that these would not be granted direct effects in their Member States. Nevertheless, the question of whether these agreements fall within the scope of Rome I is still debated by the experts. This topic is addressed in Section 4.3.

[457] See Annex A, national country reports, PT desk research questionnaire.
[458] See Annex A, national country reports, EE desk research questionnaire.
[459] See Annex A, national country reports, IT desk research questionnaire.
[460] See Annex A, national country reports, PL desk research questionnaire.
[461] *Re Algeco Scotsman PIK SA* [2017], EWHC 2236 (Ch).
[462] England and Wales High Court (Chancery Division), Re Lecta Paper UK Ltd [2020], EWHC 382 (Ch), available at: https://www.bailii.org/ew/cases/EWHC/Ch/2020/382.html (last accessed on 25 November 2021).
[463] Re Gategroup Guarantee Ltd [2021], EWHC 304 (Ch).

4.3. Analysis

This section is aimed at providing an analysis of the role of pre-insolvency workouts in the EU.

First of all, the following paragraphs will present a brief summary of initial conclusions that may be drawn from the findings of the national data collection tasks on the existence and operation of pre-insolvency workouts across the Member States. Moreover, pre-insolvency workouts in light of the provisions of the EIR, and further considerations on whether and to what extent pre-insolvency workouts may circulate across Member States via the mechanisms provided by other supra-national instruments such as the Rome I Regulation or the Brussels Ia Regulation will be described in order to provide an overview of the legal instruments which may be applicable to pre-insolvency workouts across the EU. A description of the Spanish homologation proceeding (and example of a pre-insolvency workout included in Annex A of the EIR), and of the Irish scheme of arrangements (currently not included in the list of Annex A of the EIR) is also provided.

With regards to the initial considerations relevant for the analysis at hand, these may be summed up as follows:

1. Only certain Member States seem to have procedures that could be designated as 'pre-insolvency workouts', but this number is likely to increase as the new Preventive Restructuring Directive is implemented across Europe;
2. Pre-Insolvency workout procedures may be listed under Annex A of the EIR, subject to the compliance with the criteria of the concept of insolvency proceedings in the EIR (see Section 1.2.2), and entitled to EU wide recognition on that basis, and the Preventive Restructuring Directive in certain respects incentivises this course of action. It should be noted that, for example, the Spanish homologation procedure is listed under Annex A. The same has recently been noted, for instance, in Germany, the Netherlands and Hungary in respect of which Annex A has been recently updated to incorporate public pre-insolvency arrangements (See Section 4.2., Table 1).
3. Regulation (EU) 2021/2260 has recently provided updates to Annex A of the EIR, with the effect that certain additional proceedings having a pre-insolvency nature which had been identified as 'pre-insolvency workouts' falling out of scope of the EIR at the time of the research conducted for this Study, now fall under the rules of the EIR (meaning that no questions concerning matters of jurisdiction and circulation of effects in other Member States remain in respect of such proceedings). The detailed list of updates to Annex A is provided in Section 4.2, Table 1.
4. Member States are not required however to list pre-insolvency workouts under the EIR, even if these comply with the criteria of the notion of insolvency proceedings therein (see Section 1.2.2), and may prefer not to list such procedures under in its Annex A in part to avoid being subject to the jurisdictional constraints of the EIR. In other instances, independently of Member States' discretion, certain pre-insolvency schemes may not be eligible to be listed in Annex A of the EIR due to a lack of compliance with the aforementioned criteria. Examples of such schemes falling out of the scope of the EIR are, for instance, the Belgian amicable proceeding, the Italian 'Piano attestato di risanamento', as well as the recently introduced Dutch and the German so-called 'private' or 'confidential' scheme of arrangements.
5. Court judgments or orders confirming a pre-insolvency workout may be entitled to EU wide circulation under the Brussels Ia Regulation. This possibility will be further developed and analysed in the following subsections. In this context, Section 4.5 will also describe an example of a leading Irish case involving a scheme of arrangement, in which the court took steps to ensure that its judgment confirming the scheme would circulate under the Brussels Ia Regulation.

6. Pre-insolvency workouts from jurisdictions outside the EU may have an effect on EU Member States on a variety of different bases. The UNCITRAL Model Law on Cross Border Insolvency and which has been implemented in a minority of EU States may provide a basis for recognition in some cases. The US, for instance, which has also implemented the Model Law has granted effects to Irish and UK schemes of arrangement on this basis. The circulation of UK schemes of arrangements will in particular be further analysed in Section 4.5.
7. Pre-insolvency workouts that involve the replacement or modification of contractual obligations may also have direct effects in other Member States, pursuant to the Rome I Regulation. It is stated, however, in Article 1(2)(f) of the Regulation that 'questions governed by the law of companies and other bodies, corporate or unincorporated' are excluded from the scope of the Regulation. This possibility will also be further analysed in the following paragraphs.
8. Since pre-insolvency workouts from non-EU countries are likely to involve largely financial creditors and the modification of contractual debt obligations on generally a contractual basis, it is primarily up to any dissentient creditor to challenge the debt modification. Financial and related considerations are likely to militate against the prospect of any such challenge in a number of cases.
9. Pre-insolvency workouts from non-EU countries are likely to achieve practical effect in many EU countries on the basis of the latters' domestic private international law (PIL) rules which have not been harmonised by any EU or international instrument. National PIL rules would, however, find limited application, to the extent that the non-EU pre-insolvency workouts fall within the scope of other EU or international instruments (e.g., the Rome I Regulation, which has universal application).
10. Most EU countries do not yet seem to have had to consider the effect of pre-insolvency from other countries (either EU or non-EU) in their court systems. This may be explained also by the consideration that many EU countries have only recently introduced pre-insolvency workouts in their national legal framework as a consequence of the transposition of the Preventive Restructuring Directive (and may still continue to do so until the expiry date for transposition in July 2022).

Pre-Insolvency workouts and the EIR

As mentioned in Section 3.2, pre-insolvency workouts are not covered by the EIR or other EU legislative instruments.

In particular, the EIR is part of the overall EU framework on private international law. Therefore, it sits alongside the Brussels Ia Regulation – which applies generally in civil and commercial matters. The EIR should also be seen in the context of the Preventive Restructuring Directive, which EU Member States were obliged to implement by July 2021, though they could request a one-year extension from the European Commission.[464] The Preventive Restructuring Directive is designed for businesses that are not actually insolvent but where there is a likelihood of insolvency, and the objective of the procedure is to prevent insolvency and to restore the viability of the business. The EIR, on the other hand, was intended primarily to be applicable to insolvency procedures (though certain procedures having a hybrid/pre-insolvency nature have been incorporated in Annex A to the EIR). Moreover, the EIR is based on judicial cooperation in civil matters and is based on Article

[464] On the background to the EU initiative on substantive law harmonisation see, inter alia, G McCormack, 'Business Restructuring Law in Europe: Making a Fresh Start' (2017) 17 Journal of Corporate Law Studies 1; S Madaus, 'The EU Recommendation on Business Rescue: Only Another Statement or a Cause for Legislative Action across Europe?' (2014) 27 Insolvency Intelligence 81; H Eidenmüller and K van Zweiten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16 European Business Organization Law Review 625; F Javier Arias Varona, Johanna Niemi and Tuomas Hupli, 'Discharge and Entrepreneurship in the Preventive Restructuring Directive' (2020) 29 International Insolvency Review 8.

81 of the TFEU. Because of this Treaty base, and in accordance with Articles 1 and 2 of the Danish Protocol to the TEU and the TFEU, Denmark did not participate in the adoption of the Regulation and therefore, is not bound by it nor subject to its application.[465]

The Preventive Restructuring Directive, on the other hand, has a different Treaty base – Articles 53 and 114 of the TFEU on the removal of barriers to freedom of establishment and the approximation of laws on the establishment and functioning of the internal market. The fact that the EIR is a Regulation whereas the Preventive Restructuring initiative is a Directive also has significant implications. The EIR is binding and directly applicable in all Member States (with the exception of Denmark) whereas the Preventive Restructuring Directive requires national implementing legislation and Member States are left with considerable discretion as to form and methods.

As described in Section 1.2.2., the EIR applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in (a) or (b).

It is stated in Article 1(1) that the proceedings to which the EIR applies are listed in Annex A and this is reinforced in Article 2(4) which states that the 'insolvency proceedings' means the proceedings listed in Annex A. There may be something of a mismatch, however, between the definition of insolvency proceedings in Art 1(1) and the proceedings listed in Annex A. But any divergence is reduced by the extended definition of insolvency proceedings in the EIR compared with the more restricted definition in the original insolvency Regulation – Council Regulation (EC) 1346/2000.

One of the main intentions behind the EIR is that it should apply to a greater range of procedures and the language of its Article 1 is much broader compared to Article 1 of the original Council Regulation (EC) 1346/2000, which was limited to collective insolvency proceedings involving the partial or total disinvestment of the debtor and the appointment of a liquidator. Article 2(3) of the EIR makes it clear that its scope extends to debtor-in-possession type proceedings, such as those modelled on Chapter 11 of the US Bankruptcy Code. This extension is quite significant and brings the EIR into line with the UNCITRAL Model Law on Cross-Border Insolvency.

The United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross Border Insolvency has been implemented by certain EU Member States – Greece, Poland, Romania and Slovenia, as well as the UK and other major common law jurisdictions including the US, Canada and Australia.[466] The Model Law does not attempt a substantive unification of insolvency law and its scope is limited to some procedural aspects of cross-border insolvency cases, which however do not go nearly as far as the EIR.[467]

[465] EIR, Article 2, Recital 88.

[466] The model law is available on the UNCITRAL website at https://uncitral.un.org/en/ texts/insolvency/modellaw/cross-border_insolvency and for a list of countries that have adopted the model law see https://uncitral.un.org/en/texts/insolvency/modellaw/crossborder_insolvency/status

[467] For comparisons between the UNCITRAL Model Law and the EIR see Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Insolvency Review* 246.

It seems on the basis of Articles 1(1) and 2(4) of the EIR, as well as the judgment of the CJEU in the *Eurofood* case,[468] that once a proceeding is listed in the Annex it is entitled to cross border recognition and enforcement within the EU. This interpretation provides certainty and also appears to be confirmed by the CJEU in Case C-116/11 *Bank Handlowy and Adamiak*.[469] The court said that, once proceedings are listed in Annex A, they must be regarded as coming within the scope of the regulation: "inclusion in the list has the direct, binding effect attaching to the provisions of a regulation."[470] The court added that a debtor in respect of which insolvency proceedings have been opened must be regarded as being in a situation of insolvency for the purposes of application of the regulation.

In Case C-461/11 *Ulf Kazimierz Radziejewski*,[471] the European Court suggested that the regulation applied only to the proceedings listed in the Annex and, therefore, a form of Swedish debt relief procedure considered in the case did not fall within its scope as it was not included in Annex A. This interpretation is supported by Recital 9 to the EIR which provides that the insolvency proceedings to which it applies are listed exhaustively in Annex A. It goes on to say that when a procedure appears in the Annex, the EIR applies without any further examination by national courts regardless of whether the definition is in fact satisfied. It adds that where a procedure is not listed, it is not covered by the EIR.

Annex A may, however, be under-inclusive in that certain procedures in certain EU states may satisfy the Article 1(1) definition but are not listed in the Annex. It is up to an EU Member State to choose to submit its domestic insolvency proceedings for inclusion within Annex A of the EIR. Member States may decide whether or not to choose to submit their procedures for listing. There is also a time lag in that a Member State may introduce a new insolvency procedure but some time elapses before it appears in the Annex.[472] An example of this situation has been noted with the recent updates to Annex A brought forward by Regulation (EU) 2021/2260.

Relationship between the EIR and the Preventive Restructuring Directive[473]

The Preventive Restructuring Directive is intended "to be fully compatible with, and complementary to (the EIR) by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness".[474] Recital 12 of the preamble to the Preventive Restructuring Directive refers to the relationship between it and the EIR. The EIR covers preventive procedures that promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. The recital points to the limited but important

[468] Judgment of 2 May 2006, *Re Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0341&from=EN (last accessed on 25 November 2021).
[469] Judgment of 22 November 2012, *Bank Handlowy and Adamiak*, Case C-116/11, ECLI:EU:C:2012:739, paras [33]–[35]. See also Opinion of the Advocate General Kokott, *Bank Handlowy and Adamiak*, Case C-116/11, ECLI:EU:C:2012:739, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=123091&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2088618 (last accessed on 25 November 2021), para [49].
[470] Ibid.
[471] Judgment of the Court of 8 November 2012, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*, Case C-461/11, ECLI:EU:C:2012:704, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0461&from=EN (last accessed on 25 November 2021).
[472] EIR has since been amended, most notably by Regulation (EU) 2018/946 updating Annex A and also Annex B on the list of insolvency practitioners to which the Regulation applies. The amendments take account of the introduction of new insolvency procedures/insolvency practitioners in different EU States. See also in this connection the comments in the judgment of Zacaroli J in Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch), para 79. See also European Commission, Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, COM/2021/231 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0231 (last accessed on 17 November 2021).
[473] See generally Gerard McCormack, The European Restructuring Directive (Edward Elgar, 2021) chapter 2. See also Dominik Skauradszun and Walter Nijnens, 'Brussels 1a or EIR Recast? The Allocation of Preventive Restructuring Frameworks', (2019) 16 International Corporate Rescue 193.
[474] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72, Recital 88, Recital 13.

scope of the EIR dealing as it does with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. The recital stressed "the need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs."[475]

The Preventive Restructuring Directive aims to facilitate the cross-border recognition of restructuring procedures and the recognition and enforceability of judgments emanating from such procedures.[476] It does not require, however, that these procedures should be subject to the EIR. As will be further elaborated in the following sections, it may be that procedures designed to comply with the Preventive Restructuring Directive will circulate in other EU Member States under the Brussels Ia Regulation rather than pursuant to the EIR.[477]

Article 6(8) of the Preventive Restructuring Directive should however be noted. It provides that where Member States choose to implement the Directive by means of procedures not listed under the EIR, the total duration of the stay on proceedings against the debtor is limited to 4 months if the COMI of the debtor has been transferred from another Member State within a 3-month period prior to the filing of a request for the opening of preventive restructuring proceedings. The 4-month total duration is to be contrasted with the 12-month total duration for stays, including extensions and renewals, permitted under the Preventive Restructuring Directive.

Pre insolvency workouts – the Irish scheme of arrangement as an example

At the time of this Study, schemes of arrangement under the Irish Companies Act[478] have not been listed by Ireland in Annex A, and they are therefore outside the scope of the EIR even though they may serve as a form of 'debtor-in-possession' restructuring. The Irish scheme procedure, like the similar procedure under the UK Companies Act[479], enables a company to enter into a compromise or arrangement with any class of creditors or members. In this way, the capital structure of a financially distressed company may be rearranged. The restructuring may involve various elements such as an extension of debt repayments, whole or partial debt forgiveness, and converting debt into shares or share warrants. An illustrative case-study on the matter – Nordic Aviation – is analysed in Section 4.4.

Pre insolvency workouts – the Spanish homologation procedure

By contrast with the Irish scheme of arrangement, the Spanish homologation proceeding is included in Annex A and therefore falls within the scope of application of the EIR, as mentioned in Section 4.2. A refinancing agreement qualifies for this proceeding if financial creditors increase debtor's credit availability or amend or cancel existing liabilities, either through a term

[475] Ibid, Recital 12.
[476] See, in particular, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, OJ L 172, 26.6.2019, p. 18–55, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN (last accessed on 25 November 2021), Recitals 8 and 15.
[477] Recital 14 to the Restructuring Directive refers to advantages of the Insolvency Regulation i.e. against abusive relocations of the debtor's centre of main interests during insolvency proceedings and the fact that certain restrictions should also apply to procedures not covered by that Regulation.
[478] Irish Companies Act 2014. Available at: https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html (last accessed 2 December 2021).
[479] UK Companies Act 2006. Available at: https://www.legislation.gov.uk/ukpga/2006/46/contents (last accessed 2 December 2021

extension (or stays of payments as per matured debt) or rollover into new debt. Refinancing agreements cannot bind non-financial claims (e.g., commercial, labour or public claims).

The homologation of refinancing agreements works as an alternative to insolvency filing. The advantages for the debtor of seeking the homologation of a refinancing agreement outside of an insolvency proceeding are, among others, (i) debtor's capability of avoiding a formal insolvency proceeding, which may bring about, among others, commercial risks; and (ii) debtor's ability to execute the agreement.

Circulation of pre-insolvency workouts: the Brussels Ia Regulation and Rome I Regulation

The following paragraphs will focus on those pre-insolvency workouts that Member States have introduced (or may introduce in the future) in their national legal frameworks, which either are not eligible for inclusion in Annex A of the EIR (see Section 1.2.2) or, even if eligible, have not been listed in this annex. It is worth noting how the findings of the data collected at national level (Section 4.2), denote that a certain degree of unclarity still remains with regards to if and which types of workouts may produce cross-border effects in other Member States; if so, another level of uncertainty remains in respect of whether such workouts may produce cross-border effects based on national private international law mechanisms, or on the basis of other EU legislative instruments, more specifically the Brussels Ia Regulation or the Rome I Regulation. The following paragraphs will delve further into these matters.

The starting point for tracking under which EU legislative instruments pre-insolvency workouts could circulate is, first of all, to classify the pre-insolvency workouts in two main categories: i) Arrangements where there is an intervention of a court; ii) Arrangements where no intervention of a court is required (i.e., private arrangements); finally it should be noted that hybrid residual category could be also considered, to encompass those arrangements where court sanctioning is not a requirement, but courts may intervene at a certain stage of the agreements (e.g., private arrangements, in case of objections).

For (i), the possibility of these workouts circulating according to the mechanisms of Brussels Ia Regulation should be considered; For (ii) the possibility of circulation under the Rome I Regulation should be assessed.

1. Brussels Ia Regulation: pre-insolvency workouts with court intervention

First of all, it is worth providing a brief overview of the main rules contained in the Brussels Ia Regulation in order to understand its scope of application.

The Brussels Ia Regulation applies in civil and commercial matters rather than matters of a public law nature. The overall objective of the Brussels Ia Regulation is to bring about the simplification of formalities that govern the reciprocal recognition and enforcement of judgments and to strengthen the legal protection of persons. Recital 21 in the preamble makes clear the need, in the interests of the harmonious administration of justice, to ensure that irreconcilable judgments will not be given in two EU Member States. Under Article 4, persons domiciled in a Member State must be sued in the courts of that Member State though there are rules of special jurisdiction allowing proceedings to be brought in other Member States in certain circumstances. The domicile of a legal person is defined autonomously by Article 63. Article 8 enables a person domiciled in a Member State to be sued, where it was one of a number of defendants, in the national courts where any of the defendants were domiciled, provided that the claims were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 25 deals with the extension or "prorogation" of jurisdiction where the "parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction". Article 31 provides that if proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, then any court other than the court first seised must stay its proceedings until the jurisdiction of the court first seised is established and, when it is, decline its jurisdiction in favour of that court. Under Article 31(2), if the parties have given a particular court exclusive jurisdiction that court may go on to hear the case even if it was not first 'seised'.

The underlying premise of the Brussels Ia Regulation is that of mutual recognition of judgments and orders between EU Member States based on the principle of mutual trust and subject only to a limited public policy exception and certain procedural safeguards.

Article 36 provides that a "judgment given in a Member State shall be recognised without any special procedure being required". There is a definition of a 'judgment' in Article 2(a) as being "any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court". Article 39 deals with enforcement and provides that a "judgment given in a Member State shall be enforceable in the other Member States without any declaration of enforceability being required".[480] Article 41 states that such execution takes place under the same conditions as judgments from the courts of the executing Member State. Articles 45 to 51 regulate refusal of recognition and enforcement. Procedural protections are given to a person against whom a judgment was ordered. It is also provided that recognition/enforcement shall be refused if it is 'manifestly contrary to public policy (ordre public) in the Member State addressed'.

Hence, in principle, according to the rules outlined above the Brussels Ia Regulation may apply whenever there is a judgment or order from a court or other judicial tribunal approving or confirming a pre-insolvency workout.

However, while the Brussels Ia Regulation applies generally to civil and commercial matters, there are certain exceptions stated in Article 1(2). According to Article 1(2)(b), it does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". This exception mirrors a similar provision in the earlier Brussels Convention, which also covered jurisdiction and the enforcement of judgments in civil and commercial matters.[481] Therefore, a preliminary question, as will be further explained below, concerns the interpretation to be given to this provision of the Brussels Ia Regulation in order to understand if pre-insolvency workouts fall within the scope of application of the said legislative instrument.

In this context, it is worth noting how EU jurisprudence nonetheless stressed the need for a harmonious interpretation of the Brussels Ia Regulation and the EIR, such as in the case *Nickel and Goeldner Spedition GmbH v 'Kintra' UAB* in which the CJEU affirmed that there should be no gaps and overlaps, and mentioned that the two Regulations 'must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum'.[482] This view was confirmed in Case C-641/16 *Tunkers*

[480] The CJEU has stated independence and impartiality is required in proceedings before a court or tribunal - in *Pula Parking* Case C-551/15 (9th March 2017) the court said at para 54: 'given the objectives pursued by Regulation No 1215/2012, the concept of 'court' for the purposes of that regulation must be interpreted as taking account of the need to enable the national courts of the Member States to identify judgments delivered by other Member States' courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments. Compliance with the principle of mutual trust … which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*.'

[481] The wording of the provisions is the same: *SCT Industri AB (In Liquidation) v Alpenblume AB* (Case C-111/08) [2009] IL Pr 43 at para 23.

[482] Case C-157/13, EU:C:2014:2145 at para 21.

France v Expert France[483] where the court reiterated the same principle. Accordingly, it held that actions excluded from the application of the Brussels Ia Regulation insofar as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of the EIR. Correspondingly, actions that fall outside the scope of the EIR fall within the scope of the Brussels Ia Regulation.

Though the aforementioned jurisprudence may be deemed to provide an answer to the question on whether pre-insolvency workouts (sanctioned by courts) may circulate under the Brussels Ia Regulation, however, the 'dovetailing' principle may not appear to be entirely satisfactory from a point of view of legal clarity, in particular when looking at Recital 7 of the preamble to the EIR. In fact, though Recital 7 states that the interpretation of the EIR should as much as possible avoid regulatory loopholes between it and the Brussels Ia Regulation, it also adds, however, that the mere fact that a national procedure is not listed in Annex A to the EIR should not imply that it is covered by the Brussels Ia Regulation.[484] This is because the notion of insolvency proceedings in the EIR does not encompass all types of insolvency proceedings under national laws. There are schemes in the national insolvency frameworks of the Member States, which fulfil all the characteristics of insolvency proceedings (i.e., are regulated by laws related to insolvency, are collective proceedings, are meant to address the financial distress of a debtor etc.), though still do not comply with one or some of the criteria of the concept of insolvency proceedings in the EIR (see Section 1.2.2). This is the case, for instance, of restructuring schemes that are carried out partly or entirely in a confidential manner. Such schemes, although not falling in the scope of the EIR, will not be covered by the Brussels Ia Regulation either, as the exception of Article 1(2)(b) of that Regulation will apply to these as well.

There are, however, proceedings under national law, which would not so clearly fall under the insolvency exception of Article 1(2)(b) of the Brussels Ia Regulation, or at least their qualification is subject to interpretation. This has been clearly the case with the "scheme of arrangement" under UK law, which – being an instrument regulated by company law – is capable of circulating under the Brussels Ia Regulation (at least the decision of the court sanctioning the arrangement). In this regard, an earlier study[485] reported diverging case law by the German courts, when confronted with the circulation of hybrid proceedings not listed in Annex A of the EIR. For instance, in a case dealing with a scheme of arrangement in respect of a life insurance contract (*Equitable Life),* the German Federal Supreme Court ('Bundensgerichtshof', hereinafter the 'BGH')[486] held that an order approving a UK scheme of arrangement did not qualify as an insolvency proceeding (nor under Council Regulation (EC) No 1346/2000, nor under national insolvency laws), but could possibly fall under the provisions of Articles 32 et seqq. of the Brussels Ia Regulation.[487] In respect of non-EU arrangements, the German courts also qualified proceedings under Chapter 11 of the US Bankruptcy Code as 'insolvency proceedings' under national legislation.[488] In another case, contrary to the BGH decision previously mentioned, another German court held that a UK scheme of arrangement could be considered an insolvency proceeding according to national legislation. Specifically, the court noted that the scheme of arrangement has

[483] *[*2018] IL Pr 7 at para 17 and see also Case C-649/16 *Valach v Waldviertler Sparkasse Bank AG* [2018] IL Pr 9 at para 24; Case C-296/17 *Wiemer & Trachte GmbH, in liquidation v Tadzher (ECLI:EU:C:2018:902*, 4 November 2018) at para 29.
[484] Jan-Jaap Kuipers, 'Schemes of arrangement and voluntary collective redress: a gap in the Brussels I Regulation', (2012) 8 *Journal of Private International Law* 225.
[485] External Evaluation of Regulation N.1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) – Final Report. Available at: https://op.europa.eu/en/publication-detail/-/publication/4d756fa7-b860-4e36-b1f8-c6640dced486 (last accessed 22 February 2022).
[486] BGH, 2/15/2012, NJW 2012, 2113
[487] For more information on the case see External Evaluation of Regulation N.1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) – Final Report, pp. 39-40.
[488] BGH, 10/13/2009, ZIP 2009, 2217; and OLG *Frankfurt am Main*, 2/20/2007, ZIP 2007, 932.

comparable effects to those proceedings falling under Chapter 11 of the US Bankruptcy Code, as these are aimed at restructuring and preventing insolvency of a company.[489]

This shows that some unclarity still remains with regards to the qualification of schemes of arrangements and their cross-border circulation.

The above considerations appear relevant also when one considers the possible relevance of the Lugano Convention[490] where there is a provision equivalent to Article 1(2)(b) of the Brussels Ia Regulation. The Lugano Convention is based on the original version of the Brussels Ia Regulation and forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland. These countries are not, however, a party bound by the EIR. Proceedings in such countries could not be included in Annex A, and therefore the bankruptcy exclusion in the Lugano Convention (which is similar to that of the Brussels Ia Regulation), cannot be interpreted as limited to proceedings that are listed in Annex A.

Considering the above, further information on the matter will be provided at the end of this section, whilst the following paragraphs will focus on those pre-insolvency schemes that may be considered to fall within the scope of the Rome I Regulation.

2. Rome 1 Regulation: pre-insolvency workouts without court intervention

As mentioned above, where pre-insolvency workouts available across the Member States take the form of private arrangements between the debtor and the creditors, with no intervention or sanction of the agreement by a court, the question on whether these may be granted effects and under which conditions in other Member States arises.

As indicated in Section 4.2, data collected via desk and field research also showed a level of uncertainty on the matter, as Member States do not seem to generally provide fixed rules or practices in this regard. However, considering the contractual nature of these agreements, the possibility of the application of the Rome I Regulation comes into consideration, as this legal instrument specifically deals with contractual obligations.

In this regard, whilst unlike for the Brussels Ia Regulation there seems to be no CJEU jurisprudence directly dealing with the matter, however, the CJEU ruling in Case C-54/16 *Vinyls Italia SpA, in liquidation v Mediterranea di Navigazione SpA*[491] could to a certain extent suggest that pre-insolvency workouts which are carried out on a purely contractual basis are entitled to recognition in other EU States pursuant to the Rome I Regulation. Moreover, in principle, the fact that the parties chose the law of an EU Member State other than the State in which the parties had their centre of main interests did not invalidate this choice of law to govern the workout.

The case was specifically concerned with the relationship between what are now Articles 7 and 16 of the EIR.[492] However, the observations of the CJEU appear to be of more general application. Article 7(2)(m) provides that the law of the State of opening will govern the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.[493] Article 16 however, places a limit on the operation of Article 7(2)(m) by stipulating that the latter will not apply where the person who benefited from an act detrimental to all the creditors provides proof that the said act is subject to the law of an EU

[489] For additional information on pre-insolvency and hybrid proceedings and their qualification across the EU Member States, please see External Evaluation of Regulation N.1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) – Final Report, pp. 46-66.
[490] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN (last accessed on 25 November 2021).
[491] EU:C:2017:433
[492] Fro more information see S. Bariatti, 'Party autonomy and internationality of the legal relationship: recent developments in the case law of the EU court of justice on the European Private International Law Regulations' in Derecho internacional privado europeo. Diálogos con la práctica" Valencia, Tirant Lo Blanch, 2020, pp. 189-207.
[493] Case C–339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR I–767.

Member State other than that of the State of the opening of proceedings, *and* that law does not allow any means of challenging that act in the relevant case. Article 16 permits a 'defence' to the application of the law of the State of opening and acts as a 'veto' against the invalidity of the act decreed by the latter's law.[494] In Case C-54/16 *Vinyls Italia SpA, in liquidation v Mediterranea di Navigazione SpA* the CJEU was asked whether the Article 16 defence applies when contracting parties have their head offices in a single EU State, whose law can therefore be expected to become the *lex fori* in the event of insolvency of one of those parties, and the parties through a contractual choice of law clause have designated another law as the law applicable. The court said that pursuant to the Rome choice-of-law regime, the parties can designate another applicable law. On the other hand, Article 16 could not be relied upon for abusive or fraudulent ends such as where the parties chose the governing law of the contract to circumvent the rules on insolvency with a view to gaining an undue advantage. Nevertheless, the choice of a contractual governing law other than the law of the EU State where the counterparties were established, did not bring into existence a presumption that the parties had abusive or fraudulent ends.

However, as will be further analysed below, it should be noted that reaching an ultimate conclusion on whether and to what extent agreements not falling under the scope of the EIR and the Brussels Ia Regulation could fall under the scope of the Rome I Regulation, necessarily requires a clearer interpretation of the provisions contained in the latter legislative instruments defining the scope of application of said regulations. Specifically, this concerns to what extent pre-insolvency workouts that do not fulfil the criteria to be considered insolvency proceedings under the EIR (and hence cannot be listed in its Annex A) would be considered to be (or not be) falling within the exclusions of '*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*' (Article 1(2)(b) of the Brussels Ia Regulation), and within the exclusions of '*winding-up of companies and other bodies'* (Article 1(2)(f) of the Rome I Regulation).

On a separate note, when shifting the focus to potential issues of "abusive" forum shopping practices with regards to the use of schemes of arrangements that fall outside the scope of the EIR, however, it is worth noting that to the extent that the schemes of arrangements introduced across the Member States require an agreement of the majority of creditors, there would be no need to question whether such practices shall be considered "abusive" according to the limited definition included in the EIR (i.e., which entails the detriment of the body of creditors).

Preliminary conclusions on the circulation of pre-insolvency workouts

The paragraphs above have noted how, in principle, the question of whether certain schemes of arrangements could circulate under the Brussels Ia Regulation is relevant for those schemes entailing the intervention or sanctioning of a court. Instead, the question of the application of the Rome I mechanisms may be considered for remainder private arrangements having a contractual nature. However, it is not possible in the context of this research to conclude on what precisely is covered under the Brussels Ia Regulation, or the Rome I Regulation, as the understanding of the proper meaning of Article 1(2)(f) of the latter, and Article 1(2)(b) of the former (and of the similar provision of the Lugano Convention), would require an authoritative interpretation from the CJEU, or an amendment of the Regulations themselves.

In this respect, it may also be argued that the different language versions of the relevant provisions may appear somewhat ambiguous and inconsistent. In general terms, however,

[494] See also Rolef de Weijs, 'Towards an objective European rule on transaction avoidance in insolvencies' (2011) 20 *International Insolvency Review* 219-244; Oriana Casasola, 'The transaction avoidance regime in the recast European insolvency regulation: Limits and prospects', (2019) 28 *International Insolvency Review* 163-183.

the CJEU (European Court) and national courts adopt, so far as possible, autonomous, 'European' meanings for terms that may have different meanings in different national laws. Furthermore, the approach to the construction of terminology will be purposive or teleological with the principal aim of giving effect to the purpose underlying the various provisions of the Regulation'.[495]

These matters have been addressed by the European Court in Case C-250/17 *Tarrago da Silveira v Massa Insolvente da Espírito Santo.*[496] In this case, the court said that according to its settled case-law, the wording used in one language version of a provision of EU law 'cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages'.[497] The case concerned the proper interpretation of what is now Article 18 of the EIR (Article 15 of the original Regulation 1346/2000) and the court 'noted that the various language versions of that provision are not unambiguous. The respective versions in English, French and Italian, in particular, use the expressions '*an asset or a right of which the debtor has been divested'*, '*un bien ou un droit dont le débiteur est dessaisi*' and '*un bene o a un diritto del quale il debitore è spossessato'*. However, the versions in Spanish, Czech, Danish and German, in particular, use the expressions '*un bien o un derecho de la masa*', '*majetku nebo práva náležejícího do majetkové podstaty'*, '*et aktiv eller en rettighed i massen' and 'einen Gegenstand oder ein Recht der Masse'*.[498] The court adopted an interpretation that was most in line with the context and objectives of the provision.

While a definitive judgment from the CJEU is awaited, in principle pre-insolvency workouts may be entitled to EU wide circulation under either the Brussels IA Regulation, or under the Rome I Regulation. The circulation of pre-insolvency workouts from other non-EU countries (specifically the UK) will be analysed in Section 4.4 below.

4.4. UK pre-insolvency workouts: schemes of arrangement and restructuring plans

The following paragraphs will shed light on the functioning of the pre-insolvency mechanisms currently provided for under the UK insolvency framework, namely: 1) UK schemes of arrangement, and 2) UK restructuring plans.

While once considered a somewhat clumsy mechanism,[499] **schemes of arrangement** do allow certain corporate problems such as excessive levels of debt to be addressed without necessarily tending to all the corporate ills. Schemes of arrangement contributed to the UK becoming the restructuring capital of Europe with a number of financially stretched foreign companies using the UK procedure to restructure their debts.[500]

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[495] See, eg Case C–1/04 *Staubitz-Schreiber* [2006] ECR I–701; Case C–341/04 *Eurofood IFSC Ltd* [2006] ECR I–3813, [2006] Ch. 508; Case C–339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR I–767, [2009] 1 W.L.R. 2168; Case C–292/08 *German Graphics Graphische Maschinen GmbH v van der Schee*[2009] ECR I–8421.

[496] EU:C:2018:398.

[497] At para 20.

[498] At para 21.

499 Schemes were described in the Joint DTI/Treasury *Review of Company Rescue and Business Reconstructions Mechanisms* (London, TSO, 2000) at para 43 and the 1982 *Cork Committee Report on Insolvency Law and Practice* (1982, Cmnd 8558) Ch 7 as slow and cumbersome.

500 See *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch); *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 and see generally LC Ho, 'Making and enforcing international schemes of arrangement' (2011) 26 JIBLR 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563. See also G McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies', (2014) 63 *International and Comparative Law Quarterly* 815; 'Jurisdictional competition and forum shopping in insolvency proceedings', (2009) 68 *Cambridge Law Journal* 69; Federico Mucciarelli, 'Not just efficiency: insolvency law in the EU and its political dimension', (2013) 14 *European*

The fact that schemes of arrangement were not listed in Annex A means that they were not entitled to the benefits of automatic EU-wide recognition under the EIR,[501] but this was offset against the fact that the ability of the UK courts to sanction schemes was not hampered by the jurisdictional conditions of the EIR. In particular, there was no need to establish that the COMI of the company was in the UK. The courts could sanction a scheme if a foreign company was deemed to have a 'sufficient connection' with the UK, even though its COMI may not have been in the UK. The 'sufficient connection' test was established in cases like *Re Drax Holdings Ltd*[502] and in *Re Rodenstock GmbH*,[503] where a sufficient connection was deemed to exist by virtue of the fact that the company's credit facilities contained English choice of law and jurisdiction clauses and also by reason of expert evidence that the relevant foreign courts would recognise the scheme.

This section of the report will go to consider schemes of arrangement in more detail before going on to consider the possible cross-border circulation of schemes and other so-called pre-insolvency procedures under the EIR.[504]

Schemes of arrangement enable a company to enter into a compromise or arrangement with any class of creditors or members with some element of 'give and take' on both sides. In this way, the capital structure of an ailing company may be rearranged. Schemes of arrangement can also be approved in cases where there is no insolvency (e.g., mergers).

The company makes a proposal to rearrange its affairs and makes a proposal to the court to convene meetings of classes of creditors or members whose rights are proposed to be rearranged. Corporate restructuring may involve various elements such as an extension of debt repayments, whole or partial debt forgiveness, and converting debt into shares or share warrants. The court will designate the appropriate classes and order class meetings to be convened. The class meetings are held, and the relevant class consent is deemed to have been given if approval is forthcoming from a majority in number and 75% of members or creditors or creditors within the relevant class. The scheme proposal becomes binding on the dissenting minority within the class whose rights are said to be 'crammed down' if it is approved by the court at a final sanction hearing.

In the past, the existing UK scheme of arrangement has been highly praised and, indeed, spoken of as a model for the 'early stage' restructuring procedures envisaged by the Preventive Restructuring Directive.[505] It has been suggested that a procedure modelled on the UK scheme would make restructuring "procedures less cumbersome, less costly and speedier than they are currently in some Member States".[506] Certainly, the procedure does not have any bankruptcy or insolvency stigma since it is a procedure based on company law rather than insolvency law. It is activated by the filing of documents with the court and an application to the court to convene meetings of relevant creditors and shareholders to approve the scheme.

The UK scheme can be used as a powerful debt restructuring. The court said in *Re Van Gansewinkel Groep BV:*

> *The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency*

Business Organization Law Review 175; Adrian Walters/Anton Smith, 'Bankruptcy tourism under the EC Regulation on insolvency proceedings: a view from England and Wales', (2010) 19 *International Insolvency Review* 181.

501 It may be however, that an order of a court sanctioning ('approving') a scheme of arrangement is regarded as a court judgement for the purpose of the Brussels Ia Regulation and is entitled to Europe-wide recognition on that basis.

502 [2004] 1 WLR 1049.

503 [2011] EWHC 1104 (Ch), [2011] Bus LR 1245. See also *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch); *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418; *Re Dtek Finance BV* [2015] EWHC 1164 (Ch).

504 See sub-section 4.2 for the data collected on the UK's 'scheme of arrangement'.

505 S Madaus, 'The EU recommendation on business rescue - only another statement or a cause for legislative action across Europe?' [2014] *Insolvency Intelligence* 81 at 84, suggesting that the Commission had this tool in mind.

506 See European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency', SWD (2014) 61 final, p 38.

> *proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense*.[507]

The scheme involves "debtor-in-possession". The company management can prepare a restructuring plan and submit it to creditors, though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval. The sanctioning of a scheme is a three-stage procedure with, firstly, an application to the court to convene relevant meetings of creditors or members of a company. Secondly, the relevant class meetings are held, and the scheme is required to be approved by 75% in value and a majority in number of creditors within each class. The third stage involves the scheme coming before the court for approval. The court must be satisfied that the scheme proposed is a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it.[508]

The scheme, however, lacks the facility of cross-class creditor cram-down. While dissenting creditors within a class may be "crammed-down", there is no scope for dissenting classes of creditors in their entirety to be "crammed-down". This fact makes the composition of creditor classes very important in the context of a scheme of arrangement. It also leads to more complicated strategies.

It has been held that it is only necessary to get the consent of those with an economic interest in the proposed restructuring. Schemes might therefore be used to "squeeze out" creditors who are "out of the money" as in *Re MyTravel plc*[509] and *Re IMO Carwash.*[510] In broad essence, company assets are transferred to a "newco", together with some liabilities of creditors who are "in the money", but "out of the money" creditors are left stranded with claims against the "oldco" which no longer has any assets. Such schemes are generally referred to as "prepack" or "business transfer" schemes.

Under the "business transfer" scheme, the assets or business of the company is normally transferred to a new creditor owned company with the latter assuming an agreed amount of the company's existing liabilities equalling to or exceeding the value of the business or assets being transferred. There is no necessary need, however, to obtain the approval of junior creditors who no longer have any economic interest in the business, given the current value of the business. These junior "out of the money" creditors are left behind in the old scheme company with their rights unaltered but now essentially valueless since the "oldco" has been stripped of assets. It may be, however, that even more complicated mechanisms are needed if the junior creditors have bargained for rights of a proprietary nature in a contractually agreed 'security package'.

Business transfer schemes may be complex, but they also give rise to questions of fairness and procedural propriety.[511] The courts consider the question of valuation at the sanction

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[507] [2015] EWHC 2151, [5].
[508] See *Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723, 736.
[509] See *Re My Travel Group plc* [2004] EWHC 2741 (Ch) and *Re Tea Corp Ltd* [1904] 1 Ch 12. For a general discussion, see CL Seah, 'The Re Tea
Corporation Principle and Junior Creditors' Rights to Participate in a Scheme of Arrangement: A View from Singapore' (2011) 20 *International Insolvency Review* 161.
[510] This case is also referred to as *Re Bluebrook* [2009] EWHC 2114 (Ch).
[511] See generally M Crystal QC and R Mokal, 'The Valuation of Distressed Companies: A Conceptual Framework Parts 1 and 11' (2006) 3 *International Corporate Rescue* 63 and 123; N Segal, "Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer?" (2007) 20 *Insolvency Intelligence* 49.

stage but there may be difficult questions about where in the debt structure the value "breaks".

The UK is no longer an EU Member State and is not obliged to implement the Preventive Restructuring Directive. Nevertheless, in line with the Preventive Restructuring Directive and also in line with the US Chapter 11[512], the Corporate Insolvency and Governance Act 2020 made certain changes to restructuring law and practice in the UK.[513] In particular, the Act introduced a new Part 26A in the UK Companies Act with provision for **restructuring plans** that add additional features to the previously existing schemes of arrangement procedure under Part 26 Companies Act.[514] The 2020 Act makes provision for cross-class cram down so long as certain conditions are satisfied.

Under a restructuring plan, a company is enabled to bind dissenting classes of creditors or shareholders, provided at least one class approves the plan by at least 75% by value of those voting. A scheme of arrangement under Part 26 however, has to be approved by each class. Moreover, a scheme, unlike a restructuring plan, contains a 'numerosity' i.e., a majority in number of persons within each relevant class, requirement.

Typically, there are two hearings in relation to a restructuring plan or scheme of arrangement. The first is known as the convening hearing where the Court principally considers whether the proposed classes have been properly constituted and meetings of those classes ought to be convened to vote on the plan/scheme. There is a second (sanctioning) where the court hears the result of the votes and has to decide whether to sanction the plan/scheme.

In a plan, any creditor or member whose rights are affected by the plan must be permitted to participate in the process, but those who have no genuine economic interest in the company may be excluded. Affected members and creditors must be given sufficient information to be able to vote. A restructuring plan (or scheme) sanctioned by the court is binding on all creditors/shareholders of the relevant classes and the company. Valuation issues are likely to be particularly important at the sanction stage (and possibly even at the initial convening stage), including consideration of what is the likely alternative if confirmation is refused[515], and whether those with a genuine economic interest have been excluded from participation in the process.

The court has to be satisfied that the proposal was a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it. While the court was not a rubber stamp[516], it need not be satisfied that the scheme proposed is the only fair one.[517] Thus, the court must be satisfied that, not only the statutory provisions have been observed, the relevant class must have been fairly represented by those who attended the meeting and that the statutory majority was acting 'bona fide' and not coercing the minority in order to promote interests adverse to those of the class they purport to represent. Unlike the position for the traditional Part 26 scheme, there is no additional numerosity requirement for a Part 26A restructuring plan, i.e., a majority in number of affected persons.

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[512] For a general discussion of the issues see J Payne, 'Debt Restructuring in English Law: Lessons From the United States and the Need for Reform' (2014) 130 *Law Quarterly Review* 282.

[513] For a comprehensive analysis see the INSOL Special Report by Gerard McCormack, 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (London, INSOL International, October 2020).

[514] UK Insolvency Service, 'A Review of the Corporate Insolvency Framework', p 23, para 9.9 (May 2016) states: 'The cram-down of a rescue plan onto "out of the money" creditors is currently possible in the UK only through a costly mix of using a scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to "cram-down" may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern.'

[515] Possibly an alternative plan or a sale of the business rather than a liquidation/administration.

[516] See in this connection the recent case of *Re All Scheme Ltd* [2021] EWHC 1401 (Ch) (24th May 2021).

[517] It has been pointed out that the test is not whether the opposing creditors have reasonable objections to the scheme since a creditor might be acting equally reasonably in voting either for or against the scheme. In these circumstances, the English courts consider that creditor democracy should prevail.

In sum, the following three significant differences between schemes of arrangements and restructuring plans are worth noting:

1. A restructuring plan, unlike a scheme, has a 'financial difficulty' requirement (i.e. the company that uses the procedure must be intending to overcome financial difficulties);
2. For a scheme of arrangement, all relevant classes must approve the scheme. In a restructuring plan, this is not a requirement (i.e., there is 'cross-class cramdown'). In other words, a company is enabled to bind dissenting classes of creditors or shareholders, provided at least one class approves the plan by at least 75 % by the value of those voting.
3. A scheme of arrangement under Part 26 of the Companies Act, however, has to be approved by each class of creditors; A scheme of arrangement, unlike a restructuring plan, contains a 'numerosity' requirement, i.e., requires a majority in the number of persons within each relevant class of creditors.

An illustrative case-study on UK arrangements – *Re DTEK Energy BV* – can be found in Section 4.5.

UK pre-insolvency workouts and their circulation in the EU before and after Brexit

Pre-insolvency workouts may be carried out in the UK on a purely voluntary or contractual basis. If done on a purely voluntary i.e., non-contractual basis, the question of legal recognition and enforcement basis does not arise.

If done on a contractual basis then the workout will have binding legal effect in accordance with the terms of the contract and in accordance with general principles of contractual interpretation. Contractual workouts carried out in accordance with the laws of another country, whether that country is inside or outside the EU, could still be recognised in the UK pursuant to the Rome I Regulation. The UK has 'onshored' the Rome I Regulation, i.e., it still applies in the UK as part of retained EU law post-Brexit. In fact, the UK has legislated to incorporate Rome I rules into national law[518] so that national courts will apply the same rules to determine applicable law. EU courts will also continue to apply Rome I and to give effect to a choice of UK law.

If the UK workout is not done on a purely voluntary or contractual basis then a pre-insolvency workout may still be accomplished by means of a scheme of arrangement or restructuring plan under Part 26 and Part 26A UK Companies Act respectively.

As explained in the previous discussion and the case studies both these procedures require heavy court involvement. This includes the approval (sanctioning) of the scheme/plan by the UK court.

The UK Companies Act, however, gives the UK courts jurisdiction to wind up companies not registered under that Act. A distinction nevertheless should be drawn between the existence of the statutory jurisdiction and the actual exercise of that jurisdiction in a particular case. The UK courts have jurisdiction to approve schemes of arrangement/restructuring plans under Parts 26 and 26A UK Companies Act 2006 in respect of foreign-registered companies. That theoretical jurisdiction co-exists with the power to wind up a foreign registered company. There are now, however, well-developed principles that control and confine the exercise of that jurisdiction including the company having a 'sufficient connection' with the UK and that sanctioning the scheme will provide benefits to stakeholders in the company and achieve appropriate recognition overseas.

[518] The Regulation was 'onshored' in the The Law Applicable to Contractual Obligations and Non-Contractual Obligations Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834.

As the *Dtek c*ase study shows, it does not appear that Brexit has fundamentally altered the position at least in relation to **schemes of arrangement**. Basically, the same position applies irrespective of Brexit. This was essentially the holding in the *Dtek* case.

The court stated that there was always uncertainty as to how schemes of arrangement operate within the framework of the Brussels Ia Regulation (pre-Brexit). When considering whether the Brussels Ia Regulation presented a 'jurisdictional' bar to the Court exercising jurisdiction over EU domiciled scheme members or creditors, it was assumed to apply, but when considering international effectiveness, the UK court would look for expert evidence which demonstrated alternative bases. The court said that "English Courts have … never regarded the Brussels Ia alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape"[para 31]. Such alternative bases included the Rome I Regulation and autonomous private international law rules in different States.

Turning from schemes of arrangement to **restructuring plans**, the Brussels Ia Regulation does not currently provide a basis for recognising the effects of a UK restructuring plan, which was introduced during the Brexit implementation period in the UK Corporate Governance and Insolvency Act 2020. That Act was part of the UK response to the Covid crisis.

The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[519] (the "Lugano Convention") may provide a basis for recognising **UK schemes of arrangement**. However, the same does not seem to be the case for **UK restructuring plans**, in consideration of the fact that such plans may be more likely assimilated to 'insolvency proceedings' potentially captured by the bankruptcy exceptions of Article 1(2) of the Lugano Convention which will be outlined below.

The Lugano Convention forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Brussels Ia Regulation. The Lugano Convention also applied to the UK by virtue of the UK being treated as an EU Member State for the purposes of international agreements entered into by the EU. This arrangement terminated at the end of the Brexit implementation period. On 8 April 2020, the UK applied to accede to the Lugano Convention as an independent contracting party.[520] That application is however subject to the agreement of the contracting parties to the Lugano Convention, including the EU, and that agreement has not yet been forthcoming. It should be noted that the Lugano Convention does not have the CJEU as the apex of judicial authority.[521]

While like the Brussels Ia Regulation, the Lugano Convention applies generally to civil and commercial matters, there are certain exceptions stated however in Article 1(2) such that it does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

In *Re Gategroup Guarantee Ltd,*[522] a UK court addressed the possible relevance of this provision. The case related to whether the jurisdiction of the UK court to sanction a restructuring plan had been affected by the Lugano Convention. The restructuring plan was submitted under Part 26A UK Companies Act and proposed the restructuring of bonds that by reason of Article 23(1) of the Lugano Convention were subject to an exclusive jurisdiction clause in favour of the Swiss Courts. As of 1 January 2021, the UK is no longer a party to the Lugano Convention but the claim form was issued before that date. The company argued that the Lugano Convention had no application to a claim under Part 26A because it is not a 'civil and commercial matter' as it fell within the bankruptcy exception in Article

[519] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41. Available at: http://data.europa.eu/eli/convention/2007/712/oj (last accessed 28 January 2022).
[520] See https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007.
[521] See https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html.
[522] [2021] EWHC 304 (Ch).

1(2)(b). But for the bankruptcy exclusion, the proceedings would be a civil or commercial matter.

The court noted that it was up to an EU Member State to choose to submit its domestic insolvency proceedings for inclusion within Annex A of the EIR. Therefore, the question of whether proceedings, which on the face of it were insolvency proceedings, were excluded from Brussels Ia Regulation could not be answered solely on the basis that they were, or were not, listed in Annex A.[523] In any event, certain countries that were parties to the Lugano Convention, such as Switzerland, were not also a party to the EIR. Proceedings in such a country could not be included in Annex A, and therefore the bankruptcy exclusion in the Lugano Convention could not be interpreted as limited to proceedings that were listed in Annex A.[524] The court held that on the basis of first principles, proceedings under Part 26A could have been listed under Annex A of the EIR were the UK still an EU Member State.[525] Such proceedings also fell within the exception for insolvency and related proceedings under Article 1(2) of the Brussels Ia Regulation and the Lugano Convention.

Conclusions

Court judgments or orders confirming (sanctioning) a **UK scheme of arrangement** may be entitled to EU wide recognition under the Lugano Convention, though it is doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention.[526] It would however be likely that **UK restructuring plans** would be regarded as excluded by virtue of Article 1(2)(b) from the scope of the Lugano Convention as 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

It is also likely that the same results will follow if the two situations are considered instead under the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[527] (the "Hague Judgments Convention") where also the EU is considering accession. The Hague Judgements Convention applies generally to judgments in civil or commercial matters but there is an exception in Article 2I for 'insolvency, composition, resolution of financial institutions, and analogous matters'. Hence, similar notes to those provided above on the need for interpretation on the scope of application of the Brussels Ia and Rome I Regulation may be applicable shall the Hague Judgements Convention be acceded by the EU and the UK.

4.5. Case studies

1. Case Study – Nordic Aviation (11th September 2020)[528]

[523] It should be noted how the UK court findings seem to confirm the non completion of the dovetailing principle between the EIR and the Brussels Ia Regulation as set out in the relevant CJEU case-law described in section 4.3.
[524] Ibid, paras 76,81
[525] Ibid, paras 83,133, 137.
[526] See the European Commission's Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, Communication from the Commission to the European Parliament and the Council, COM(2021) 222 final, 4.5.2021. Available at: https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf (last accessed 28 January 2022).
[527] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last accessed 28 January 2022). See also the answer given by Mr Reynders on behalf of the European Commission (22.11.2021) to the Parliamentary question E-004121/2021, according to which "The EU's longstanding approach is that the appropriate framework for cooperation with third countries outside the EFTA/EEA in that field is provided by the multilateral Hague Conventions and the EU has consistently promoted that framework. Available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-004121_EN.html (last accessed 28 January 2022).
[528] High Court of Ireland, Nordic Aviation Capital Designated Activity C;ompany v The Companies Act 2014 to 2018 (Approved) [2020] IEHC 445 (11 September 2020), available at: http://www.bailii.org/ie/cases/IEHC/2020/2020IEHC445.html (last accessed on 25 November 2021).

The Irish High Court approved a scheme of arrangement in respect of Nordic Aviation Capital, the world's largest regional aircraft leasing company. The scheme restructured approximately US$5.9 billion of English, New York and German law governed debt owed by the Irish-incorporated company, Nordic Aviation Capital DAC (Nordic) and related Irish and foreign-incorporated companies (the NAC Group).

COVID-19 had a significant impact on the NAC Group's business, in particular by disrupting the ability of its lessee customers to meet their obligations. There was a drop in cash collections and the market value of the NAC Group asset base, and a risk of a potential covenant breach under the group financing arrangements. The NAC Group took the view that bilateral waivers and deferrals with each of its lenders (of which there were more than 85) would not be possible. Nordic put forward evidence to the effect that, in the event of a covenant breach or other event of default, the NAC Group might have to be liquidated or file for bankruptcy protection under Chapter 11 of the US Bankruptcy Code. Instead, a waiver and deferral binding on all the NAC Group lenders was implemented via the scheme.

Nordic had guaranteed the US$5.9 billion of debt. It was, therefore, only Nordic that needed to be subject to a scheme of arrangement. A scheme of arrangement under Part 9 of the Irish Companies Act 2014 is a flexible mechanism that allows for the restructuring of a company's debt and/or shareholding. The company does not need to be insolvent in order to avail itself of a Part 9 Scheme.

The decision shows that the Irish courts will adopt a pragmatic and commercial approach, which is similar to the approach taken by the courts in the UK and other common law jurisdictions.

It should be noted that the Irish High Court further directed pursuant to Article 53 of the Brussels Ia Regulation that a certificate be issued certifying that the court had jurisdiction to hear and determine the application pursuant to Article 1(1), Article 4 and Article 8(1) of that Regulation.

2. Case Study – Re DTEK Energy BV (8 June 2021)[529]

This restructuring concerned the restructuring of bank and bondholder (note holder) liabilities involving a group of companies. The financing arm of the group was incorporated in the UK, but the parent company was located in the Netherlands whereas the main operating companies were located in Ukraine where the companies supplied a large part of the energy market. It also appeared that the group had some operations in Cyprus. The group’s operations had been adversely affected by the ongoing tension between Ukraine and Russia as well as other matters. The group proposed a restructuring of its loan obligations which essentially involved an amendment and extension of these obligations. These liabilities were governed by a mixture of English and New York law, and some were subject to a Singapore arbitration clause. There was large scale creditor ‘buy in’ to the restructuring proposals but a Swiss-incorporated lender objected. This lender was part of the well-known Russian conglomerate, Gazprom.

Separate inter-connected schemes of arrangements were proposed for the bank creditors and the bondholder creditors. Separate class meetings were ordered to be held and then held with unanimous creditor approval of the proposals by those attending and voting. The dissentient creditor, Gazprombank, who held up to 10% of the outstanding liabilities failed to attend the meeting but objected to confirmation of the schemes at the court sanction hearing. In that hearing the court had to assess whether each scheme was "fair" in the sense that it embodies a compromise or arrangement that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision having regard to its ordinary class interests.

[529] England and Wales High Court (Chancery Division), DTEK Energy BV, Re [2021] EWHC 1551 (Ch) (8 June 2021), available at: http://www.bailii.org/ew/cases/EWHC/Ch/2021/1551.html (last accessed on 25 November 2021).

The court considered that the scheme was fair in this sense and rejected the Gazprombank objection. Looking at the evidence as a whole, Gazprombank was not in a significantly stronger position as regards repayment of its loan than any other scheme creditor. The scheme did not operate unfairly by compelling it to compromise recovery rights that were materially better than those of other scheme creditors.

Gazprombank also argued that the English Court could not be satisfied as to the international effectiveness of the scheme post-Brexit, such that any grant of sanction would be an act in vain. The court did not accept this proposition. There was undisputed evidence that the restructuring would be recognised in the US pursuant to Chapter 15 of the US Bankruptcy Code which implemented the UNCITRAL Model Law on Cross Border Insolvency Law in the US. The Model Law had also been implemented within the EU in Greece, Poland, Romania and Slovenia and also in Singapore

According to the established principles governing the approval of schemes of arrangement and applied by the English court in this case:

1. *The Court must be satisfied that the scheme will achieve its purpose and will not make an order which has no substantial effect.*
2. *It must be satisfied that the scheme achieves a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets.*
3. *It does not need certainty as to the position under foreign law, but does require credible evidence it will not be acting in vain.*
4. *Credible evidence must show that there is a reasonable prospect that the scheme will be recognised and given effect.*

The Court stated that there was always uncertainty as to how schemes work within the framework of Brussels 1a Regulation. When considering whether the Brussels Ia Regulation presented a jurisdictional bar to the Court exercising jurisdiction over EU domiciled scheme members or creditors, it was assumed to apply but when considering international effectiveness, the English Court would look for expert evidence which demonstrated alternative bases. The court said that 'English Courts have … never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape' [para 31]. Such alternative bases included the Rome I Regulation and private international law.

After hearing evidence from foreign law experts on whether the scheme would be recognised in Cyprus under Rome I, the court was satisfied that there was a reasonable prospect that the scheme would be substantially effective in Cyprus. It did not agree with Gazprombank's argument that Rome I covers only purely consensual variations or extinguishing of contractual rights.

On recognition in the Netherlands, the English court held that it could not decide between rival expert reports on foreign law matters. It focussed instead on the question of whether there was a reasonable prospect of the scheme having a substantial effect in the Netherlands, both as regards the consenting creditors and as against Gazprombank.

The court also refers to a report produced by Prof. Dr. Christoph Paulus and Prof. Dr. Peter Mankowski according to which the Bank Scheme would be given effect in every Member State of the EU by virtue of Art 12(1)(d) of the Rome I. This provides that the law applicable to a contract (in the instant case, English law) shall govern the various ways of extinguishing obligations: and that rule covers all modes of extinguishing obligations (including those operating against dissentient creditors).

This evidence concerning the applicability of Rome I is consistent with evidence upon which the English Court has felt able to rely in other cases. The evidence is also consistent with what is often referred to as a generally accepted principle of private international law that a

variation or discharge of a contractual right in accordance with the governing law of the contract will generally be given effect in other countries.'[530]

There was somewhat contradictory evidence that the Dutch court might have to grant a confirmatory judgment without re-addressing the merits. There was a further view that the requirements of Dutch private international law for the recognition and enforcement of a judgment sanctioning a scheme are not met (i) because the fact that the debt over which the English court has exercised jurisdiction is governed by English law is not itself an internationally accepted connecting factor; and (ii) because Gazprom's loan documents contain an arbitration clause.

The English court concluded that it would regard a scheme as substantially effective if it has 'very solid support' amongst scheme creditors and this was the case here.

[530] Ibid, Paras 37-39.

5. Conclusions

The Study findings shed light on the functioning of the safeguards introduced in the EIR to mitigate (abusive) forum shopping, with particular focus on the introduction of the suspect period mechanisms for COMI relocations set out in its Article 3. The Study considers firstly that the safeguards provided in the EIR, as applied by national courts, seem to have had positive effects in line with the objective of mitigation of (abusive) forum shopping practices. This Study notes this to be even more true where the practical incidence of certain forum shopping practices has diminished as a consequence of national legislative reforms modifying individual debtors' relief periods in certain countries. Additionally, forum shopping practices in respect of the UK also appeared to be reduced (if not eliminated) as a consequence of Brexit, on one hand, and the enactment of the Preventive Restructuring Directive on the other.

However, the Study also highlights how practical difficulties remain with regards to the distinction between desirable and abusive forum shopping practices. The EIR seeks to differentiate between beneficial and 'fraudulent or abusive' variants of forum shopping by referring to the concept of the 'detriment to the general body of creditors' in its Recital 29. However, the Study finds that the safeguards of the EIR do not seem to precisely distinguish between COMI shifts carried out in mutual agreement with creditors (which would be beneficial) or based on the debtor's unilateral decision. In this context, the Study highlights how objective criteria could be formulated in the EIR in view of discerning abusive practices from neutral or beneficial practice, with presumptions in support of the Court's assessment.

The findings of the Study also highlight how the national insolvency laws governing insolvency proceedings across the different Member States are characterised by a high level of diversity, both in terms of types of insolvency proceedings accessible in the different countries (e.g., liquidation proceedings, rescuing and restructuring proceedings), as well as in terms of specific rules concerning various aspects of said proceedings. When considering if and to what extent approximation of national rules in certain areas of insolvency law could be an effective means to address potential abusive forum shopping practices, the Study provides different recommendations in respect of the following areas of national insolvency laws:

1. **Conditions to access insolvency proceedings**: the Study does not consider currently viable the harmonisation of the conditions to access insolvency proceedings across Member States, based in particular on the peculiar diverse basis of values and interests intertwined with insolvency policies in the different countries.
2. **Avoidance actions and clawback rights:** the Study considers that a full harmonisation of the matter may negatively impact the national insolvency systems and create legislative gaps regarding local issues. To overcome such drawbacks, two possible alternatives could be considered. On the one side, harmonisation could take place on a principle-based approach ((i) the principle of equal treatment of creditors; and (ii) the principle of protection of trust); in turn, a second alternative could be a partial harmonisation of transaction avoidance rules, i.e., approximation of rules only for transactions that are characterised by cross-border elements.
3. **Directors' duties related to imminent/actual insolvency proceedings**: the Study considers that full harmonisation of the directors' duties would not be able to take into consideration the local peculiarity of private law, company law and criminal law. So-called "minimum harmonisation" could be considered, either by (i) harmonising the rules of private international law on the topic to clarify whether the law applicable is the *lex societatis* or the *lex fori concursus*; or (ii) attempt a minimum harmonisation of the liability of the directors for breaching their duties.
4. **Position of secured creditors:** the Study considers full harmonisation in this sector to be unlikely achievable due to different policy considerations which inform Member

States' approaches towards security rights. Should the harmonisation route be nonetheless still be investigated, the Study suggests that further in-depth research should be carried out on (i) the common principles underpinning the security rights across the Member States and; (ii) policy reasons supporting the legislative choices concerning the position of secured creditors in the distribution ranking.

5. **Court capacity:** the Study once again highlights that the factors that determine court capacity are deeply rooted within the Member States' national legal culture and traditions. Nevertheless, the Study considers that the development of national specialised chambers in commercial, corporate and insolvency matters would be a welcomed step to foster court capacity, whilst a unified European training program for judges to deal with EU insolvency matters could improve both internal court capacity and the ability to cooperate with other courts.
6. **Asset tracing and recovery:** once more, rather than a harmonisation proposal of national rules, the Study considers that more stringent rules on cross-border cooperation among insolvency practitioners and courts could be developed in relation to asset tracing, and welcomes the development of a unified database for assets located across the EU.

Finally, the Study highlights the complexity of the landscape concerning the available pre-insolvency workouts across the Member States, i.e., those pre-insolvency arrangements that fall outside the realms of the application of the private international law mechanisms of the EIR. First of all, the Study findings show how the legislative landscape is currently still evolving as the Preventive Restructuring Directive is yet to be fully transposed in all the Member States' national legislative frameworks. Secondly, some countries may decide to include new schemes of arrangements in Annex A of the EIR, provided they meet the 'insolvency' requirements explained in Section 1.2.2. For those schemes of arrangements not currently falling under the scope of the EIR, the Study considers theoretically possible that these could be granted effects in other Member States, either via the Brussels Ia Regulation, or the Rome I Regulation. The question of which EU legislative instruments would find application to a specific foreign scheme of arrangement would depend on whether the workout at hand was sanctioned by a court (and hence could be recognised via the Brussels Ia Regulation), or whether it is a purely contractual workout (and hence would fall under the framework of the Rome I Regulation). However, the Study considers that in order to ultimately answer the question of the circulation of effects of pre-insolvency workouts, there is the need to clarify a preliminary question at EU level, namely that of the scope of application of the aforementioned regulations. In conclusion, the Study welcomes an authoritative interpretation by the CJEU of the scoping and exclusions provisions contained in Article 1 respectively of the Brussels Ia and Rome I regulations, or an amendment of the same Regulations.

Last but not least, with regards UK pre-insolvency workouts post-Brexit, the Study considers that court judgments or orders confirming (sanctioning) a UK scheme of arrangement may be entitled to EU wide recognition under the Lugano Convention (whilst this appears less likely for UK restructuring plans). However, it if first of all doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention, and therefore the potential relevance of the Hague Judgments Convention could be assessed as an alternative. Finally, and similarly to the conclusions drawn above for EU pre-insolvency workouts, the Study considers that in order to ultimately answer the question at hand, there would still be a preliminary need to clarify the interpretation of the exclusion of 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' from the scope of the Lugano Convention (Article 1(2)(b)).

ANNEXES

Annex A – National country reports

Annex B – Survey results

Annex C – Literature review

EU Resources in Relation to Forum Shopping		
Full Reference and Link (where available)	**Short Description**	**EU/ National Level**
Delegations of the Netherlands, Germany and Spain, *Proposals from the delegations of the Netherlands, Germany and Spain on abusive COMI-transfer* (Council document 10306/14) https://data.consilium.europa.eu/doc/document/ST-10306-2014-INIT/en/pdf	This proposal from member states from the pre-2015 reform discussions states suggests that any transfer of COMI would be nullified whenever its "exclusive or main object or effect was to harm the interests of creditors or employees". Ringe (see above) argues this proposal better delineates between abusive forum shopping and beneficial COMI shifts.	EU
Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023	Recent EU Directive on pre-insolvency proceedings.	EU
INSOL Tracker on the Implementation of the EU Directive on Restructuring and Insolvency https://www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency	Resource that monitors the implementation of the aforementioned Directive.	EU
Conference on European Restructuring and Insolvency Law (CERIL) https://www.ceril.eu/news/ceril-statement-2017-1-on-transactions-avoidance-laws	CERIL is an organisation of experienced and respected practitioners, judges and academics, that is dedicated to the improvement of restructuring and insolvency laws and practices in Europe, the European Union and its Member States.	EU
Reinhard Bork, 'CERIL Report 2017-1 on Transactions Avoidance Laws' https://www.ceril.eu/news/ceril-statement-2017-1-on-transactions-avoidance-laws	This CERIL project aims at collecting information on transactions avoidance rules from various jurisdictions and examines them regarding their underlying policies and principles.	EU
UNCITRAL Legislative Guide on Insolvency Law https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law	The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a state's insolvency laws. It is intended to inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and	Int'l

	regulations or reviewing the adequacy of existing laws and regulations.	
World Bank, 'Doing Business report and rankings' https://www.doingbusiness.org/en/doingbusiness	This World Bank publication measures the regulations that enhance business activity and those that constrain it in economies around the world. One such legislative factor is insolvency law.	Int'l
World Bank, 'Doing Business resolving insolvency' https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency	This World Bank resource studies the time, cost and outcome of insolvency proceedings involving domestic legal entities.	Int'l
Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen, 'Study on a new approach to business failure and insolvency' (2016) European Commission https://ec.europa.eu/info/sites/default/files/insolvency_study_2016_final_en.pdf	This report, commissioned by the European Commission DG Justice, documents a comparative study on substantive insolvency law throughout the EU. It also includes an analysis of the EC Recommendation on a new approach to business failure and insolvency and its implementation in Member States.	EU
Hess/Oberhammer/Pfeiffer: Study for an external evaluation of Regulation (EC) No. 1346/2000 on Insolvency Proceedings 2012 ("The Heidelberg-Vienna-Luxembourg Report") https://op.europa.eu/en/publication-detail/-/publication/4d756fa7-b860-4e36-b1f8-c6640dced486	This report delivers a legal/empirical assessment of the practical application of the EIR 2000.	EU
European Commission Press Corner, 'Remarks by Commissioner Gentiloni at the Eurogroup press conference' SPEECH/21/624 (15th February 2021) https://ec.europa.eu/commission/presscorner/detail/en/speech_21_624	Remarks by Commissioner Gentiloni at the Eurogroup press conference.	EU
European Council, 'The Stockholm Programme — An open and secure Europe serving and protecting citizens', OJ C 115, 4.5.2010, p. 1–38 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52010XG0504%2801%29	Plan from the European Council on the area of justice and home affairs where it an emphasis was placed on 'on the need to work on common rules on the conflict of laws and jurisdiction in the European Union'.	EU
European Commission, 'Green Paper: Building a Capital Markets Union' SWD (2015) 13 final https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN	Green paper where the Commission set out to form a Capital Markets Union.	EU

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan' COM(2020) 590 final https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF	Communication of the new action plan to build a Capital Markets Union.	EU
European Commission, 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment' (initiative) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws	This initiative from the European Commission will address the main discrepancies in national corporate (non-bank) insolvency laws, which have been recognised as obstacles to a well-functioning Capital Markets Union.	EU
European Commission Directorate-General Economic and Financial Affairs, 'Corporate solvency of European enterprises: state of play, Note to the Eurogroup Working Group' (2021) https://www.consilium.europa.eu/media/48396/20210402-ewg-commission-note-on-corporate-solvency.pdf	This note, among others, presents an overview of recent data and developments relevant for assessing the solvency position of the corporate sector in 2020.	EU
European Parliament, 'Resolution on the Convention on Insolvency Proceedings of 23 November 1995' [1999] OJ C 279. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51999IP0234%2801%29	This is the European Parliament's resolution on the Convention on Insolvency Proceedings of 23 November 1995.	EU
Government of the United Kingdom, 'History and background to the EC Regulation on insolvency proceedings' https://www.insolvencydirect.bis.gov.uk/freedomofinformationtechnical/technicalmanual/Ch37-48/chapter41/part1/part_1.htm	This source provides the history and background to the EC Regulation on insolvency proceedings.	UK
Mr Almeida Freire, European Economic and Social Committee, «Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Economic Social Committee – A new European approach to business failure and insolvency' *COM(2012) 742 final* and on the 'Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on	This is the opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council and the European Economic Social Committee – A new European approach to business failure and insolvency' COM(2012) 742 final and on the 'Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings'.	EU

insolvency proceedings'» COM(2012) 744 final [2013] OJ C 271/55. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013AE0472		
European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic And Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings' COM/2012/0743 final https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0743&rid=5	This report aims to present to the European Parliament, the Council and the European Economic and Social Committee an assessment of the application of the Regulation.	EU
European Commission, 'Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law' JUST/2015/JCOO/FW CIVI0103 FRAMEWORK CONTRACT ENTR/172/PP/2012FC LOT 2 https://ec.europa.eu/info/sites/info/files/final_report_formatted_jiipib2_for_publication_final_opoce_0.pdf	This is the Final Report on the Impact Assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law.	EU
European Commission, 'Commission Staff Working Document, Impact Assessment, *Accompanying the document* Revision of Regulation (EC) No 1346/2000 on insolvency proceedings' COM(2012) 744 final SWD(2012) 417 final http://insreg.mpi.lu/Impact%20assessment.pdf	This is a Commission Staff Working Document on the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings.	EU
Professor Reinhard Bork, Conference on European Restructuring and Insolvency Law (CERIL), 'CERIL Report 2017-1 on Transactions Avoidance Laws' (2017) https://congressus-ceril.s3-eu-west-1.amazonaws.com/files/6d509c400baa4af081b4bda6a0326139.pdf?Signature=YaMTgd2Fb%2BBwSmn8IA6cnDhA8dk%3D&Expires=1643658267&AWSAccessKeyId=AKIAIUTTQ23AZYZKILZQ&response-content-disposition=inline%3Bfilename%3D2017-01_CERIL_Report_on_Transaction_Avoidance_Laws.pdf	This Report explains the concept and results of a research project executed by a working group of the Conference on European Restructuring and Insolvency Law (CERIL). The study sought to collect detailed information on national transactions avoidance laws and to identify correlations using a principle-based analysis, making enquiries into the relevance of the principle of equal treatment of creditors and the principle of protection of trust.	EU
Conference on European Restructuring and Insolvency Law (CERIL), 'CERIL Statement 2017-1 on Avoidance Actions' (2017) https://congressus-ceril.s3-eu-west-1.amazonaws.com/files/dacb58d6dbea47b7abaf4eeb1d94a54c.pdf?Signature=i10zcy1Cb	This is the CERIL Statement 2017/01 on Transactions Avoidance Laws - Clash of Principles: Equal Treatment of Creditors vs. Protection of Trust in Europe.	EU

Atzxv3F7CxI%2FQctQ7g%3D&Expires=1643658421&AWSAccessKeyId=AKIAIUTTQ23AZYZKILZQ&response-content-disposition=inline%3Bfilename%3D2017-01_CERIL_Statement_on_Transaction_Avoidance_Laws.pdf		
Ministère de la justice, 'Les Entreprises En Difficulté', rapport 2019. http://www.justice.gouv.fr/art_pix/6-PARTIE5_References_stastiques_justice_2019_16x24.pdf	This document refers to the statistics on companies in difficulty in France.	FR
INSOL International, 'Avoidance Provision in a Local and Cross-border Context: A Comparative Overview' (2008) Technical Series Issues No. 7, 1.	INSOL document on rules on avoidance actions across the EU.	Int'l
INSOL Europe, 'Harmonization of Insolvency Law at EU Level' 18-20.	INSOL document providing opinions on potential harmonisation of insolvency laws across the EU.	Int'l
Opinion of the Advocate General Kokott, *Bank Handlowy and Adamiak*, Case C-116/11, ECLI:EU:C:2012:739 https://curia.europa.eu/juris/document/document.jsf?text=&docid=123091&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2088618	This is the opinion of Advocate General Kokott in the case Bank Handlowy and Adamiak.	EU
Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN	This is the Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.	EU
European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency', SWD (2014) 61 final, p 38. https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2014/swd_2014_0061_en.pdf	This proposal aims at improving conditions and incentives for effective preventive restructuring of firms and on giving a second chance to honest entrepreneurs who once failed. It links in with the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy for jobs and growth.	EU

Caselaw in Relation to Forum Shopping		
Full Reference and Link (where available)	**Short Description**	**EU/ National Level**
Re Eurofood IFSC Ltd Case C–340/104 [2006] ECR I–3813 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0341	This Grand Chamber judgement was a preliminary ruling from the Irish Supreme Court after insolvency proceedings commenced in two member states.	EU/IE/IT
Interedil Srl Case C–396/09 [2011] BPIR 1639 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0396&from=EN	This CJEU preliminary ruling clarified its interpretation of COMI after the judgements in Eurofood and Daisytek.	EU/UK/IT
Mediasucre Case C-191/10 [2012] ECR 39/3 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CA0191&qid=1626421461497	This Court of Justice preliminary ruling concerned joining an Italian company to a French insolvency proceeding. The Court held that the Italian company can only be joined if its COMI is in France.	EU/FR/IT
Staubitz-Schreiber (Case C-1/04) [2006] ECR I-701 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0001&from=EN	This preliminary ruling concerned a German company that moved COMI to Spain after the request for insolvency proceedings was submitted but before proceedings commenced. The Court held such a transfer is in conflict with the European Insolvency Regulation.	EU/DE/ES
Novo Banco SA Case C-253/19 (July 16th, 2020) ECLI:EU:C:2020:585 https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62019CJ0253	Concerned COMI for a natural person. The Court held that COMI presumption is not rebutted because an individual's only immovable property is located outside the jurisdiction in which they reside.	EU/UK/PT
Leonmobili Srl v Homag Case C-353/15 OJ 2016 C326/4 ECLI:EU:C:2016:374 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.2016.326.01.0004.01.ENG	Restatement of the classic COMI test.	EU/IT
Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 https://www.insol.org/_files/Fellowship%202015/Session%206/Hellas%20Telecommunications.pdf	Judgement of the England and Wales High Court where the court held that the COMI of Hellas Telecommunications (Luxembourg) II SCA had effectively been transferred from Luxembourg to England, despite the fact that	UK/LU

	the company's registered office remained in Luxembourg	
Case C-54/16, Vinyls Italia SpA v Mediterranea di Navigazione SpA ECLI:EU:C:2017:433 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16	CJEU was asked whether the Article 16 defence applies when contracting parties have their head offices in a single EU State, whose law can therefore be expected to become the lex fori in the event of insolvency of one of those parties, and the parties through a contractual choice of law clause have designated another law as the law applicable.	EU/IT
C-423/15, Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG ECLI:EU:C:2016:604 https://curia.europa.eu/juris/document/document.jsf?text=&docid=182298&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=518872	Case where the CJEU dealt with the concept of abuse of choice of law or abuses of EU legislation.	EU
Case C-110/99, Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas ECLI:EU:C:2000:695 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-110/99	Case where the CJEU dealt with the concept of abuse of choice of law or abuses of EU legislation.	EU
Case C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia ECLI:EU:C:2014:145 https://curia.europa.eu/juris/liste.jsf?num=C-155/13&language=EN	Case where the CJEU dealt with the concept of abuse of choice of law or abuses of EU legislation.	EU
Case C-425/06, Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze v Part Service Srl, company in liquidation, formerly Italservice Srl ECLI:EU:C:2008:108 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-425/06	Case where the CJEU dealt with the concept of abuse of choice of law or abuses of EU legislation.	EU
Case C–339/07 Seagon v Deko Marty Belgium NV[2009] ECR I–767. https://curia.europa.eu/juris/liste.jsf?language=en&num=C-339/07	Reference for a preliminary ruling concerning the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).	EU

C-157/13 - Nickel & Goeldner Spedition, EU:C:2014:2145 at para 21. https://curia.europa.eu/juris/liste.jsf?num=C-157/13&language=EN	Request for a preliminary ruling concerning the interpretation of Articles 3(1) and 44(3) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Articles 1(2)(b) and 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.	EU
Case C-649/16 Valach v Waldviertler Sparkasse Bank AG ECLI:EU:C:2017:986 https://curia.europa.eu/juris/document/document.jsf?text=&docid=198043&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=525163	Request for a preliminary ruling concerning the interpretation of Article 1(2)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.	EU
Case C-641/16, Tünkers France and Tünkers Maschinenbau, ECLI:EU:C:2017:847, **https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0641&from=en**	Request for a preliminary ruling concerning the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.	EU
Case C-649/16, Peter Valach and Others v Waldviertler Sparkasse Bank AG and Others, ECLI:EU:C:2017:986 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0649&from=en	Request for a preliminary ruling concerns the interpretation of Article 1(2)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.	EU
Case C-296/17, Wiemer & Trachte GmbH v Zhan Oved Tadzher, ECLI:EU:C:2018:902 **https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0296&from=en**	This request for a preliminary ruling concerns the interpretation of Article 3(1), Article 18(2) and Articles 21 and 24 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.	EU
Case C-111/08, SCT Industri AB (In Liquidation) v Alpenblume AB, ECLI:EU:C:2009:419 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-111/08	Reference for a preliminary ruling concerning the interpretation of Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.	EU
Case C-250/17, Virgílio Tarragó da Silveira v Massa Insolvente da Espírito Santo Financial Group SA, EU:C:2018:398. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0250&from=NL	This request for a preliminary ruling concerns the interpretation of Article 15 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.	EU

Case C-116/11, Bank Handlowy and Adamiak, ECLI:EU:C:2012:739 https://curia.europa.eu/juris/document/document.jsf?text=&docid=130249&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=527017	Reference for a preliminary ruling concerning the interpretation of Articles 4(1) and (2)(j) and 27 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC) No 788/2008 of 24 July 2008.	EU
Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch) http://www.bailii.org/ew/cases/EWHC/Ch/2012/3686.html	Judgement of the England and Wales High Court.	UK
Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2012/164.html	Judgement of the England and Wales High Court.	UK
Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 http://www.bailii.org/ew/cases/EWHC/Ch/2011/1104.html	Judgement of the England and Wales High Court.	UK
Re Magyar Telecom BV [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418 https://www.bailii.org/ew/cases/EWHC/Ch/2013/3800.html	Judgement of the England and Wales High Court.	UK
Re Dtek Finance BV [2015] EWHC 1164 (Ch). https://www.bailii.org/ew/cases/EWHC/Ch/2015/1164.html	Judgement of the England and Wales High Court.	UK
Sparkasse Hilden v Benk [2012] EWHC 2432 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html paras 19-22	Judgement of the England and Wales High Court.	UK/DE
O'Donnell v Bank of Ireland [2012] EWHC 3749 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2011/3749.html	Judgement of the England and Wales High Court.	UK/IE

Re Melars Group Ltd [2021] EWHC 1523 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2021/1523.html	Judgement of the England and Wales High Court.	UK/MT
Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2015/3778.html	Judgement of the England and Wales High Court.	UK/ES
Re Algeco Scotsman PIK SA [2017] EWHC 2236 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2017/2236.html	Judgement of the England and Wales High Court. Distinguished between good and bad forum shopping.	UK/LU
BGH, 2/15/2012, NJW 2012, 2113 (Equitable Life)	Decision of the German Federal Supreme Court ('Bundensgerichtshof') on the qualification of a UK scheme of arrangement.	DE
BGH, 10/13/2009, ZIP 2009, 2217;	Decision of the German Federal Supreme Court ('Bundensgerichtshof') on the qualification of a US scheme of arrangement.	DE
OLG Frankfurt am Main, 2/20/2007, ZIP 2007, 932	Decision of the German 'Oberlandesgericht Frankfurt am Main' on the qualification of a UK scheme of arrangement.	DE

General Sources on Regulation (EU) 2015/848, Forum Shopping and Related Issues		
Full Reference and Link (where available)	**Short Description**	**EU/ National Level**
Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisited' in Vesna Lazić and Steven Stuij (eds), *Recasting the Insolvency Regulation* (T.M.C. Asser Press 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091071	This book chapter provides an overview of the Regulation (EU) 2015/848, in particular articles 3 and 7. It also discusses familiar criticisms such as under and over-inclusiveness. Further, it features a helpful account of UK schemes of arrangements and an evaluation of the original reform proposals of INSOL Europe and member states.	EU
Delegations of the Netherlands, Germany and Spain, *Proposals from the delegations of the Netherlands, Germany and Spain on abusive COMI-transfer* (Council document 10306/14)	This proposal from member states from the pre-2015 reform discussions states suggests that any transfer of COMI would be nullified whenever its "exclusive or main object or effect was to harm the interests of creditors or employees". Ringe (see above) argues this	EU

https://data.consilium.europa.eu/doc/document/ST-10306-2014-INIT/en/pdf	proposal better delineates between abusive forum shopping and beneficial COMI shifts.	
Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (2019) 20 European Business Organization Law Review 547 https://link.springer.com/article/10.1007/s40804-019-00160-0	This journal article charts the development of insolvency law in the EU and explains the UK's position as Europe's most attractive jurisdiction in this regard. It also features some interesting empirical data about the stringency of insolvency regimes across member states plus the UK, as well as the number of Scheme of Arrangement proceedings going through UK courts. The author also argues that Brexit negates the UK's competitive advantage in forum shopping.	EU/UK
OECD, 'Policies for productivity: the design of insolvency regimes across countries' (*OECD,* 2018) https://www.oecd.org/economy/growth/policies-for-productivity-the-design-of-insolvency-regimes-across-countries-2018-going-for-growth.pdf	This report is an assessment of the factors that contribute to poor insolvency regimes in terms of labour market productivity. Also remarks on how insolvency should be designed for ensuring smooth exit or effective restructuring. This report views the UK approach as a model to be replicated for its low barriers to restructuring and encouraging climate for entrepreneurs.	EU/UK
Daoning Zhang, 'Reconsidering Procedural Consolidation for Multinational Corporate Groups in the Context of the Recast European Insolvency Regulation' (2017) 26 International Insolvency Review 332 https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1286?casa_token=-WtlcpcurbQAAAAA%3AtbmBltjU71SC-KJaf_-nhLmTLwpXyjUZvphVKA_RkTHGtfh5sJRuQ3HUh25oQQdRGE2UfU0Pg1p8KeGkWA	This journal article deals with strategies for dealing with insolvent multinational corporate groups (a company with multiple subsidiaries across different member states). Specifically, the article evaluates 'procedural consolidation' whereby the insolvency of many subsidiaries can be handled by one court. Such a procedure is legal under the 2015 Regulation.	EU
Thomas Hoffman, 'The Brexit and Private International Law: An Outlook from the Consumer Insolvency Perspective' in David Ramiro Troitiño, Tanel Kerikmäe and Archil Chochia (eds), *Brexit: History, Reasoning and Perspectives* (Springer 2018) https://link.springer.com/chapter/10.1007/978-3-319-73414-9_14	This book chapter analyses how certain issues of private international law will be regulated once the Brussels Ia Regulation no longer applies to the UK. For UK courts, the Cross-Border Insolvency Regulations 2006 would regulate again EU-transborder insolvencies. The author concludes that 'consumer insolvency tourism' will be greatly impacted by Brexit.	EU/UK
Nicolaes Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings' (2017) 30(5) Insolvency Intelligence 65 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978137	This journal article provides an overview of the Preventative Restructuring Directive. It argues that whilst the Directive takes cues from the UK scheme of arrangement and its US counterpart procedure, the Directive has the potential to be more efficient than the UK and US procedures.	EU
Ilya Kokorin, 'Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices' in Vesna Lazić and Steven Stuij (eds), *Recasting the Insolvency Regulation* (T.M.C.	This book chapter argues that the EU law conception of COMI leads to uncertainty and unnecessarily drawn-out litigation. For one, the definition is overly-vague. Secondly, the issue of corporate group insolvency is still not	EU

Asser Press 2020) https://link-springer-com.kuleuven.e-bronnen.be/chapter/10.1007/978-94-6265-363-4_2	adequately addressed. Thirdly, business practices and structures have evolved beyond the current COMI definition, particularly in relation to platform-based and decentralised operations. Kokorin also argues that there may be room for companies to contract around insolvency jurisdictions.	
Gerard McCormack, 'Something Old, Something New: Recasting the European Insolvency Regulation' (2016) 79 Modern Law Review 120 https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12169?casa_token=Qd5q1ES6KX4AAAAA%3AqNKYFx3REAZhpHiKFjhPy_1i1kdwJa3yZT2zGSO9T8gFtX6NDFViTLEH30mJZ3MyxRiU_KhTwNtVuHlltA	This journal article evaluates the strengths and weaknesses of Regulation (EU) 2015/848. On the one hand, the widened scope, further clarifications, newly formulated main/secondary proceedings relationship and enhanced information flows are welcome improvements. On the other hand, the Regulation brings about further confusion for the sake of political compromise.	EU
Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review 246 https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1282?casa_token=ySo1Xe5LQS4AAAAA%3AWglaHaMUr5AmOknt9g_wA14u0d2MG7j-FirVVymmQwITlQAQWMK4ijt0PUEYZ5jINwEyroIYPvpcJG_qNg	This journal article compares Regulation (EU) 2015/848 and the UNCITRAL Model Law on Cross-Border Insolvency of 1997. The two share similar catalogues of norms and rules for the coordination of main and secondary insolvency proceedings. However, the 2015 Regulation goes further in its unifying effect due to its binding nature and comprehensive scope of its rules, as well as being more precise. The author argues the UNCITRAL Model Law is now in need of modernisation.	EU
Rolef de Weijs and Martijn Breeman, 'Comi-migration: Use or Abuse of European Insolvency Law?' (2014) 11(4) European Company and Financial Law Review 495 https://www.degruyter.com/document/doi/10.1515/ecfr-2014-0495/html	This journal article appraises the then draft Regulation (EU) 2015/848, in particular expanding on instances of abusive and non-abusive forum shopping. Forum shopping that seeks to reorganise creditor rankings should be outlawed. However, forum shopping that seeks to address common pool and tragedy of the commons problems should be permissible.	EU
Gert-Jan Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders' (2018) 27 International Insolvency Review 150 https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1303	This journal article expands on what is meant by stakeholder involvement in insolvency proceedings, particularly given that both the European Commission and Parliament emphasised their importance in various communications. Insolvency law in general has also been influenced by a more holistic approach that take into account employees and local communities. This is mirrored in the groups the Commission has consulted in considering changes to EU insolvency law, such as trade unions and research institutes.	EU
Paul J. Omar, 'The Inevitability of 'Insolvency Tourism'' (2015) 62 Netherlands International Law Review 429 https://www-proquest-com.kuleuven.e-	This journal article, written prior to the introduction of Regulation (EU) 2015/848, argues that unless insolvency regimes are harmonised across all member states, forum shopping is inevitable. As that outcome is impossible, the regulatory focus on forum	EU

bronnen.be/docview/2097648724?OpenUrlRefId=info:xri/sid:primo&accountid=17215	shopping should minimise any damage done, as opposed to trying to prevent it entirely.	
Peter Mankowski, 'The European World of Insolvency Tourism: Renewed, But Still Brave?' (2017) 64 Netherlands International Law Review 95 https://www-proquest-com.kuleuven.e-bronnen.be/docview/1961527647?OpenUrlRefId=info:xri/sid:primo&accountid=17215	This journal article assesses Regulation (EU) 2015/848 after its implementation and in the context of the then-recent Brexit referendum. The author believes the 3-month exception period for COMI relocation is sensible and the Regulation adequately balances creditors' interests and the freedom of establishment. The author also argues that the UK will no longer be the favoured destination for insolvency tourism going forward.	EU
Laura Carballo Pineiro, 'Brexit and International Insolvency Beyond the Realm of Mutual Trust' (2017) 26 International Insolvency Review 270 https://heinonline-org.kuleuven.e-bronnen.be/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/intvcy26&men_hide=false&men_tab=toc&kind=&page=270	This journal article deals with the post-Brexit methods of judicial cooperation between UK courts and member states courts. Given that the principle of mutual trust no longer applies, the UNCITRAL Model Law on Cross-Border Insolvencies will become prominent again. However, not all member states have ratified the Model Law and this may be a reason to implement it at the EU level instead.	EU
Koukoulaki and others, 'Restructuring seriously damages well-being of workers: The case of the restructuring programme in local administration in Greece' (2017) 100 Safety Science 30 https://www.sciencedirect.com/science/article/pii/S0925753517309748?casa_token=1bAAVvn_4pYAAAAA:ap7iXrPTm9XjmpPOmiDOKHyUMpe-i9_wRynp9kV4TF2TzrDGLTpxnpLgIJvCDCANpVJaea_U8lM	This study investigates the impact of corporate restructuring on employee wellbeing in Greece. Increased demands at work were associated with increased stress and emotional exhaustion. The job insecurity that came with restructurings also exacerbated these experiences. Employees reported decreases in emotional exhaustion if they perceived that justice was being done in the restructuring process.	EL
Zoltan Fabok, 'Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation' (2017) 26 International Insolvency Review 295 https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1284?casa_token=MN74M2pHonkAAAAA%3AJy65H7hKYbEPdtgHdz8Aal0gbGGSb43LeP_q1XgbVTuvRRC3sdivFN0_3ceLtRLnionY8VmJA6ycCE8coQ%3Fsaml_referrer	This journal article starts from the fact that if a court in one member state wrongfully accepts jurisdiction over an insolvency proceeding, in line with Annex A of Regulation (EU) 2015/848, the court of the correct jurisdiction cannot assume jurisdiction on the basis of mutual trust. The author argues that the latter court, where jurisdiction would rightfully be assumed, should not have to respect the principle of mutual trust.	EU
Francisco Garcimartin, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' (*SSRN*, 21 March 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412	This article appraises Regulation (EU) 2015/848, focusing on three aspects in particular. First, the author deals with the scope of the Regulation. Secondly, issues arising from COMI determinations. Lastly, the scope of the jurisdiction of the courts of member states.	EU

Bob Wessels, 'The EU Regulation on Insolvency Proceedings (Recast)' (2015) 22 Maastricht Journal of European & Comparative Law 771 https://heinonline.org/HOL/Page?handle=hein.journals/maastje22&div=59&g_sent=1&casa_token=B6tSYJFyky8AAAAA:YgtJtczjgU8YmwE8fwaWFSqkEK8u1WobDuvKxjQfXeFqZun5tX0IrR-Qif1GUSUPtbny5vf040w&collection=journals	This journal article identifies the five main shortcomings of the previous EU insolvency regulation (Regulation (EC) 1346/2000) and how Regulation (EU) 2015/848 seeks to remedy each of them. In particular, the author explains how the 2015 Regulation incorporates pre-insolvency proceedings and seeks to address forum shopping.	EU
Susan Block-Lieb, 'The UK and EU Cross-Border Insolvency Recognition: From Empire to Europe to Going It Alone' (2017) 40 Fordham International Law Journal 1373 https://heinonline.org/HOL/Page?handle=hein.journals/frdint40&div=44&g_sent=1&casa_token=FNVQ8ImYn9YAAAAA:4DuzvOK0xNshoNTKxrj-mw1C14uNSxYbRZ-67X32jApYGWuv1u_F-E48l9KUL6G9x997MbOfHs0&collection=journals	This journal article argues that it is in the UK's best interests to retain the Regulation (EU) 2015/848 in its post-Brexit legal regime. This article is also interesting due to the fact that it delves into the negotiations that produced Regulation (EC) No 1346/2000. The concerns expressed by UK representatives in those negotiations were then resolved in UK courts, in judgements that were then codified in the 2015 Regulation. The author argues that the British influence on this area of EU law, which it was poised to benefit greatly from, will have all been for nothing.	EU/UK
Nicolò Nisi, 'The recast of the Insolvency Regulation: a third country perspective' (2017) 13 Journal of Private International Law 324 https://www-tandfonline-com.kuleuven.e-bronnen.be/doi/full/10.1080/17441048.2017.1345901?scroll=top&needAccess=true	This journal article argues that Regulation (EU) 2015/848 could be potentially more effective if its scope was widened to allow for the inclusion of third States. In particular, it would lead to further judicial cooperation and consistency and may bring about more international efficiency.	EU/Non-EU
Renato Mangano, 'The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Global Enterprises' (2019) 20 European Business Organization Law Review 779 https://www-proquest-com.kuleuven.e-bronnen.be/docview/2186632791?pq-origsite=primo	This journal article argues that the COMI rules in Regulation (EU) 2015/848 have not achieved their desired effect. For one, the COMI rules have both logical and teleological flaws. As well, the terms "administration on a regular basis" and "ascertainability by third parties" may not always be reconcilable. The author goes on to offer an alternative wording for Articles 2 and 3.	EU
Zoltan Fabok, 'The Jurisdictional Paradox in the Insolvency Regulation' (2016) 4(1) Nottingham Insolvency and Business Law eJournal 3 https://ssrn.com/abstract=2915827	This journal article argues that there is a misalignment between the rules in Regulation (EU) 2015/848 in relation to the applicable laws in question and certain provisions of the Brussels I Regulation. Fabok argues that the prohibition on any other courts hearing actions against the insolvent represents a *de facto* rule of *vis attractive* (concentration of all litigation relating to the debtor in the insolvency court). However, this *de facto* rule conflicts with Brussels I jurisdiction rules.	EU

Reinhard Bork and Kristin van Zwieten, *Commentary on the European Insolvency Regulation* (Oxford University Press 2016)	This academic book contains detailed article-by-article commentary on the EIR in English.	EU
Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (Oxford University Press 2016)	This academic book explains the changes brought about by the recast Regulation on Insolvency Proceedings.	EU
Moritz Brinkmann, *European Insolvency Regulation* (Hart Publishing 2019)	This academic book analyses the European Insolvency Regulation article by article, as well all relevant case-law.	EU
John Briggs, 'Cross-border insolvency – the treatment of legal acts detrimental to creditors in English and Italian insolvency law and under the European Insolvency Regulation' (2016) 29 Insolvency Intelligence 49	*On file with Dr Gerard McCormack*	EU
Look Chan Ho, 'Making and Enforcing International Schemes of Arrangement' (2011) 26 Journal of International Banking Law and Regulation 434 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912516	This journal article maps out the scheme jurisdictional basis and hurdles in light of Council Regulation (EC) 1346/2000 on insolvency proceedings and Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Judgments Regulation), and also considers the recognition of English schemes abroad.	EU/UK
Amir Adl Rudbordeh, 'A Theory on Abusive Forum Shopping in Insolvency Law' (2016) 4(1) NIBLeJ 1	This journal article accounts for when forum shopping is beneficial versus when it is abusive.	EU
Andrew Keay, 'Security rights, the European Insolvency Regulation and concerns about the non-application of avoidance rules' (2016) 41 European Law Review 72	This journal article debtors who have entered insolvency proceedings in a Member State of the EU so that the European Regulation on Insolvency Proceedings applies, and before the opening of insolvency proceedings they granted some form of security to another party. The article analyses the issues that are relevant to determining whether the granting of security prior to the advent of insolvency proceedings under the Regulation can be avoided, and it examines the extent to which pre-insolvency transactions involving security would be protected by arts 5 and 13 of the Regulation. It then analyses the concerns that might be articulated in relation to the application of art.13 and what options are available to the EC to address these concerns.	EU
Andrew Keay, 'The harmonization of the avoidance rules in European Union insolvencies' (2017) 66 International and Comparative Law Quarterly 79	This journal article examines options to address divergence between national avoidance rules. One option, harmonisation, is analysed as well as its possible benefits and drawbacks.	EU

https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/harmonization-of-the-avoidance-rules-in-european-union-insolvencies/E81042BD23E108C57F7F22034DAEDB01		
Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies', (2014) 63 International and Comparative Law Quarterly 815 https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/bankruptcy-forum-shopping-the-uk-and-us-as-venues-of-choice-for-foreign-companies/1631ACE9A8DBCCDD329B9F1B55A80482	This journal article critically evaluates 'forum shopping' possibilities offered by the UK and US in bankruptcy/insolvency cases. The paper concludes that while the UK may have shut its doors too firmly against foreign forum shoppers, the US is too much a safe haven.	UK/US
Gerard McCormack, "Jurisdictional competition and forum shopping in insolvency proceedings", (2009) 68 Cambridge Law Journal 69 https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/jurisdictional-competition-and-forum-shopping-in-insolvency-proceedings/4FBC1BDBDCEEDFCF73548E8216CDB561	This journal article asks whether the jurisdictional restraints can be overcome and whether bankruptcy forum shopping can become widespread in Europe in the wake of the European Insolvency Regulation which allows for Europe-wide recognition of insolvency proceedings.	EU/UK
G Moss and M Haravon, '"Building Europe" – The French Case Law on COMI', (2007) 20 Insolvency Intelligence 22	*On file with Dr Gerard McCormack*	EU/FR
Federico Mucciarelli, 'Not just efficiency: insolvency law in the EU and its political dimension', (2013) 14 European Business Organization Law Review 175 https://www.cambridge.org/core/journals/european-business-organization-law-review-ebor/article/abs/not-just-efficiency-insolvency-law-in-the-eu-and-its-political-dimension/49BC5ED5E939BDDB1123FA6BA61BC322	This journal article highlights the politics of insolvency law and details the debate between allowing firms to freely choose between competing regimes and harmonising across the EU, which comes with its own problems. For the author, this debate shows that the choice regarding power allocation over bankruptcies in the EU depends on the progress of European integration and is mainly a matter of political legitimacy, not only of efficiency.	EU
J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 European Business Organization Law Review 563 https://www.cambridge.org/core/journals/european-business-organization-law-review-ebor/article/abs/crossborder-schemes-of-arrangement-and-forum-shopping/8249E93C8433432F6DBF2DABA1EF647A	This journal article investigates the UK's rise as the choice of jurisdiction for companies facing insolvency, particularly explaining the use of an English scheme of arrangement and why it might be regarded as valuable to these companies.	EU/UK

Adrian Walters/Anton Smith, 'Bankruptcy tourism under the EC Regulation on insolvency proceedings: a view from England and Wales', (2010) 19 International Insolvency Review 181 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630890	This journal article outlines the structural features of the European legal framework that make forum shopping for personal insolvency law possible, including the EC Regulation on Insolvency Proceedings, and explains why England and Wales, in particular, has proved to be an attractive 'tourist' destination. The article charts how the official receivers and the courts in England and Wales have sought to manage the influx of foreign bankruptcies in terms of legal principle and process drawing on two reported cases, Eichler and Mitterfellner.	EU/UK
Joseph A. Caneco, 'Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU' (2016) *Law School Student Scholarship,* 843 https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1839&context=student_scholarship	This paper examines the European Union's attempt to harmonise the opening and effect of insolvency proceedings through two regulations, Regulation 1346/2000, having gone into effect in 2002 and in force until 2017, and Regulation 2015/848.	EU
Nauta Dutilh, 'The European Insolvency Regulation (recast): A brief summary of the most important provisions' https://www.nautadutilh.com/en/file-download/download/public/1375	This paper presents an overview of the most important provisions of the R-EIR.	EU
Elizabeth A McGovern and James Hatchard, 'Forum shopping – the end of an era?' Global Restructuring Watch (29 May 2015) https://www.globalrestructuringwatch.com/2015/05/forum-shopping-the-end-of-an-era/	Commentary of the Recast Insolvency Regulation.	EU
Luboš Smrčka, Markéta Arltová and Jaroslav Schönfeld, 'Quality of Insolvency Proceedings in Selected Countries – Analysis Focused on Recovery Rates, Costs and Duration' (2017) 28 Administratie si Management Public 116, 123. https://www.researchgate.net/publication/317830667_Quality_of_insolvency_proceedings_in_selected_countries_-_Analysis_focused_on_recovery_rates_costs_and_duration	The study attempts to define the dependence between how efficient insolvency proceedings are in particular countries (especially from the perspective of the yields for creditors from these proceedings) and the general level of development of the surveyed countries.	EU
Horst Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 European Business Organization Law Review 423, 429. https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrtha4tamzomfrxilrtg4ytgmrygqzdo&tocid=mjxw62zogi3damrtha4tamzomfrxilrtg4ytgmrygqzdo&rowIndex=-1,	This article explores the merits of an alternative approach to the COMI standard that gives more room to freedom of choice in international company insolvency law in Europe.	EU

Anna Hrycaj, Andrzej Jakubecki, Antoni Witosz, 'Prawo restrukturyzacyjne i upadłościowe, System Prawa Handlowego tom 6'(2020)	Book on Polish Bankruptcy and Restructuring Law.	PL
Brown Rudnick Trade Alert, Issue no.32/2020, the Netherlands (2020) https://brownrudnick.com/wp-content/uploads/2020/12/Trade-Alert-The-Netherlands.pdf	Trade alert on the new Dutch legislation on out of court restructuring plans.	NL
Gilles Podeur, '*European Union: After The Implementation Of The EU Restructuring Directive, Does France Remain Debtor-Friendly*?' (2021) https://www.mondaq.com/france/insolvencybankruptcy/1116378/after-the-implementation-of-the-eu-restructuring-directive-does-france-remain-debtor-friendly	Article on the implementation of the Restructuring Directive in France.	FR
S. Golshani, A.A. Hojabr, A. Leonard, A. Rueda, A. Jungbluth, 'The Legal 500Country Comparative Guides, France, Restructuring & Insolvency', page 14 https://www.legal500.com/guides/chapter/france-restructuring-insolvency/?export-pdf	Article on Restructuring and Insolvency law in France.	FR
Ringe, Wolf-Georg, Forum Shopping Under the EU Insolvency Regulation (August 1, 2008). Oxford Legal Studies Research Paper No. 33/2008. https://ssrn.com/abstract=1209822 or http://dx.doi.org/10.2139/ssrn.1209822	This paper questions the hostile attitude towards the phenomenon of forum shopping.	EU
Julie Margaret, 'Insolvency and test of insolvency: an analysis of the balance sheet and cash flow test' (2002) 12(2) Australian Accounting Review 59. https://www.researchgate.net/publication/229565165_Insolvency_and_Tests_of_Insolvency_An_Analysis_of_the_Balance_Sheet_andCashflow_Tests	Article on the balance sheet and cash flow tests to insolvency.	Int'l
Aurelio Gurrea-Martinenz, 'The avoidance of Pre-Bankruptcy Transaction: An Economic and Comparative Approach' (2018) Chicago-Kent Law Review 711, 716. https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4219&context=cklawreview	This paper seeks to analyse the economic rationale of avoidance actions in corporate insolvencies, and those aspects that should be considered in order to design a desirable system of avoiding powers.	Int'l

Eva J. Lohse, 'The Meaning of Harmonisation in the Context of European Union Law - A Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation* (Edward Elgar 2011) 282.	This chapter will focus on defining the process of harmonisation by elaborating cornerstones of a definition of harmonisation in the context of European former Community law.	EU
Roel J. de Weijs, 'Towards an objective European rule on transaction avoidance in insolvencies' (2011) International Insolvency Review 20(3) 219. https://international.vlex.com/vid/towards-an-objective-european-855603803	Article explores the question of whether, and to what extent, it is possible and desirable to identify rules on transaction avoidance solely on the basis of objective criteria.	EU/ Int'l
Gerner-Beuerle, Carsten, Paech, Philipp and Schuster, Edmund-Philipp, 'Study on directors' duties and liability' (2013) http://eprints.lse.ac.uk/50438/	It is the purpose of this study to provide the relevant information in a comprehensive manner, in order to support to European Commission to consider its future policy in the area of directors' liability issues.	EU
Oriana Casasola, 'The Harmonization of Transaction Avoidance: A Compromise Solution' (2020) 29(5) Norton Journal of Bankruptcy Law and Practice 3. https://pure.hud.ac.uk/en/publications/the-harmonization-of-transaction-avoidance-a-compromise-solution	The present contribution seeks to assess the possible solutions to the unsatisfactory results of the current EU regulation with the knowledge acquired from a comparative study concerning transaction avoidance in U.K., Germany and Italy. In particular, the paper aims to address the harmonisation of transaction avoidance at the EU level.	EU
Andrew Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79. https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/harmonization-of-the-avoidance-rules-in-european-union-insolvencies/E81042BD23E108C57F7F22034DAEDB01	This paper examines options to address divergence between national avoidance rules.	EU
Seon Bong Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries' (1999) 2(2) International Area Review 35, 42. https://doi.org/10.1177/223386599900200203	In this paper, the author attempts to analyze some basic differences between the common law judge's roles and civil law judge's roles and contemporary trends.	Int'l
Irene Lynch Fannon, Jennifer LL Gant, Aoife Finnerty, and Molly O'Connor, 'JCOERE Judicial Cooperation Supporting Economic Recovery in Europe Report 2: Report on Judicial Cooperation and European Harmonisation and Integration in Preventive	This Report analyses the co-operation obligations arising from the EIR Recast, which are imposed on courts and practitioners in EU Member States to co-operate in cross-border insolvency and restructuring matters. The Report also undertakes a benchmarking of judicial utilisation and awareness of best	EU

Restructuring' *DG Justice Programme Project No. 800807* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855398	practice guidelines on co-operation that have been adopted by European and international organisations.	
Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (2006) https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf	This report provides a comparative overview of judicial education and training in a number of jurisdictions.	Int'l
Dr. Heike Gramckow and Barry Walsh, 'Developing Specialized Court Services International Experiences and Lessons Learned' (The World Bank Report, 2013) https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1&isAllowed=y	This report outlines the international experiences and good practices related to establishing specialised courts and creating the associated judicial expertise.	Int'l
G McCormack, 'Business Restructuring Law in Europe: Making a Fresh Start' (2017) 17 Journal of Corporate Law Studies 1; https://eprints.whiterose.ac.uk/105573/3/Business%20Restructuring%20Law%20in%20Europe%20-%20Making%20a%20Fresh%20Start.pdf	This paper critically examines a new European approach to business failure and insolvency. It addresses the broader political dimensions of the subject and sets the new European approach in the context of the objectives of insolvency law to rescue viable businesses and to liquidate non-viable ones.	EU
S Madaus, 'The EU Recommendation on Business Rescue: Only Another Statement or a Cause for Legislative Action across Europe?' (2014) 27 Insolvency Intelligence 81 https://ssrn.com/abstract=2648825	This paper explains and discusses European Commission's "Recommendation on a New Approach to Business Failure and Insolvency".	EU
H Eidenmüller, K van Zweiten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16 European Business Organization Law Review 625 https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id2662213.pdf	In this paper, the authors critically review the "Restructuring Recommendation" (RR) and put it into the context of the reform of the EIR.	EU
F Javier Arias Varona, Johanna Niemi and Tuomas Hupli, 'Discharge and Entrepreneurship in the Preventive Restructuring Directive' (2020) 29 International Insolvency Review 8.	This article discusses the relationship between entrepreneurs and non-entrepreneurs in an insolvency situation and concludes that a fair interpretation of the new Directive requires that the situation of the ordinary person with liability for business debt be closely scrutinised.	EU

https://doi.org/10.1002/iir.1369		
Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Insolvency Review* 246. https://doi.org/10.1002/iir.1282	This article compares the Recast European Insolvency Regulation of 2015 with the UNCITRAL Model Law on Cross-Border Insolvency of 1997, focused on their scope of application, international jurisdiction and the coordination of main and secondary proceedings.	EU
Jan-Jaap Kuipers, 'Schemes of arrangement and voluntary collective redress: a gap in the Brussels I Regulation', (2012) 8 *Journal of Private International Law* 225. https://doi.org/10.5235/JPRIVINTL.8.2.225	The present article aims to analyse the position of English schemes of arrangement and Dutch voluntary collective redress in the framework of Brussels I.	Int'l
S. Bariatti, 'Party autonomy and internationality of the legal relationship: recent developments in the case law of the EU court of justice on the European Private International Law Regulations' in Derecho internacional privado europeo. Diálogos con la práctica" Valencia, Tirant Lo Blanch, 2020, pp. 189-207.	This Article explores party autonomy and internationality of the legal relationship in line with the recent developments in the case-law of the EU court of justice on the European Private International Law Regulations.	EU
CL Seah, 'The Re Tea Corporation Principle and Junior Creditors' Rights to Participate in a Scheme of Arrangement: A View from Singapore' (2011) 20 *International Insolvency Review* 161. https://ink.library.smu.edu.sg/sol_research/990	This paper examines the application of the principle derived from the Re Tea Corporation's case in recent schemes of arrangement to break negotiation deadlocks between senior and junior creditors of a financially distressed company.	Int'l
M Crystal QC and R Mokal, 'The Valuation of Distressed Companies: A Conceptual Framework Parts 1 and 11' (2006) 3 *International Corporate Rescue* 63 and 123; N Segal, "Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer?" (2007) 20 *Insolvency Intelligence* 49. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=877155	This article, addressed primarily to the parties to corporate reorganisation proceedings in the UK and their advisers, provides a conceptual framework within which questions such as, what should be done with the company's business, and how the value in the company's estate should be distributed amongst them, might be answered.	Int'l
J Payne, 'Debt Restructuring in English Law: Lessons From the United States and the Need for Reform' (2014) 130 *Law Quarterly Review* 282.	Article UK debt restructuring.	UK/ Int'l

Gerard McCormack, 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (London, INSOL International, October 2020). https://www.insol.org/account/login?ReturnUrl=%2fLibrary	Article on the permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19.	UK
Federico Mucciarelli, 'Not just efficiency: insolvency law in the EU and its political dimension', (2013) 14 European Business Organization Law Review 175. https://eprints.soas.ac.uk/16957/1/Not%20Just%20Efficiency%20EBOR%202013.pdf	This paper will show the difficulty of reform by addressing two alternative options to regulate cross-border insolvencies in the European Union.	EU
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