

European Insolvency Regulation

5. Scope of application and jurisdiction

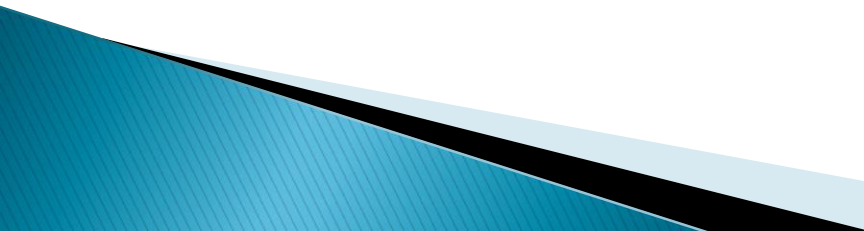
Dr Marek Porzycki



Scope of application: 'insolvency proceedings'

- ▶ Art. 1(1) EIR, Art. 2(1) and (4) EIR
- ▶ Elements of the traditional definition taken from the old EIR (1346/2000):
 - **collective** proceedings
 - based on the debtor's **insolvency**
 - entailing the partial or total **divestment** of the debtor
 - appointment of a **liquidator/insolvency practitioner** (→ Annex C/B)
- ▶ no limitations as to the person of the debtor → proceedings against consumers/non-entrepreneurs may also be included if provided for in national law
- ▶ list of insolvency proceedings in Annex A to the EIR

‘Insolvency proceedings’ – problematic issues under the old EIR (1346/2000)

- ▶ proceedings applicable to solvent but distressed debtors – e.g. French *sauvegarde*
 - ▶ varying degrees of the divestment of the debtor → the concept of ‘debtor-in-possession’
 - ▶ temporary liquidators listed in Annex C to the old EIR (cf. ECJ in Eurofood) → problem of „interim proceedings”
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Scope of application – changes in the recast EIR (2015/848)

- ▶ emphasis on rescue proceedings and „second chance” → changed wording of Art. 1(1) EIR
- „based on laws related to insolvency” instead of „insolvency proceedings”;
- reference to **plural purposes**: rescue, adjustment of debt, reorganisation or liquidation;
- reference to proceedings applicable in case of **likelihood of insolvency** → pre-insolvency proceedings also clearly included (see also recital 10 to the EIR);
- inclusion of both (i) proceedings involving a partial or total divestment of the debtor and appointment of an insolvency representative and (ii) proceedings involving control or supervision of the court over affairs and assets of the debtor → clear inclusion of „**debtor-in-possession**” schemes (see also definition in Art. 2(3) EIR).

Scope of application – changes in the recast EIR (2015/848)

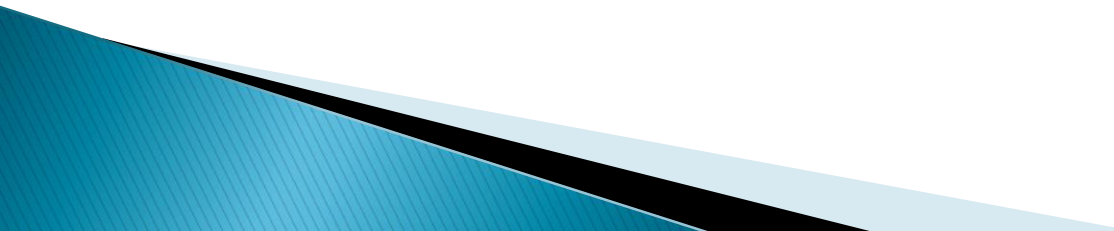
- ▶ **„public collective proceedings”** – both **judicial and administrative proceedings** (see recital 20 and definition of „court” in Art. 2(6)) but excluding confidential proceedings (recitals 12 and 13)
- ▶ including **interim proceedings** (Art. 1(1)(c), see also recital 11) (see also Eurofood case in a later presentation)
- ▶ expanded definition of **„collective proceedings”** (Art. 2(1)) → inclusion of proceedings involving a significant part of creditors (cf. „partial arrangement” under Polish Restructuring Law)
- ▶ the exhaustive list in **Annex A** has been maintained → the recast EIR is **applicable only to proceedings listed in Annex A** (see also recital 9)

Exclusion of proceedings against entities listed in Article 1(2) of the EIR

▶ Credit institutions:

- recognition of proceedings, conflict of laws – Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions + national implementing provisions (e.g. Articles 451–470 of the PL Bankruptcy Law for credit institutions)
- „**banking resolution**” (harmonisation of proceedings) – Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms + national implementing provisions (PL: Law of 10.06.2016 on the Bank Guarantee Fund, deposit guarantee scheme and compulsory restructuring)

Exclusion of proceedings against entities listed in Article 1(2) of the EIR

- ▶ Insurance undertakings – Articles 267–296 of Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) + national implementing provisions (e.g. Articles 481–482 of the PL Bankruptcy Law)
 - ▶ collective investment undertakings – national provisions of cross-border insolvency law (e.g. Articles 378–417 of the PL Bankruptcy Law)
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Scope of application: COMI in the EU

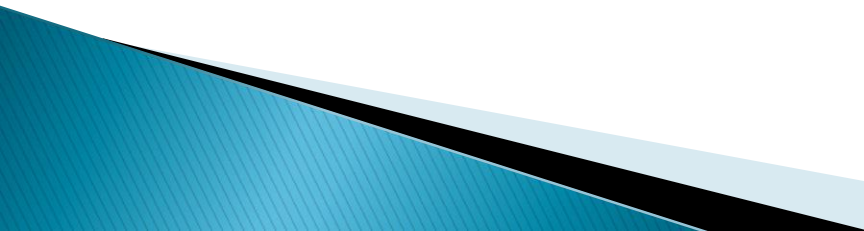
- ▶ centre of main interests (COMI) – defined in Art. 3(1) EIR, basis for jurisdiction under Art.3(1) EIR (see below)
- ▶ the EIR applies only to cases with COMI in the EU – mentioned in recital 25 to the EIR, results also from Art. 3.
- ▶ primacy of EU law → national law applies in cases outside the scope of the EIR
- ▶ national provisions on cross-border insolvency apply in cases where COMI is situated outside the EU or in Denmark
e.g. Articles 378–417 of the Polish Bankruptcy Law

Example

Bankrupt Inc., a company with COMI in the U.S. has an establishment in Vienna, Austria which coordinates sales across Central Europe. Bankrupt Inc. has an outstanding claim against a debtor in Poland for price of equipment sold by the establishment in Vienna. An Austrian court opens a *Konkursverfahren* against Bankrupt Inc. The Austrian liquidator wants to sue the Polish debtor before a Polish court and recover the outstanding amount.

Can the Austrian liquidator act before a Polish court?

Jurisdiction to open insolvency proceedings

- ▶ main insolvency proceedings – **COMI** of the debtor (Art. 3(1) EIR)
 - ▶ secondary/territorial insolvency proceedings – **establishment** of the debtor (Article 3(2) EIR) – see another presentation
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Center of main interests (COMI)

- ▶ Art. 3(1) EIR: The "centre of main interests" shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties
- ▶ objective: predictability for third parties (in particular creditors) → legal certainty → calculation of legal risk (see Virgos-Schmit, para. 75)
- ▶ special consideration for the perception of creditors (see recital 28 to the EIR)
- ▶ „interests” – include not only commercial, industrial or professional activities, but also general economic activities (Virgos-Schmit, para. 75)

COMI of legal persons

- ▶ **rebuttable presumption of COMI being in the place of the registered office (Article 3 (1) EIR)**
- ▶ **case of ‘letterbox companies’**
- ▶ **no particular rules for **groups of companies** → COMI to be assessed separately for each legal person. Control by parent/holding company often taken into account in order to achieve coordination of proceedings within the group → in some cases efforts at ‘substantive consolidation’ (but still separate proceedings against each legal person). [Art. 56–77 EIR: provisions on coordination of proceedings against companies in a group – see a later presentation]**

COMI of legal persons

- ▶ several factors to analyse – e.g. ‘mind of management’, ‘head office’ etc.
- ▶ a comprehensive assessment of all relevant factors needed (see CJEU in Interedil, taken over to recital 30 of the recast EIR)
- ▶ emphasis on the company’s actual centre of management and supervision and of the management of its interests, ascertainable to third parties (see CJEU in Interedil, taken over to recital 30 of the EIR)

an example of a thorough analysis of relevant factors: judgment of the English court for Quayside/Newcastle upon Tyne of 9.2.2005 opening insolvency proceedings against Parkside Flexibles S.A., a company of Polish law

COMI of legal persons – examples

1. A German businessperson established a limited company in The Netherlands because of a friendlier regulatory regime. The company is registered in Nijmegen but carries out its activities exclusively in Frankfurt where it is managed.
2. A French holding company has subsidiaries in several other Member States, incorporated as companies under local law. Main decisions concerning the subsidiaries are taken at the premises of the parent company in France, however day-to-day production activities of the subsidiaries take place in the states of their incorporation, where almost all assets and all employees of the subsidiaries are located.

COMI of natural persons

- ▶ no legal presumption in the old EIR
- ▶ Presumptions introduced in Art. 3(1) of the recast EIR, on the basis of the Virgos–Schmit Report:
 - for **traders/entrepreneurs/professionals** (individuals exercising an independent business or professional activity): **principal place of business.**

The presumption does not apply if the principal place of business has been moved to another Member State within 3 months prior to the request for the opening of proceedings.

- for **non-entrepreneurs/consumers: habitual residence**

The presumption does not apply if the habitual residence has been moved to another Member State within 6 months prior to the request for the opening of proceedings.

COMI of natural persons – examples

1. Jan Kowalski lives in Słubice, Poland and commutes daily to work as employee in a bicycle repair-shop BikeFix.de in Frankfurt an der Oder, Germany. He is employed on the basis of an employment contract under German law.
2. Jan Kowalski lives in Słubice, Poland and commutes daily to his own bicycle repair-shop BikeFix.de in Frankfurt/Oder, Germany. He is registered as an entrepreneur in Frankfurt/Oder.
3. Jan Kowalski lives in Słubice, Poland and commutes daily to work for BikeFix.de in Frankfurt an der Oder, Germany. In order to avoid the rigidity of German labour law, the owner of BikeFix.de told Jan to register in Frankfurt/Oder as an entrepreneur and concluded a contract for cooperation with him. Jan is paid an hourly rate and works mostly for BikeFix.de, where he spends between 15 and 20 working days per month.

Shifting the COMI under the EIR

- ▶ limitations intended to discourage „forum shopping” and fraudulent transfers of COMI
- ▶ Presumptions of Art. 3(1) EIR do not apply:
 - for companies and legal persons – if the registered office has been moved to another Member State within 3 months prior to the request for the opening of proceedings
 - for individuals exercising an independent business or professional activity (entrepreneurs/traders) – if the principal place of business has been moved to another Member State within 3 months prior to the request for the opening of proceedings
 - for other individuals (consumers/non-entrepreneurs) – if the habitual residence has been moved to another Member State within 6 months prior to the request for the opening of proceedings
- ▶ The presumptions do not apply but **the COMI definition alone still applies!**

ECJ/CJEU judgments (see student presentations)

- ▶ Eurofood, Case C-341/04, 2 May 2006
- ▶ Staubitz-Schreiber, Case C-1/04, 17 January 2006
- ▶ Interedil, Case C-396/09, 20 October 2011
- ▶ MH and NI v OJ and Novo Banco SA, Case C-253/19, 16 July 2020

note: please read full versions with grounds (indicated on the curia.eu website as „Judgment”)

Issues to be discussed:

- when are insolvency proceedings opened?
- ‘race to the court’
- shifting COMI during or before the proceedings
- possibility of review of a court decision on COMI and international jurisdiction

Additional reading

- the respective parts of the Virgos–Schmit Report
- R. Bork, K. van Zwieten, *Commentary on the European Insolvency Regulation*, 2nd ed., Oxford University Press, 2022, commentary to Art. 1 and Art. 3
- G. Moss, I. Fletcher, S. Isaacs, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, 3rd ed., Oxford University Press 2016, Chapter 3 – Scope and Jurisdiction, pp. 47–69
- R. Bork, R. Mangano, *European Cross–Border Insolvency Law*, Oxford University Press 2016, pp. 77–105 (paras. 3.01 – 3.64)
- judgment of the combined Court for Quayside and Newcastle upon Tyne of 9.2.2005 opening insolvency proceedings against Parkside Flexibles S.A

Additional reading in Polish (selection)

- ▶ F. Zedler, P. Filipiak, A. Hrycaj, Komentarz do rozporządzenia Rady (WE) Europejskie prawo upadłościowe. Komentarz, Wolters Kluwer 2011, commentary to Articles 1–3 of the old EIR
- ▶ M. Porzycki, Podstawa jurysdykcji krajowej w głównym postępowaniu upadłościowym, Kwartalnik Prawa Prywatnego 2008, nr 1, p. 219
- ▶ A. Hrycaj, Jurysdykcja krajowa w sprawach o ogłoszenie upadłości objętych zakresem zastosowania rozporządzenia Rady (WE) Nr 1346/2000 w sprawie postępowania upadłościowego, Wolters Kluwer 2011 [note: the most extensive publication available in Polish]