



# JCOERE

## Judicial Co-operation Supporting Economic Recovery in Europe

### Report 2

Report on Judicial Co-operation in  
Preventive Restructuring and  
Insolvency in the EU

*Substantive and procedural harmonisation,  
judicial practice and guidelines.*



INSOL  
EUROPE



UNIVERSITÀ  
DEGLI STUDI  
FIRENZE

Published September 2020

<https://www.ucc.ie/en/jcoere/>



# Judicial Co-operation Supporting Economic Recovery in Europe (JCOERE)

*DG Justice Programme Project No. 800807*

## Report 2: Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

*Substantive and procedural harmonisation, judicial practice and guidelines*



INSOL  
EUROPE



UNIVERSITÀ  
DEGLI STUDI  
FIRENZE



## Table of Contents

<b>Acknowledgments .....</b>	<b>11</b>
<b>I. Chapter 1: Judicial Co-Operation and Economic Recovery in Europe (JCOERE) Report</b>	
<b>2: Introduction .....</b>	<b>13</b>
1.1 Introduction .....	13
1.2 The European Project and Judicial Co-operation .....	14
1.3 A European Judiciary .....	14
1.3.1 Enforcing the Copenhagen criteria .....	15
1.3.2 The Tampere Council .....	16
1.4 Co-operation, Trust, Recognition, and Harmonisation .....	16
1.4.1 Co-operation and the EIR Recast 2015 .....	17
1.5 JCOERE Project Summary to Date .....	18
1.6 Framework of the Second Report .....	19
1.6.1 Engaging with the European Judiciary .....	19
1.6.2 Common and Civil Law cultures.....	21
1.6.3 Differences in qualifications and training.....	21
1.6.4 Independence .....	22
1.7 The Judiciary and Cross-border Insolvency Co-operation .....	22



The content of this document represents the views of the author only and is his/her sole responsibility.

The European Commission does not accept any responsibility for use that may be made of the information it contains.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).



1.8 Co-Operation Guidelines, Examples, and Experience .....	22
1.9 Chapter 2: Transition .....	23
<b>II. Chapter 2: Court-to-court and Judicial Co-Operation in the European Union .....</b>	<b>24</b>
2.1 Introduction to Chapter 2 .....	24
2.2 The European Insolvency Regulation and the Obligation to Cooperate .....	25
2.2.1 Introduction to the EIR and its Recast .....	25
2.2.2 EIR & EIR Recast: Cooperation obligations .....	26
2.2.3 The Evolution of the EIR Recast: European Union Institutions .....	31
2.3 EIR & EIR Recast: Cooperation Obligations and the Regulation of Groups of Companies .....	34
2.3.1 EIR & EIR Recast: Cooperation obligations for groups of Companies .....	34
2.3.2: EIR & EIR Recast: The regulation of proceedings for groups of Companies.....	36
2.3.3 The evolution of Chapter V: European Union Institutions .....	38
2.4 Conclusion and Transition .....	39
<b>III. Chapter 3: Potential Obstacles to Court-to-court Co-operation in Preventive Restructuring Cases.....</b>	<b>41</b>
3.1 Introduction .....	41
3.1.1 A summary of policy objectives relating to preventive restructuring .....	42
3.2 Obstacles Arising from Substantive Law: Findings from JCOERE Project Report 1 .....	44
3.2.1 The Member States contributing to the JCOERE Questionnaire and why .....	45
3.2.2 The contributors and their roles .....	46
3.3 The Classification of States – Our Perspective .....	46
3.3.1 Member States with robust restructuring processes: The Common Law countries .....	47

3.3.2 Civil Law countries with pre-existing rescue processes.....	48
3.3.3 Civil Law countries responding to the financial crisis.....	48
3.3.4 Innovator countries.....	49
3.3.5 Newer accession states.....	50
3.3.6 The Resisters .....	50
3.3.7 Outliers.....	51
3.4 Harmonisation and Co-operation.....	51
3.5 Procedural Obstacles: Findings from JCOERE Project Report 1 .....	52
3.5.1 Rights in Rem .....	52
3.5.2 Constitutional issues – public hearings.....	53
3.5.3 Co-operation: Statute, judge-made protocol or guideline? .....	55
3.5.4 Court or administrative authority?.....	57
3.5.5. Court or administrative authority: Case law.....	57
3.6 Workers.....	59
3.7 Further Obstacles.....	60
3.7.1 Liability for non-co-operation .....	60
3.7.2 Effect of non-co-operation .....	60
3.7.3 Practitioner resistance .....	61
3.8 Observations from the European Judiciary.....	62
3.8.1 The nature of insolvency.....	62
3.8.2 Procedures and protocol .....	63
3.9 Conclusion and Transition.....	65
<b>IV. Chapter 4: Influences of Judicial and Legal Culture in Europe.....</b>	<b>66</b>
4.1 Introduction .....	66

4.2 Mutual Trust and the Rule of Law in the EU.....	67
4.3 The Influence of Legal Culture on Rule of Law Principles: Common Law and Civil Law Traditions .....	70
4.3.1 Judicial culture and legal origins .....	71
4.3.2 Legal culture and the judicial role.....	72
4.4 Creating a European Judicial Culture – Networks and Training.....	74
4.4.1 Harmonising judiciaries through training and the European Judicial Training Network .....	74
4.4.2 Judicial training and mutual trust .....	76
4.4.3 Protecting the rule of law through shared knowledge and values .....	76
4.5 Challenges to Judicial Independence in the EU.....	78
4.6 European Judicial Education and Qualification.....	80
4.7 Towards Resolving Challenges to Judicial Co-operation.....	87
4.8 Conclusion and Transition.....	89
<b>V. Chapter 5: Judicial Co-Operation in Restructuring Processes .....</b>	<b>91</b>
5.1 Judicial Co-Operation in Cross-Border Restructuring.....	91
5.2 Foundation of the European Approach: Recognition of Proceedings under the European Insolvency Regulation 2000 and the EIR Recast 2015 .....	92
5.2.1 Foundations of the European approach: The co-operation obligations .....	93
5.2.2 Foundations of the European approach: Some issues surrounding co-operation .....	95
5.3 The European Approach: Developing an Obligation to Co-operate in Restructuring .....	96
5.3.1 Combining the EIR Recast and the new focus on restructuring .....	97
5.3.2 The classification of rescue as an insolvency proceeding .....	100
5.3.3 Rescue proceedings that are not included in the EIR Recast .....	100

5.4 Beyond Recognition to a Broader Understanding of Co-operation .....	101
5.4.1 The nature of the action: Enforcing rights or a collective bankruptcy proceeding? .....	104
5.4.2 Specific actions, rules and exceptions to co-operation in an insolvency and restructuring context .....	106
5.4.3 The invocation of exceptional rules.....	109
5.4.4 The public policy exception in the EIR Recast.....	110
5.5 Conclusion and Transition.....	110
<b>VI. Chapter 6: Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation.....</b>	<b>112</b>
6.1 Introduction .....	112
6.2 The Sharing or Obtaining of Information and Disclosure Requirements.....	113
6.2.1 The Model Law: The sharing of information between courts and cooperation ..	114
6.2.2 The ALI-III Global Principles: Disclosure duties and sharing of information .....	116
6.2.3 The World Bank Principles: Access to information about the Debtor.....	117
6.2.4 The JudgeCo Principles and Guidelines: Disclosure and harmonisation of the proceedings.....	118
6.2.5 The CoCo Guidelines: The right to obtain information in a cross-border insolvency scenario.....	118
6.3 Asset Coordination.....	119
6.3.1 The Model Law: Stay on individual actions and relief .....	119
6.3.2 The ALI-III Global Principles: Coordination and value maximisation.....	120
6.3.3 The World Bank Principles: Stay of actions to ensure higher recovery.....	121
6.3.4 The JudgeCo Principles and Guidelines: Moratorium and agreement from other insolvency practitioners.....	122
6.3.5 The CoCo Guidelines: Asset coordination and cooperation between insolvency practitioners.....	122
6.3.6. The ELI Report: The need for a coordinated strategy.....	123

6.4 The Mechanism of Cooperation and Communication .....	123
6.4.1. The Model Law: Cooperation and agreements concerning the coordination of proceedings.....	124
6.4.2 The JudgeCo Principles and Guidelines: Communication and precautions .....	125
6.4.3 ALI-III Global Principles: The need for informal ways to communicate and cooperate .....	126
6.4.4 The CoCo Guidelines: Direct communications and cooperation between insolvency practitioners.....	127
6.4.5. The ELI Report: The inclusions of guidelines and best practices in the protocols .....	127
6.5 The Mechanism of Notification or Service of Official Documents .....	128
6.5.1. The Model Law: Notification to foreign creditors .....	128
6.5.2. ALI-III Global Principles: Electronic notices and service list.....	129
6.5.3. The JudgeCo Principles and Guidelines: The ‘sufficient’ notice and the online registry .....	130
6.5.4. The CoCo Guidelines: Notices of court hearings and court orders .....	130
6.6 Conclusion.....	131
<b>VII. Chapter 7: Comparative Analysis of Co-operation in Other Federalised Systems: The United States .....</b>	<b>133</b>
7.1 Introduction.....	133
7.2 Forum Shopping and Court Cooperation in the United States .....	134
7.2.1 The idiosyncrasies of the United States bankruptcy regime .....	134
7.2.2 Forum determination in the USA.....	137
7.2.3 European parallels .....	140
7.2.4 American cases on forum determination or transfer .....	140



Polaroid 2001 .....	140
Enron (2002) .....	142
General Motors (GM) Case (2009).....	144
7.3 Coordinating Proceedings in other Cooperative Paradigms .....	147
7.3.1 Maxwell.....	148
7.3.2 Nortel .....	149
7.3.3 Blackwell .....	149
7.3.4 Nakash.....	149
7.3.5 Lehman.....	151
7.3.5 Limitations of the United States’ approach to cross-border co-ordination .....	151
7.4 Competition in the International Restructuring Forum Context .....	152
7.5 Comparing Co-operation in the US with the EIR Recast.....	153
7.5.1 Comparing procedural co-ordination .....	153
7.6 Conclusion and Transition.....	154
<b>VIII. Chapter 8: JCOERE Focus Group Survey on Judicial Cooperation Guidelines Awareness, Use, and Recommendations .....</b>	<b>156</b>
8.1 JCOERE Survey of Judicial Practice: Introduction and Methodology.....	156
8.2 Observations from the Judicial Survey.....	157
8.2.1 Judicial experience with co-operation.....	157
8.2.2 Awareness and use of co-operation and communication guidelines .....	159
8.2.3 Desired access to information .....	162
8.2.4 Judicial training requirements .....	163
8.3 Analysis of and Reflection on the Results.....	165
<b>IX. Chapter 9: Reflections, Conclusions, and Recommendations of the JCOERE Project .....</b>	<b>167</b>
9.1 Introduction: The JCOERE Research Project.....	167

9.2 The Preventive Restructuring Directive.....	167
9.2.1 Methodology.....	168
9.2.2 Different approaches to preventive restructuring in the EU.....	168
9.3 The EIR Recast 848/2015.....	169
9.4 Co-operation as a Separate Concept from Recognition .....	170
9.5 Co-operation and the European Judiciary.....	170
9.6 UNCITRAL Model Law and Guidelines.....	171
9.7 Cross Border Insolvency?.....	172
9.8 Some Future Trends.....	173
9.9 Conclusion.....	173
<b>Annex I: Documents presented at Judicial Wing Meeting at INSOL Europe Annual Congress in Copenhagen. ....</b>	<b>175</b>
<b>Annex II(a): Survey of Judicial Practice in Cross-Border Restructuring Cases - Co- Operation and Communication .....</b>	<b>181</b>
<b>Annex II(b): Sondaj privind practicile judiciare în cazurile de restructurare transfrontalieră - Cooperare și comunicare.....</b>	<b>193</b>
<b>Annex II(c): Questionario sulle prassi giudiziarie in tema di insolvenza transfrontaliera - Cooperazione e comunicazione .....</b>	<b>206</b>
<b>Annex III: Chapter 6 - Additional Guidelines.....</b>	<b>218</b>
The ADB Standards: The sharing of information about the debtor .....	218
The ADB Standards: Stay in the context of a reorganisation .....	219
CODIRE: The need for adequate and updated information .....	219
CODIRE: The role of professionals to maximise the value of the assets .....	221
ACURIA: Disclosure and transparency .....	221
<b>Annex IV: Bibliography.....</b>	<b>224</b>

## Acknowledgments

We extend our sincere thanks to all of our partner teams and their leaders, Dr Paul Omar and Caroline Taylor at INSOL Europe; Professor Lorenzo Stanghellini, Professor Andrea Zorzi, Dr Iacopo Donati, and Niccoló Usai at Università degli Studi di Firenze in Italy (UNIFI); and Judge Nicoleta Nastasie, Dr Cristian Drăghici, Professor Ioana Panc, Professor Smaranda Angheni and Ioana Duca at Universitatea Titu Maiorescu (UTM) in Bucharest, Romania for their unyielding support and hard work on the JCOERE project. In particular, we are extremely grateful to the project team at UNIFI for their skilled research and work on Chapter 6 of this Report.

We are also extremely grateful to our Advisory Board members, the Honourable Judge Michael Quinn and his judicial assistant Lorna Reid, Adjunct Professor Jane Marshall, Professor Gerry McCormack, Dr Emilie Ghio, Declan Walsh and Judge Anthony Collins, all of whom have generously provided their time and assistance to the Project and the production of Report 2.

An important aspect of the research for Report 2 was facilitated through the distribution of a judicial survey, the completion of which would not have been possible without the generous assistance of a number of people in facilitating contact with European judiciary.

The JCOERE Project Team would like to express its gratitude to the Honourable Judge Michael Quinn of the Irish High Courts and Lorna Reid for facilitating the contact with both the INSOL Europe Judicial Forum and the group of Irish judges hearing commercial cases in Ireland.

We would also like to express our gratitude to Professor Lorenzo Stanghellini of UNIFI for facilitating the contact with the network of Italian Judges.

We would also like to express our gratitude to Judge Nicoleta Mirela Nastasie of the Bucharest Tribunal for facilitating the contact with the network of judges among the Romanian Magistracy.

We are extremely grateful to all of the judges from the INSOL Europe Judicial Forum, the Irish Judiciary and the Italian and Romanian Magistracies who took the time to complete the survey. We were delighted with the engagement that we received from you and your contribution to the Project cannot be understated.



The content of this document represents the views of the author only and is his/her sole responsibility.

The European Commission does not accept any responsibility for use that may be made of the information it contains.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

Finally, we extend our sincere gratitude to our national country report contributors Dr Emilie Ghio and Dr Paul Omar (France), Gert-Jan Boon (The Netherlands), Dr Antonio Sotillo Marti and Javier Vercher, with additional input from Professor Nuria Bermejo and Professor Francisco Garcimartin (Spain). Dr Susanne Fruhstorfer (Austria), Sylwester Żydowicz with additional input from Michał Barłowski (Poland), Professor Dr Stephan Madaus (Germany), and Assistant Professor Line Langkjær (Denmark) who have responded so generously to our follow up queries from the research pertaining to Report 1 and the accompanying questionnaire.

Professor Irene Lynch Fannon, Principal Investigator, Dr Jennifer L. L. Gant, Post-Doctoral Researcher, Aoife Finnerty, Research Assistant and Molly O'Connor, Project Manager