MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
BUSINESS LAW DEPARTMENT

JŪRATĖ RANDYTĖ
EUROPEAN AND INTERNATIONAL BUSINESS LAW

RULES ON JURISDICTION IN CROSS-BORDER INSOLVENCY PROCEEDINGS WITHIN THE EU

Master thesis

Supervisor:
Prof. Dr. Rimvydas Norkus

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LIST OF ABBREVIATIONS

COMI - Centre of Main Interests

ECJ - European Court of Justice

EIR/European Insolvency Regulation – Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings

Virgos/Schmit Report – Virgos M., Schmit E. *Report on the Convention on Insolvency Proceedings*. DRS 8 (CFC)

Heidelberg/Vienna Report - Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4

EU - European Union

UK – United Kingdom

INTRODUCTION

Statement of the topic. Since European Union has provided its members the common market, businesses and corporations started to move across borders and incorporate abroad for many reasons: more beneficial taxation systems and laws, bigger markets, or just for expansion of business by moving out from domestic market. It became a common practice to register a company in one country while the place of performance of main activity is in another and the creditors are in the third one. Unfortunately, the reality is that the business is not always successful and brings benefit, sometimes unexpected situations occur and companies face some serious problems causing insolvency or even bankruptcy. In such situations it is very important that legal rules concerning commencement of insolvency proceedings would be well defined, clear, easily understandable and applicable in order to ensure quick and effective judicial process.

Insolvency proceedings carried out between two or more states are regulated by uniform rules entrenched in The Regulation on Insolvency[1] concerning rules on jurisdiction, applicable law and recognition of foreign judgments. This Master thesis is concerned exceptionally on jurisdictional rules, leaving aside the latter two. Furthermore, considerable attention is to be paid for the currently prepared Recast of Insolvency Regulation – it shall provide more clear definitions, solve divergent interpretation of specific articles and as a result guarantee easier application of legal act. Thus, the main issues of applicability of jurisdiction rules have to be indicated and analyzed through relevant case law and legal doctrine. Furthermore, amended rules of the Recast regarding jurisdiction have to be examined with an evaluation if it can be considered sufficient to eliminate previously indicated issues and guarantee more effective application of jurisdiction rules between Member States.

It is noteworthy that the cases with cross-border element require that the center of main interests (thereinafter - COMI) of an insolvent company would be properly indicated. Concerning the determination of COMI of great importance is that the term would be clearly understood and uniformly used. When the company performs its functions or owns assets in two Member States or even more the situation becomes complicated and demands further

[1] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000.

investigation. The Regulation itself gives very little guidance in this respect (it only specifies where COMI is presumed to be but not what it is) and only recitals of the Regulations can provide a little explanation which is of only limited assistance. Concerning this matter attention has to be paid to the development of COMI definition throughout ECJ practice analyzing the cases of *Staubitz-Schreiber*[2] – the first ECJ decision on COMI, its further determination in *Eurofood*[3], *Interedil*[4] with its final clarification in *Rastelli*[5]. Member State's national case law determining the notion of *"center of main interests"* will be also taken into consideration in order to provide as clear as possible understanding of the definition. Moreover, until the Recast of Insolvency Regulation, rules identifying the place of COMI of individuals were not defined and it has led to the application of national laws of the Member States concerning this matter and provoking a legal uncertainty and decreasing uniformity. Another problematic aspect is the COMI of group of companies – lack of a specific framework for group insolvency in the current text of Insolvency Regulation constitutes an obstacle dealing with the insolvency of multi-national groups of companies. Accordingly, in the Master Thesis will also be examined how properly to determine jurisdiction in such situation and what improvements towards this matter is made in the Recast of Regulation.

Increased incidence of cross-border movements of companies have also encouraged controversial phenomenon of migration across borders in order to profit from more favorable insolvency regime. In practice these actions are referred to as *forum shopping* or *COMI shifting* and even though the Regulation firmly requires avoid phenomenon of forum shopping in order to maintain proper functioning of an internal market, the real situation is much more complex. Legislators, courts and legal scholarships react with suspicion when debtors cross the border only to profit from a different insolvency law system. The most prominent legal tool, the European Insolvency Regulation, is based on the assumption that forum shopping is harmful for the functioning of the European Internal Market. One of the objectives set in this Master thesis is to question this hostile attitude that the Regulation has towards forum shopping. In addition to this, the author will examine (if there can be any) controversial arguments emphasizing positive effects of forum shopping. Moreover, there will be analyzed balance between right of

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[2] Case C-1/04, Susanne Staubitz-Schreiber [2006] ECR I–701.

[3] Case C-341/04, *Eurofood IFSC Ltd [2006] ECR I-3813.*

[4] Case C-396/09, *Interedil Srl v Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-9915.

[5] Case C-191/10, *Rastelli Davide e C. Snc v Jean-Charles Hidoux* [2011] ECR I-13209.

establishment which cannot be restricted for businesses in the European Union and *forum shopping* trying to draw a line between these two definitions, distinguishing legal and illegal actions concerning COMI shifting.

Finally, before amendment of The Regulation there was no clearly set mechanism concerning revision of proper application of jurisdiction rules and competence of the court handling the case. There existed only the obscure rule stating that the court which is handling the case shall examine its own jurisdiction over this matter. Uncertain definition of COMI and lack of clear mechanism how to indicate it, have led to a situation of conflicts of jurisdiction. This situation appears when courts of both states declare themselves competent to carry out the proceedings because of the subjective notion of COMI[6]. In the Thesis there will be provided overview and evaluation of currently changing situation, specific articles in The Recast of Insolvency Regulation concerning this matter and clarifying supervision mechanism as well as possible consequences of its violation.

The object of Master Thesis is articles of European Insolvency Regulation and its Recast determining jurisdiction and its application practice.

Scientific Research problem is lack of clarity in definition of rules for proper indication of jurisdiction in cross-border insolvency proceedings which makes impossible to ensure uniform applicability of such rules between Member States.

Relevance. As newly prepared amendment of European Insolvency Regulation has a purpose to eliminate earlier indicated and existed issues on application of jurisdiction rules, there is not yet any legal doctrine providing evaluation of the Recast and its plausible effectiveness. This Master Thesis will provide general overview of the amendments made towards rules on jurisdictions and assess whether it is likely to eliminate main concerns existed in primary Insolvency Regulation.

Scientific novelty. Even though rules on jurisdiction on European Insolvency Regulation and problems of its applicability among Member States were analyzed before this Master Thesis by several researchers, it has never been done yet in the light of the Recast of Regulation. Newly formed text of the Recast will be assessed through analysis of ECJ case law and its contribution for preparation of the amended rules emphasizing why previous version of

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[6] Maslin J.P., *The effectiveness of European Cross-Border Insolvency Regulation as a Tool Against Forum Shopping*, Working Paper. [interactive] 2010, p.14 [accessed 2015-03-04] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539391>.

certain rule was not effective and if amendment of it is likely to eliminate all factors which interferes with proper application of jurisdiction rules.

Review of the literature. The Master Thesis will be based first of all, on articles and recitals of Insolvency Regulation and its Recast, also scientific research papers and articles of such authors as B. Wessels, P. Oberhammer, T. Pfeiffer and others who analyzed various topics on jurisdiction in insolvency proceedings. In addition, one of the main sources will be documents of European Commission: legislation, commentaries, communications and etc. Exceptional importance is given to European Commission's acts because the topic have to be analyzed in the light of European Union, moreover, there will be used ECJ case law for deeper and more detailed analysis of the topic. For general information there will be also used several legal books, such as Fletcher F. "Insolvency in private international law", Abbott K., Pendlebury N. "Business Law", Soriano V., Alférez F., "The European Insolvency Regulation: Law And Practice" and others.

Significance of the Master Thesis will reflect in given evaluation of newly prepared Recast of Insolvency Regulation concerning rules of jurisdiction. It will help to understand the significance of incentive to amend the primary text of the Regulation in the light of development of European Insolvency Law in general. In addition to this, Master Thesis will provide basic guidelines for future researchers who aim to investigate rules on jurisdiction in the light of Recast of Insolvency Regulation.

The aim of Master Thesis is to analyze the case law and identify main problems of application rules on jurisdiction among EU, compare rules of Insolvency Regulation Recast with currently existing ones and determine how (if) the amended articles could solve indicated issues of application. By indicating the differences it will be possible to spot existing problems of application and answer if new amendment is likely to solve these problems. Besides this, there will be analyzed development of certain rules on jurisdiction in ECJ case law in order to indicate the degree of influence made to the amended articles on jurisdiction. Consequently, proportionate attention will be paid to examine existing supervision mechanism for proper applicability of jurisdictional rules and how it can be improved to function effectively.

The tasks of the Master Thesis:

1. To analyze articles of Insolvency Regulation concerning rules on jurisdiction in cross-border cases and compare them with articles of the amendment of the Regulation.
2. By analysis of ECJ case law to indicate main problems of application of jurisdiction rules entrenched in the Insolvency Regulation.

3. To analyze cases of the Member States related to jurisdiction issues.
4. To indicate main concerns of application of jurisdiction rules in EU and national level and evaluate whether the recast of Insolvency Regulation is able to resolve and eliminate them.
5. Give recommendations for further development of jurisdiction rules in the landscape of European Insolvency law.

The defended hypothesis of the Master Thesis is that the Recast of Insolvency Regulation eliminates previously existed concerns regarding rules on jurisdiction, clarifies divergent or uncertain definitions and creates effective mechanism for supervision and control of proper jurisdictional rules application among Member States of the European Union.

The methods of analysis of this Master Thesis are the analytical method, the logical method, comparative method and case analysis method. Due to significance of practical applicability of EIR rules the leading methods of analysis of this Master Thesis will be the case-analysis and comparative method. Therefore, by identifying any problems of applicability of the articles of EIR, they will be compared to new articles of amended regulation by analyzing if they are likely to eliminate obstacles for divergence in interpretation and application of them.

The structure of the Master Thesis is comprised of an introduction, three main chapters and conclusions.

In the first chapter there will be given general overview of cross-border insolvency, short analysis of Insolvency Regulation as a main legal act for such proceedings in EU and the importance of proper application of jurisdiction rules.

Second chapter divided into two subchapters will provide first of all, analysis of rules on jurisdiction in main insolvency proceedings between EU and indicate main concerns arising in the Member States related with determination of COMI (of companies and private individuals) and the phenomenon of *forum shopping.* Second subchapter will contain analysis of issues indicating jurisdiction for secondary insolvency proceedings and convergent understanding of *establishment* among Member States.

In the third chapter attention will be paid for the clarification of supervisory mechanism for proper application of jurisdiction rules and indication of competent court for cross-border cases among Member States. There will be analyzed what is currently existing mechanism and how it is going to be changed after the amendment of Insolvency Regulation.

1. UNDERSTANDING CROSS-BORDER INSOLVENCY

Insolvency law within European countries became of the great importance in past decade. Start of economic crisis has led number of big and medium enterprises to bankruptcy. According to The Recommendation of European Commission "from 2009-2011, an average of 200 000 firms went bankrupt per year in the EU. About one-quarter of these bankruptcies have a cross-border element. About 50% of all new businesses do not survive the first five years of their life. 1.7 million jobs are estimated to be lost due to insolvencies every year"[7]. Because of legal regime of European Union encouraging business incorporation in the Member States of EU there have arisen a number of cases containing cross-border proceedings which require a special legal regime and particular knowledge of legal theory in order to apply such laws properly.

Cross-border proceedings appear in situations where either assets of a company are located in different jurisdictions or creditors are from different jurisdictions or law of different jurisdictions is applicable. The term "cross-border insolvency" defines those situations when assets (or debts) of a debtor are located in more than one state or when a debtor is a subject of more than one state jurisdiction[8]. The fundamental definition provided in Article 1 (1) corresponds to traditional concept of insolvency associated with lack of liquidity or negative balance sheet of the debtor unable to meet his financial obligations. Under that concept, insolvency proceedings mainly concentrate on distribution of assets towards the creditors and the restructuring of businesses facing financial difficulties.[9] The Insolvency Regulation does not give a distinct definition and leaves it to national law to determine whether the proceedings listed in Annex A (which are characterized as insolvency proceedings) falls within the Regulation. In contrast, the proceeding which by the member state is defined as insolvency proceeding but not listed in the Regulation falls outside the scope.

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[7] Communication from the Commission to the European Parliament, The Council and The European Economic and Social Committee. *A new European approach to business failure and insolvency* [interactive]. Strasbourg, 2012, p.1. [accessed 2015-02-25]. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0742&from=en>.

[8] Israel J. *European Cross-Border Insolvency Regulation*. Antwerpen-Oxford: Intersentia, 2005. p.8

[9] Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4 [interactive]. [accessed2015-03-22]. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

However, due to changed economic situation the perception of insolvency proceedings changed as well. Member States started to consider incorporation of "second chance" for failing companies giving exceptional importance for restructuring and discharge of insolvent companies the notion of pre-insolvency proceedings has been included in their national law. The Heidelberg Report[10] emphasizes that almost two-thirds of Member States already have such proceedings and the main concern about these proceedings is that they do not fall under the scope of the Regulation. Consequently, there occurs a situation, that effects of such proceedings cannot be recognized and enforced among the EU. As a result, foreign creditors could continue with individual enforcement action towards the insolvent company and would be less willing to agree with on negotiations for restructuring or give consent to rescue plans[11]. During the preparation of Recast of Insolvency Regulation these factors obviously were taken into account and as a result the Recast provides definition of cross-border insolvency proceedings in much broader sense. It also includes actions deriving directly from insolvency proceedings[12] as well as "bankruptcy, proceedings relating to winding-up of insolvent company, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings"[13]. Finally, the Recital 10 declares that proceedings aiming to promote rescue of economically viable but distressed businesses should also fall under the scope of Regulation as well as proceedings of restructuring when there is only a likelihood of insolvency. Thus, it can be assessed that the Recast extended the prior notion of Insolvency proceedings including also pre-insolvency proceedings under its scope in order to promote possibility of business rescue. Further recitals even more extends the scope of insolvency proceedings falling

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[10] Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4 [interactive]. [accessed2015-03-22]. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

[11] *Executive Summary of the Impact Assessment, Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings.* Commission Staff Working Document. [interactive]. Strasbourg, 2012 [accessed 2015-04-21]. <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[12] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, recital 6. 16636/5/14 REV 5 [interactive]. [accessed: 2015-04-21].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[13] *Ibid.* recital 7.

under the Regulation, including interim proceedings[14] and those which are triggered by situations where the debtor faces non-financial difficulties if they can give any probability for insolvency in the future[15].

Despite the necessity to clearly define what falls under the scope of insolvency proceedings, what is even more significant in cross-border insolvency - proper applicability of jurisdiction rules. Not considering its main function to indicate in which of the Member States insolvency proceedings will be carried out, there is more aspects emphasizing the relevance of application of such rules. First of all, insolvency proceedings are governed by the law of the state where it was opened, thus, if proceedings would be carried out in different Member States it can result in different outcome. Furthermore, the judgment commencing the main insolvency proceedings is followed by the obligation for other Member States of automatic recognition from the date of entering into force in home state with no further formalities and no right to question competence of the court seized. Finally, the administrator the main proceedings may exercise his rights among all related EU member states, including repatriating assets[16], registering the judgment[17], and publishing notice in member states and such effects may only be challenged in the home court for the main proceedings[18].

As among European Union there is one consolidated law but each Member State has also its own national rules and case law, it is difficult to ensure that in each state the same law would be understood and applied in the same way.

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[14] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, recital 15. 16636/5/14 REV 5 [interactive]. [accessed: 2015-04-21].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[15] *Ibid.* Recital 17.

[16] See Insolvency Regulation art. 18 (1).

[17] See Insolvency Regulation art. 22.

[18] Bufford S., International Insolvency Case Venue in the European Union: The Paramalat and Daisytek Controversies [interactive]. *The Columbia Journal of European Law* 2006 Vol. 12, No. 2 [accessed 2015-04-10]. <http://iiiglobal.org/component/jdownloads/finish/39/4046.html>.

1.1. Regulation on Insolvency as a main law for cross-border insolvency within EU and its Recast

This Chapter will examine main principles concerning Insolvency Regulation and provide with short overview of legal development towards the Recast of Regulation. Moreover, there will be presented main principles under which is based whole Insolvency Regulation and its functioning. The seconds subchapter will analyze commonly arising situation of conflicts of jurisdictions between different Member States – main factors which lead to such situation, what consequences can cause conflicts of jurisdictions in insolvency cases with cross-border element and what could be done to prevent it.

National insolvency laws are often not designed to cope with cross-border insolvencies and any problems that arise whether jurisdictional or practical. This makes it difficult to administer such insolvencies both quickly and effectively and any conflict in respective national laws can result in the dissipation of assets and the loss of a potential opportunity to rescue a viable business. Such uncertainties can be a barrier to trade and can have a negative impact on the flow of investment between countries.[19]

The European Insolvency Regulation is the product of many years of reflection and a significant development in the way states approach insolvency law.[20] On 31 May 2002, the EC Regulation on insolvency proceedings entered into force.[21] In the years since its entry into force the EIR has more than met expectations, as evidenced by a rich judicial practice which has been able, with its help, to solve the conflicts which arise when a person becomes insolvent and defaults generally in the cross-border market.[22] It facilitated strong grounds for legal cooperation between courts of the Member States as well as improved legal certainty in cross-border cases.

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[19] Fletcher F. *Insolvency in private international law*. Supplement to second edition. Oxford: Oxford University Press. 2007, p.78.

[20] Piñeiro L. *Towards the reform of the European Insolvency Regulation: codification rather than modification*. [interactive]. Nederland Internationaal Privaatrecht (NIPR), 2014, 2: 207-215. [accessed 2015-02-17]. <http://ssrn.com/abstract=2482014>.

[21] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000.

[22] Wessels B, *Revision of the EU Insolvency Regulation: What Type of Facelift?* [interactive]. 2011 [accessed 2015-02-18]. <www.eir-reform.eu/uploads/papers/PAPER%205-1.pdf>.

During more than ten years of application of the Regulation legal scholars and practitioners indicated various problems concerning its scope, uncertain definitions of main terms leading to improper application of specific articles, lack of supervising mechanism of such rules' applicability. Indication of various drawbacks of the existing regulation, change of political and economic environment and development in national insolvency law have encouraged the European Commission to take actions in order to improve the text of it and eliminate existing problems of application.

Discussing the main factors which existence requires revision of current text of the Insolvency Regulation, first of all modernization of national insolvency law has to be taken into account. As stated in the earlier subchapter, besides traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, various pre-insolvency or hybrid schemes have been put in place. These were perceived as protecting the debtor from his creditors and also allowing business to continue its operation. Furthermore, there was significant changes made in economic environment and companies as they started to incorporate in international groups (parent and subsidiaries), which apply corporate governance rules and have access to capital in the global financial markets, not mentioning that small businesses increasingly establish and operate without borders. Consequently, companies between EU have to adapt to dynamic business environment (globalization, relocation of businesses, financial crisis), which increases the risk of financial difficulties. Another issue which signifies the necessity of revision of the Regulation is that case law and many academic publications indicated specific difficulties in the application of it, concerning complex indication of balance between the universality of the debtor's insolvency and the territoriality of proceedings, the variety and disparity of national laws resulting, for example, in different consequences for creditors and the limited possibility of coordination of the proceedings.[23] These factors were the first call for initiating amendment of existing Insolvency Regulation which encouraged discussions what should be done in order to adapt the application of regulation to modernized economic and legal environment.

Main areas regarding amendment of the Regulation is related to (1) scope, (2) jurisdiction, (3) secondary proceedings (4) publicity of proceedings and lodging of claims (5) groups of

[23] European Commission. *Consultation on the future of European Insolvency Law*. [interactive]. 2012 [accessed 2015-03-04]. <http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm>.

companies.[24] These are considered as the main elements concerning the Recast of Regulation where the most important drawbacks were indicated during the years of application of Regulation restricting the Articles being applied in most effective way.

Regarding the extension of the Insolvency Regulation‘s scope and its application not only to insolvency proceedings is already explained above. This amendment will encourage to rescue economically unstable businesses to recover and to avoid going bankrupt. Second chance for enterprises is perceived as a tool to maintain economic stability and preserve jobs for people.

Further, the Recast of Regulation maintains the concept of “center of main interests” ("COMI") and also introduces provision determining COMI of individuals. The concept of COMI is clarified, the modifications proposed will be able to ensure that the COMI test is consistent with the case law developed by the European Court of Justice since 2002. The proposed Regulation also provides measures to prevent abusive forum shopping, courts should, in accordance with their own proceedings, properly verify that the debtor's COMI is indeed located within their territory. The prepared amendments is perceived increase legal certainty and ensuring uniformity of application of relevant rules during the insolvency proceedings.[25] Also, the Recast includes provisions requiring establishing insolvency registers, which already exist in many Member States, in order to ensure sharing of information between Member States easily in timely manner.

Moreover, important changes are being made in regard of group of companies entrenching jurisdiction rules in case of insolvency of such groups as it was not included in primary Insolvency Regulation. Lack of a specific framework for group insolvency created obstacles to the efficient administration of the insolvency of members of a group of companies.[26] To this respect, the Recast Regulation retains the entity-by-entity approach to the insolvencies of group companies[27] defining rules how to identify COMI of each subsidiary. It is emphasized in the Recast that such improvements first of all are made to help creditors – existing clear rules defining the mechanism

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[24] Wessels B. *Recast European Insolvency Regulation. An Introductory Analysis* [interactive]. 2015 [accessed on 2015-03-04]. <http://bobwessels.nl/wp/wp-content/uploads/2015/03/2015-02-18-EIR-Recast-ppt-copy.pdf>.

[25] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings.First reading, Orientation debate [interactive]. 2012/0360 (COD) 2014, p.5. [accessed 2015-03-05]. <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/507499/IPOL-JOIN_NT%282013%29507499_EN.pdf >.

[26] *Ibid.* p.6.

[27] *Ibid.*

how to identify state of debtor's COMI would help to ensure higher level of creditor's rights protection.

All mentioned spheres for improvement are foreseen as being effective and sufficient in order to improve insolvency proceedings carried out between two or more Member States. It is still questionable if all the main concerns related to European Insolvency Regulation were clearly indicated and will not cause even greater issues of applicability and effectiveness on insolvency cases. The European Council is due to adopt the regulation in March 2015 and the European Parliament in April or May 2015. The majority of the provisions will, however, not take effect for another two years, April or May 2017[28]. It is still a long way to actual application of amended Regulation and is still not possible to predict accurate results of it. It could be identified only through practice and its application what means that legal researchers and practitioners are not able to foresee future problems that will arise, only by analysis of the Recast's text. It might solve some previously existed and indicated issues and make an essential influence to the development of European insolvency law, but it will be examined in the next chapter of the Master Thesis.

1.2. Concepts of jurisdictions under the EU Insolvency Regulation

Since undertakings more and more operate without borders, insolvency of such undertakings also influences functioning of the internal market. According to Recital 3 of the Insolvency Regulation there is necessary to coordinate measures which are taken in regard to insolvent debtor's assets. Most of such cases include instances where the debtor owns assets in several Member States or where a part of creditors are not in the state where the insolvency proceedings have been commenced. Such situations often give rise to a great number of rather complex questions concerning international jurisdiction of the court which is authorized to start insolvency proceedings, applicable law or substantive and procedural effects of such proceedings[29].

All the above mentioned issues arising in cross-border cases is regulated by European Insolvency Regulation. It is the main instrument to maintain uniformity in cross-border proceedings

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[28] Tett R., Carinson K. The recast EC Insolvency Regulation: a summary of the main provisions [interactive]. *Corporate Rescue and Insolvency*. 2015 Volume 8, Issue 1 [accessed 2015-04-14], <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/The_recast_EC_Insolvency_Regulation%20Cover.pdf>.

[29] Wessels B. The Changing Landscape of Cross-border Insolvency Law in Europe [interactive]. *Juridica International* 2007 XII: 116-124 [accessed 2015-04-16]. <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe>.

among European Union and rules set out in the Regulation are based generally on two principles – universality and territoriality. Under the universality theory there is one court which handles the insolvency case and the courts in other jurisdictions can provide only assistance to some extent. These primary proceedings involve all debtor's assets located within EU[30]. Under this approach all actions relating to insolvency proceedings will be carried out on the basis of the rules established in the law of the country where the debtor has his domicile (or registered office) and the law of the state in which the insolvency measures have been undertaken[31]. Single administration for all insolvency related activity for all creditors means that (a) a single procedure is opened in debtor's home country which effects all his assets worldwide; (b) a single national law is applied for procedural and substantive questions; (c) all creditors can participate (national and foreign) in the proceedings.[32] Also, this universal approach dictates that all other jurisdictions must recognize the orders which were decided on main proceedings[33]. In addition, orders made in other official acts related to main insolvency proceedings, such as commencing the insolvency proceedings in the main jurisdiction, establishing any plan of arrangement or reorganization, selecting local or foreign law to be applied, also have to be recognized by foreign courts[34]. Thus, the universal approach embodies the hearing the insolvency case only in one court and obligation for foreign courts to recognize the decision and the effects of these proceedings. Universal approach is evaluated positively for its convenience as it is better for creditors and debtors to deal with one instead of several insolvency proceedings. Also, if number of separate proceedings is reduced that means lower costs of the proceedings[35].

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[30] Howcroft N. Universal Vs. Territorial Models For Cross-Border Insolvency: The Theory, The Practice, And The Reality That Universalism Prevails [interactive]. *U.C. Davis Business Law Journal*. 2008 No 8. p.370 [accessed 2015-04-16]. <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=8+U.C.+Davis+Bus.+L.J.+366&srctype=smi&srcid=3B15&key=c71a37ce6586f220433d57ba00de1567>.

[31] Wessels B. The Changing Landscape of Cross-border Insolvency Law in Europe [interactive]. *Juridica International* 2007 XII: 116-124 [accessed 2015-04-16]. <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe>.

[32] Soriano V., Alférez F., *The European Insolvency Regulation: Law And Practice*. Hague: Kluwer Law International. 2004, p.12.

[33] Howcroft N. *op. cit.*

[34] Howcroft N. *op. cit.*

[35] McCormack, G. Universalism in Insolvency Proceedings and the Common Law. Oxford Journal of Legal Studies [interactive]. 2012, 32: 1-23 [accessed: 2015-05-09]. <http://ojls.oxfordjournals.org/content/32/2/325.abstract>.

On the other hand, principle of territoriality is based on the notion that the measures of the specific proceedings have legal effects exceptionally within the territory of the state where it was handled. Proceedings under this concept may affect only assets and interests located within the jurisdiction[36]. Assets which are located abroad could not be affected and the liquidator would have no powers in the other countries. Territorial proceedings exist in favor of local creditors as foreign creditors sometimes may not be informed about or have insufficient notice of the main proceedings, or it would be inconvenient for them to participate in insolvency proceedings in foreign country due to language barriers or other factors. It is much easier to submit a claim for local proceedings in their home country[37].

Although, rules in Insolvency Regulation are based on these two principles, apparently, the total purity of concepts in practice is unatainable in the light of cross-border insolvencies in international level and endeavor to impose them at full extent would cause severe problems[38]. Main proceedings encompass all debtor's assets worldwide, but where territorial proceedings have been opened, the local property first have to be applied to the settlement of claims of creditors in the territorial proceedings and afterwards, only the remaining assets (if any) after the payment of such claims in full will be handed over the liquidator in main proceedings[39]. Thus, in practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models, mostly referred to as 'modified', 'limited', or 'mitigated' universalism, as most of them at their core have universality element. The EU Insolvency Regulation is based on a mixed model,

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[36] Howcroft N. Universal Vs. Territorial Models For Cross-Border Insolvency: The Theory, The Practice, And The Reality That Universalism Prevails [interactive]. *U.C. Davis Business Law Journal*. 2008 No 8. p.370 [accessed 2015-04-16]. <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=8+U.C.+Davis+Bus.+L.J.+366&srctype=smi&srcid=3B15&key=c71a37ce6586f220433d57ba00de1567>.

[37] Howcroft N. Universal Vs. Territorial Models For Cross-Border Insolvency: The Theory, The Practice, And The Reality That Universalism Prevails [interactive]. *U.C. Davis Business Law Journal*. 2008 No 8. p.370 [accessed 2015-04-16]. <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=8+U.C.+Davis+Bus.+L.J.+366&srctype=smi&srcid=3B15&key=c71a37ce6586f220433d57ba00de1567

[38] Goode R, Milles R., *Principles of Corporate Insolvency Law*. Student edition. London: Sweet & Maxwell, 2005, p.574.

[39] *Ibid.* p. 723.

referred to as "co-ordinated' universality" (or mitigated universality)[40]. Modified universalism starts with pure universalism idea which moves towards the incorporation of certain tendencies of territorialism. Under this approach there is a single main insolvency proceeding with world-wide effect, but it also retains a possibility of territorial proceedings which would only affect assets locally[41]. The principle of modified universalism for its flexibility is perceived as the most suitable ground on which shall be based rules of the Insolvency Regulation.

[40] Wessels B., The Changing Landscape of Cross-border Insolvency Law in Europe[interactive]. *Juridica International. 2007,* 12: 116-124. [accessed 2015-04-18]. <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe>.

[41] Eidenmüller H., A New Framework for Business Restructuring in Europe: The EU Commission's Proposal for Reform of the European Insolvency Regulation and Beyond [interactive]. ECGI - Law Working Paper 2013, No. 199/2013. [accessed 2015-05-09]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230690>.

2. RULES ON JURISDICTION IN THE LANDSCAPE OF EU CROSS-BORDER INSOLVENCY

Insolvency proceedings between Member States of the EU are carried out relying on two main principles – universality and territoriality with more detailed assistance of Insolvency Regulation and also national insolvency law for the questions which are not regulated by Insolvency Regulation. Even if Insolvency Regulation sets proper guidance and decent level of harmonization of insolvency law within EU countries, due to different interpretation of relevant articles or national law inconsistency with the Regulation there arise some disparities and issues in applying such rules. During more than ten years of application of the Regulation, legal practitioners and researchers together have indicated main issues on applicability, interpretation or the text of regulation itself. It was also examined what spheres were not regulated by Insolvency Regulation and the necessity and the extent of it. Thus, considering these important insights there was initiated amendment for the Regulation which would be adapted to changed economical and legal situation and make essential influence for the development of European insolvency law. Even before entering into force there are already various considerations to what extent recast of the Regulation will be able to solve existed problems and how effective new articles will be.

As mentioned above, when there is a situation of insolvent company having its creditors between more than one state, the proceedings become more complicated than it appears in domestic cases without a cross-border element. In this chapter will be analyzed main questions on jurisdiction as it is entrenched in insolvency regulation as well given an overview of national rules between Member States.

The Regulation distinguishes insolvency proceedings into two groups: main proceedings[42] which are brought in a Member State in which territory debtor‘s center of main interests is located and territorial proceedings[43] which are brought in the state where debtor has its establishment. That approach is kept also in the Recast of Regulation. Therefore, only the fact that debtor has an establishment situated within the territory of one Member State it is not sufficient to open territorial

[42] These proceedings extent to all debtor‘s assets except to the extent to which assets situated into another Member State are available to local creditors in territorial proceedings.

[43] Referred to proceedings brought in another Member State where the debtor possesses an establishment. These proceedings subdivide into secondary proceedings which are those brought after the opening of main proceedings in another Member State.

proceedings. To enable these proceedings to be opened the debtor must have its COMI in another Member State.[44] Territorial proceedings are often intermixed with secondary proceedings and perceived as the same proceedings, but actually it is not always so. If territorial proceedings have been opened before to the opening of main proceedings apparently, it cannot be declared as secondary proceedings. Virgos-Schmit Report labels such proceedings as „independent proceedings"[45]. The significance of dividing proceedings into main and territorial reflects in respect of debtor's assets and to what extent it can be affected and also to protect the diversity of interests. In addition to this, the recast of Insolvency Regulation recital 48 provides that "main insolvency proceedings and secondary proceedings can contribute to the efficient administration of the debtor's insolvency estate or the effective realization of the total assets" emphasizing significance of cooperation between actors involved in all the concurrent proceedings[46].

One of the features what makes insolvency jurisdiction conferred by the Regulation exclusive is that the court seized of a case cannot decline jurisdiction on the ground of *forum non conveniens*[47] in respect of both – main and secondary proceedings. It is explained that if it would be allowed, there would be no court elsewhere within European Union able to open main or secondary insolvency proceedings in respect of assets located within the territory of that state which court had refused jurisdiction.[48] Furthermore, as outlined by McCormack G. "application of the *forum non conveniens* doctrine <...>, is liable to undermine the predictability of the rules of jurisdiction laid down <...> and consequently to undermine the principle of legal certainty, which is the basis of the

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[44] Goode R., Miles R., *Principles of Corporate Insolvency Law*. 4th edition. London: Sweet & Maxwell, 2011, p.720.

[45] But there also are some contradicting opinions that secondary proceedings differ from independent proceedings – the former are confined only to winding-up (Insolvency Regulation para 3(3) and the latter may be any collective insolvency proceedings within the Regulation).

[46] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, 16636/5/14 REV 5 [interactive][accessed: 2015-04-19].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[47] This notion refers to situation when according to the rules indicating jurisdiction one court is competent but due to specific circumstances in another court to hear the case it is more convenient for the parties. Then this doctrine is being invoked and the case is transferred to the court which is considered as more suitable. Decision to transfer the case may be based on various grounds, such as the residence of the parties, location of evidence of witness, plaintiff's choice of forum or else. The doctrine of *forum non conveniens* can be invoked by the defendant or the court.

[48] Goode R. *op. cit*. p. 576.

Regulation"[49]. It is important to note, that there is no entrenched rule in Insolvency Regulation requiring to abstain from application of the doctrine of *forum non conveniens*. Neither it is in the Recast of Regulation, but it cannot be applied because the doctrine itself denies jurisdiction rules, even though there are opinions that application of *forum non conveniens* in insolvency cases could help to prevent forum shopping, because it requires objective relations with the chosen forum of another state which is considered as "more convenient" for the case.

2.1. Jurisdiction for the main insolvency proceedings

In case of company insolvency with a cross-border element it is crucial to identify properly which Member State's court is competent to accept the request and commence the proceedings. Article 3 (1) of the Regulation determines that "the courts of the Member State within the territory of which the center of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings"[50] and it is referred to main proceedings. From the wording of this article follows two observations. First, a concept of court is defined in a broad sense and refers to any judicial body or other competent body, which has the power to open insolvency proceedings under the law of the corresponding Member State (art. 2 (d))[51]. This concept, for example, refers to authorities such as the public notaries. Second, article 3 (1) is a rule on international jurisdiction, not on territorial which is determined by the national law of each State.[52] This rule was not modified in the Recast and has retained absolutely the same wording because there was no need for any amendment as it was clearly defined from the very beginning, easy to understand and apply. The main complexity arising in application of this article is with the concept of the center of main interests. As long as this notion is not clearly expressed within the Regulation and only Recitals 13 and 14 of the preamble give a little guidance it makes interpreting and specifying the center of main interests

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[49] McCormack G., Reconciling European conflicts and insolvency law. European Business Organization Law Review [interactive]. 2014 [accessed 2015-04-18]. <https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-%202015/Literature/Session%20Nine/McCormack_2014_Reconciling_European_Conflicts_and_Insolvency_Law.pdf >. (For a general analysis, see P. de Vareilles-Sommières, *Forum Shopping in the European Judicial Area* (Oxford, Hart Publishing 2007), in particular the introduction by Edwin Peel).

[50] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000.

[51] In the Recast of Insolvency Regulation the same is defined in art. 2(6)(ii).

[52] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction. [interactive]. [accessed 2015-04-19] <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

complicated. The Recast of Regulation provides more detailed definition of COMI relying on what has been developed in case law through years attempting to clarify what should be included in the notion of "center of main interests".

2.1.1. Concerns about main insolvency proceedings: definition of COMI and prevention of forum shopping

Article 3 of the Regulation defines rules relying on which shall be identified jurisdiction in the main insolvency proceedings. According to it, main connecting factor is the center of main interests and the main problems concerning jurisdiction in main insolvency proceedings rise from the definition of COMI. The phenomenon of forum shopping is another concern regarding such proceedings which is assessed as harmful for proper functioning of EU internal market and legal certainty in cross-border insolvency. These two issues and all possible measures which could be taken to eliminate them will be further examined in the following subchapters.

2.1.1.1. Development of COMI definition

The COMI represents the prime focus of the economic activity of the debtor and, therefore, ensures that the insolvency proceedings will be handled by a jurisdiction with which debtor has the closest connection[53]. An Insolvency Regulation have chosen COMI as a criterion because it was considered expedient to carry out main insolvency proceedings in a Member State where creditors are established, where they lived and transacted with the debtor and where the most debtor's assets are located – in a place of business activity[54]. When Insolvency Regulation entered into force there was a situation of legal uncertainty as in regards of the definition of COMI, thus, important role was entrusted to the European Court of Justice with the assistance of legal researchers to clarify cases handled in Member State's courts in handled in Member State's courts in 2002 had the same principal point of legal conflict - indication of COMI, with highly contested cases like those of *Daisytek* (involving 16 subsidiaries, in the UK, Germany, and France) and *Parmalat* (involving

[53] Garcimartín F. *The EU Insolvency Regulation: Rules on Jurisdiction*. [interactive]. [accessed 2015-04-19] <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[54] Eidenmueller, H. Abuse of Law in the Context of European Insolvency Law [interactive]. *European Company and Financial Law Review, Forthcoming*. Oxford: 2009. [accessed 2015-04-30] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353932>.

Italy, Ireland, the Netherlands, and Luxembourg)[55]. Clarification of center of main interests provided by ECJ cases made significant input helping to facilitate indication of COMI for national courts in future cases.

2.1.1.1.1 Explaining definition of COMI until the Recast of Insolvency Regulation

The definition of COMI in Insolvency Regulation apparently was a term open to interpretation in specific circumstances. In the Regulation there is laid down presumption that COMI of a company is in place of debtor's registered office if it cannot be proven the contrary. The presumption, therefore, is rebuttable under specific circumstances which were clarified in several insolvency cases. Certain French courts have expressed opinion that the debtor's COMI should remain the debtor's registered seat. In contrast, in other Member States (especially, UK, Germany and Italy) courts have formed more extensive approach to COMI denying presumption entrenched in the Regulation. For example, in the judgment of Justice Lightman in the case of *Enron Directo SA* the court held that center of main interest of Spanish incorporated company was in England, not in Spain. Such decision was based on the fact that all important management decisions were taken in England and it was considered sufficient factor to rebut the presumption that COMI coincided with the place of registration[56].

However, because of national courts obligation to interpret COMI in uniform sense two different concepts of COMI have developed:

a) "Mind of Management Theory" which declares that center of main interest is in a place, where the most important decisions of insolvent company are adopted;
b) "Business Activity Approach" according to which COMI had to be identified referring to criteria that are objective and ascertainable by third parties to ensure legal certainty and foreseeability.[57]

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[55] Wessels B., The Changing Landscape of Cross-border Insolvency Law in Europe. *Juridica International.[interactive] 2007,* 12: 116-124. [accessed 2015-04-19]. <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe>.

[56] Ringe W., Thery L., Current Issues in European Financial and Insolvency Law: Perspectives from France and England. [interactive]. Portland: Bloomsbury Publishing, 2009. p.79.

[57] Latella D., The "COMI" concept in the Revision of the European Insolvency Regulation. *European Company and Financial Law Review* [interactive]. Hamburg, 2014. [accesed 2015-04-20]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336470##>.

European Court of Justice gave the first ruling on COMI in 2006, the case of *Staubitz-Schreiber* by indicating that debtor's COMI have to be determined at the time when the debtor lodges the request to open insolvency proceedings.[58] Before the *Staubitz-Schreiber* English Court of Appeal in judgment *Shierson v Vlieland-Boddy*[59] gave opposing explanation that the COMI has to be determined as at the date of the first hearing[60] what was considered as creating favorable conditions to take advantage of forum shopping. However, as long as after the *Staubitz-Schreiber* judgment it became incompatible with EU law and could not be further applied.[61]

The second step was taken in *Eurofood* judgment few months later. *Eurofood* was a company with registered office in Ireland wholly owned by its parent company *Paramalat SpA* in Italy which has already been subjected to insolvency proceedings (in Italy). On 27th January, 2004 the main *Eurofood* creditor *Bank of America* presented winding-up petition for the court. The same day Irish court appointed provisional liquidator for *Eurofood* to manage its assets and legal affairs. On 20th Italian court opens an insolvency proceedings deciding that *Eurofood's* COMI is located in Italy. Despite that, on 23 March, 2004 Irish court also opened insolvency proceedings determining that center of main interests is located within Ireland territory. This led to a situation when both the Italian court and the Irish court asserted jurisdiction to open the main proceeding, both stating that COMI of the company was in their Member State. As regards to COMI of a subsidiary this judgment declared that "where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) <...>, whereby the center of main interests of that subsidiary is situated in the Member State where its registered office is, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation

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[58] Case C-1/04, Susanne Staubitz-Schreiber [2006] ECR I–701.

[59] English Court of Appeal case *Shierson v Vlieland-Boddy [2005] EWCA Civ 974 All ER (D) 391.*

[60] *Staubitz-Schreiber - The first ECJ decision on COMI [interactive]*. 2006 [accessed 2015-04-19] <http://www.taglaw.com/insolvency/414-staubitz-schreiber-comi.html>.

[61] Later in *Elchinov* case the ECJ has held that national courts are not bound by precedents established by superior courts in circumstances where those precedents are incompatible with EU Law. The Bulgarian Supreme Court had overturned a decision of a lower court and remitted the case back for rehearing. The lower court, however, found itself unable to reach a decision compatible both with EU Law and the binding ruling of the superior national court. The ECJ held that the lower court must depart from national court procedure and precedent to ensure compatibility with EU Law.(Case C-173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa [2011] 1 CMLR 29).

exists which is different from that which location at that registered office is deemed to reflect"[62] The ECJ further explains that such situation exists when a company is not carrying any business in the state where it is registered. In contrast it also emphasizes that if the company carries out its activity in a Member State where it has registered office, the mere fact that its economic choices are controlled by a parent company located in another Member State is not enough to rebut the above mentioned presumption[63]. André J. Berends agrees with such position of ECJ, stating that "center of main interests" more corresponds to the place where activities are carried out and not where main decisions are taken, because for creditors it would be more ascertainable: definitely, it is much easier to see where the company carries out its activities than where general decisions for such company are taken. In addition, he correctly presumes that there can be different levels of control of the parent company over the subsidiary and the connection between them can be quite loose. Then it can be constituted that the bigger control the parent company has over its subsidiary, the more center of main interests is in a Member State where a parent company is established. Such rule would create extremely unclear situation for creditors when they would have to indicate debtor's COMI[64]. Described position corresponds to earlier mentioned "Business Activity Approach" and restricts the application of liberal "Mind of Management Theory" due to the fact that ECJ firmly requires to interpret definition of COMI in uniform manner among Member States, because only then it could serve its function to define the competent forum and the law applicable to the case.

Another aspect relates with separate legal personality of an insolvent company. As noted by ECJ, the center of main interest of each legal entity has to be determined separately and each debtor constituting a separate legal entity is subject to its own jurisdiction. Despite this, opening of single insolvency procedure over a group of companies is still excluded. The Insolvency Regulation declares that each entity of group of companies, if it is constituted as a legal person is separate legal body which is subject to independent legal procedure[65]. Despite this, for example in United

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[62] Case C-341/04, *Eurofood IFSC Ltd* [2006] ECR I-381.

[63] Situations when the presumption laid down in the Regulation that COMI of an enterprise is where it has registered office will be examined more detailed in the next subchapter of this Master Thesis.

[64] André J. Berends. *The Eurofood Case: One Company, Two Main Insolvency Proceedings: Which One Is The Real One?*. Netherlands:International Law Review [interactive]. Amsterdam, 2006, No. 53, p 331-361. [accessed 2014-11-20]. <http://journals.cambridge.org/abstract_S0165070X06003317>.

[65] Latella D., The "COMI" concept in the Revision of the European Insolvency Regulation. *European Company and Financial Law Review* [interactive]. Hamburg, 2014. [accessed 2015-04-20]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336470##>.

Kingdom allows substantive consolidation of assets in some exceptional cases[66]. It constitutes that in specific circumstances there is a possibility of deviations from ECJ practice if it does not create obstacles for formation of uniform practice among EU Member States.

Eurofood was the first case which provoked further interpretation of COMI in case of group of companies' insolvency. Consequently, in the following *Interedil* decision ECJ clarified the *Eurofood* judgment in respect to "center of main interests" stating that it has to be indicated by reference to criteria that are both objective and ascertainable by third parties in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings[67]. The court further explained that "requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors are taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them"[68] it means that if company's administration is in the same place where its registered office is and it can be ascertained by third parties, the presumption of COMI will be applied. Only "if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect"[69]. Finally, the *Rastelli*[70] case is worth mentioning concerning the matter. It made significant contribution in perception of COMI in the case group of companies and further defined the possibility to rebut the presumption of COMI. In that case, liquidation proceedings were commenced against the French company *Mediasucre* which COMI was in Marseille. *Rastelli* was another company incorporated in Italy and there was no reference for its establishment in France. Despite that, the liquidator of company *Mediasucre* requested French court to open insolvency proceedings against *Rastelli* on the basis that assets of these two companies were intermixed (they shared common bank accounts and assets were occasionally transferred from one company to another). ECJ decided that French courts did not have jurisdiction for *Rastelli*,

[66] Moss G., Coordination of Multinational Corporate Group Insolvencies: Solving the COMI Issue [interactive]. Rome: International Insolvency Institute, 2010 p.3. [accessed 2015-04-24]. <http://iiiglobal.org/component/jdownloads/finish/362/5325.html>.

[67] Case C-396/09, Interedil Srl v Interedil Srl, Intesa Gestione Crediti SpA [2011] ECR I-09915.

[68] *Ibid.*

[69] Case C-341/04, *Eurofood IFSC Ltd* [2006] ECR I-3813.

[70] Case C-191/10, *Rastelli Davide e C. Snc v Jean-Charles Hidoux* [2011] ECR I-13209.

stating that the mere fact of intermixed property was not sufficient to rebut the presumption of COMI and declare that the center of main interests is in France. Moreover, the court noted that it was not apparent to third parties that the property of *Mediasucre* and *Rastelli* were intermixed[71]. After this ruling, there was established strict requirement that in order to rebut the presumption of COMI there must exist sufficient evidence that debtor's COMI is in another state than its registered office. Furthermore, it reaffirmed the requirement of that evidence to be ascertainable by third parties (creditors) which was already defined in *Eurofood.*

As can be concluded of an overview of EU case law, ECJ has clarified definition of COMI entrenched in Article 3(1) with exceptional contribution on *Eurofood* and *Interedil* cases. To sum up the ECJ explanation of COMI in overviewed cases the main features of the definition is as follows:

a) COMI has to be determined at the time when the debtor lodges the request to open insolvency proceedings (*Staubitz- Schreiber*);
b) It has to be determined in accordance with the circumstances in each individual case but not relying on national law;
c) COMI of a subsidiary is indicated by the presumption of registered office unless it can be proven opposite by objective and ascertainable by third parties criteria (Eurofood);
d) In case of group of companies, the subsidiary's COMI can be identified without references to the place of its parent company's COMI (*Rastelli*).

In conclusion, despite that COMI was significantly clarified in analyzed case law there is still much space left for further clarification regarding COMI of group of companies and circumstances to rebut the presumption of COMI. There is still necessary to determine more factors which would be sufficient to neglect the presumption of COMI set out in the Regulation and for that more case law is needed.

2.1.1.1.2 Modern definition of COMI in the Recast of Insolvency Regulation

After review of main ECJ case law concerning definition of COMI, it should be examined how it have influenced the amendments of articles of Insolvency Regulation in its Recast and what guidance towards better understanding of the notion of COMI it provides.

[71] Phillips H., Rastelli Davide e C v Hidoux (in his capacity as liquidator appointed by the court for the company Mediasucre International) [interactive]. *International Corporate Rescue* Vol.9, Issue 5. London, 2012. [accessed 2015-04-24]. <http://www.chasecambria.com/site/journal/article.php?id=668>.

In the Recast of the Regulation COMI remains as a prime connecting factor. As it was clarified in ECJ case law there was no need to change it, even if before it caused certain difficulties in former cases. The new text related to COMI provided additional guidance by introducing a provision regarding COMI of natural persons and adding a recital which defines the nature of presumption of registered office.[72] Article 3 was complemented with further explanation that as centre of main interests should be considered "a place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties"[73]. Although, this Article provides some additional clarification of concept of COMI, for further guidelines recitals of Recast shall be examined.

Recital 28 of the Recast now establish that determining whether the center of the debtor's main interests is ascertainable by third parties, first of all, should be considered creditors and their perception as to the place where debtor performs its activity (administration of interests). This Recital clearly summarizes what was explained in *Interedil* judgment emphasizing the importance of creditors' perception about debtor's COMI. Mentioned explanation also highlights the significance of clear and easily understandable definition of COMI not only for judges in national courts, but firstly for creditors, so as they could foresee which law is applicable in the relations with their debtor in order to protect their interest at the highest level. Main insecurity about this rule is that neither in the mentioned recital, nor anywhere else in the Recast it is specified which "third parties" have to be considered. It is not clear whether this provision is limited only to creditors as a "third parties" or is there another body which can be subject for such term.

Important to note, that now the Recast also defines COMI of individual persons, which was not provided earlier in the Regulation. Before, there was only limited guidance given in Virgos-Schmit Report defining that professional individuals' (such as self-employed persons or freelancers) COMI shall be considered place of their professional domicile and for natural persons – their habitual residence[74]. The necessity to define clear rules identifying individual person's COMI

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[72] Garcimartín F. *The EU Insolvency Regulation: Rules on Jurisdiction* [interactive]. [accessed 2015-04-25] p.4. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[73] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, 16636/5/14 REV 5 [interactive][accessed: 19/04/2015].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[74] Virgos – Schmit report. Cited from: Walters A., Smith A. "Bankruptcy Tourism" under the EC Regulation on Insolvency Proceedings: A View from England and Wales [interactive]. Nottingham: 2010. [accessed 2015-05-08] <http://ssrn.com/abstract=1630890>.

appeared due to the growing number of bankruptcies of private individuals in Member States where such proceedings are allowed. For example, in 2010, 162,000 private individuals requested to start insolvency proceedings in the UK and 140,000 in France[75]. The same as regarding COMI of companies, COMI of private individuals shall be determined by objective factors which are ascertainable by third parties[76]. German court carried out a case where individual debtor's COMI had to be determined and the situation was not very usual: a person who has his domicile in Luxembourg, was imprisoned in Germany. The Court referring to German Civil Code provisions concluded that domicile of a person was still in Luxembourg as he was relocated to Germany not voluntarily[77]. Moreover, it is questionable if such relocation could be ascertainable to third parties. Recast of the Regulation expressly defined that COMI of individuals shall correspond to their habitual residence as it was already stated in Virgos – Schmit Report. Thus, the Recast did not create any new rule regarding COMI of natural persons and only clearly entrenched such rule in one of its articles (Article 3) increasing the level of legal certainty in European insolvency law.

Also, the Recast contains absolutely new provision concerning the presumption of COMI and circumstances to rebut it in case of both – companies and private individuals. Recital 30 invokes that "in the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in that other Member State"[78]. As further explains Article 3 of the Recast, "that presumption shall only apply if the registered office

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[75] Cross-border Insolvency Law in the EU. Library briefing. Library of the European Parliament [interactive]. 2013 [accessed 2015-05-08] <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI%282013%29130476_REV1_EN.pdf>

[76] Wessels B. International Insolvency Law. Third edition, 2012 para 10559. Cited from: Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4 [interactive] [accessed 2015-05-08]. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

[77] Case BGH11/8/2007 NZI 2008, 121 Germany.

[78] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, 16636/5/14 REV 5 Recital 30 [interactive][accessed: 2015-04-19].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

has not been moved to another Member State within three-month period prior to the request to open insolvency proceedings"[79] In case of insolvency of individuals who does not carry any independent business or individual activity, the mentioned Recast's Recital sets out that the presumption that individual's COMI corresponds to his habitual residence can be rebutted if debtor's assets are located in another State than his registered residence or it is obvious that he moved to another Member State only to file for insolvency proceedings and to use more favorable law[80]. Here also, Article 3 of the Recital defines minimal period of existence of debtor's COMI in certain Member State: (1) for individuals who carry business or economic activity – 3 months and those who do not – 6 months prior filling for insolvency proceedings[81]. *Eurofood* judgment can be considered as a first big step in ECJ case law towards the definition and clarification of the idea of rebutting the presumption of COMI in a place of registered office. However, as first step for this notion English, German and Italian case law can be taken into account, supporting more extensive approach to the determination of COMI and complying with previously mentioned "Business Activity Theory". Mainly, the wording of this recital has evolved from *Interedil* judgment which declared strict rules in order to make negation of the presumption more difficult to invoke.

By indicating factors relying on which the presumption can be rebutted the Recast provides more flexibility which enables to define COMI in each case individually, relying on specific circumstances of that case so as to indicate center of main interests which corresponds to the actual situation. Invoking such rule might prevent situations when COMI is defined only by formal rules established in the Regulation not considering facts which can help to define where actual place of debtor's COMI is. On the other hand, with further specification that all relevant factors shall be considered and only if they seem sufficient to evaluate that COMI of the debtor is in another Member State without a doubt, makes the presumption "stronger" which is viewed as creating legal certainty and enabling easier identification of COMI. Moreover, it also is seen as preserving rights of third parties[82], although the term "third parties" is still not entirely clear.

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[79] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, 16636/5/14 REV 5 Article 3 (1) para 2. [interactive][accessed: 2015-04-19].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[80] *Ibid.* Recital 30.

[81] Ibid. Article 3 (1) para 3; para 4.

[82] Norkus R., Kavalne S. Mokslinio tyrimo *Pasiūlymo dėl Europos Parlamento ir Tarybos Reglamento, pakeičiančio 2000 m. Gegužės 29 d. Tarybos Reglamentą (EB) Nr. 1346/2000 dėl bankroto bylų, nuostatų galima įtaka bankroto*

Concerning Article 3 of the Insolvency Regulation which sets out how to identify jurisdiction in a cross-border case there is significant contribution made by ECJ case law. As the court has explained in several cases, these rules on jurisdiction apply not only in main and secondary proceedings but also to insolvency related actions (which are excluded from the scope of Brussels 1 Regulation under Article 1 (2) (b)). First, in *Seagon* judgment the court determined that jurisdiction of a Member State in which territory insolvency proceedings are carried out, also applies to "actions which derive directly from those proceedings and which are closely connected to them"[83]. But the court did not further explain such actions and when it can be declared as "closely linked" to insolvency proceedings. It was followed by *F-Tex* decision where ECJ had to examine whether the action brought by the applicant (assignee) in the main proceedings has a direct link with the insolvency of the debtor and is closely connected with the insolvency proceedings. ECJ observed that the origin and content of the action brought are, in essence, the same as those of action brought by liquidator. The court declared that first of all, unlike the liquidator who is acting to the interest of the creditors, assignee is free to decide whether to exercise the right of claim he has acquired and he is not legally obliged to enforce the claims taken over. Second, the assignee acts in his own interests and his own personal benefit, the consequences of his action are different from those of an action brought by a liquidator, which is intended to increase the assets of the undertaking which is the subject of main insolvency proceedings. Moreover, according to German law (which was applied for the main proceedings) closure of insolvency proceedings would not affect assignee's right to exercise his claim. Regarding these characteristics the court concluded that the action in the main proceedings was not closely connected to insolvency proceedings.[84] It is also important to mention another ECJ judgment in *Nickel & Goeldner Spedition*, where the court clarified that in order to qualify an action as insolvency related, the subject matter of an action is relevant and not the procedural context in which such an action was brought[85]. The Recital precisely follows decisions of ECJ and in Recital 7 of the Recast expressly states that under the scope of

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procesams Lietuvoje ir galimas poveikis Lietuvos ekonominiams interesams bankroto srityje galutinė ataskaita [interactive]. Mykolo Romerio Universitetas. Vilnius, 2013 [accessed 2015-04-25]. <http://www.ukmin.lt/uploads/documents/reglamentas%20MRU%20galutine%20ataskaita_1.pdf>

[83] Case C-339/07, *Seagon v. Deko Marty* [2009] ECR 1-767.

[84] Case C-213/10, *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* [2012] published in the electronic Reports of Cases, Application: OJ C 195 from 17.07.2010, p.7; Judgment: OJ C 165 from 09.06.2012, p.3.

[85] Case C-157/13, *Nickel & Goeldner Spedition v Kintra UAB* [2014] not yet published. Judgment: OJ C 395 from 10.11.2014, p.1; Application: OJ C 156 from 01.06.2013, p.23.

Insolvency Regulation shall fall not only insolvency proceedings but also actions related to it. Moreover, Article 6 gives detailed explanation that the State where main insolvency proceedings are carried out also has jurisdiction "for any action which derives directly from the insolvency proceedings and is closely linked with them"[86]. Although the Recast defines court jurisdiction for insolvency related actions quite clearly, but nowhere in the Recast there is specified or explained definition of such actions and what characteristics can mean that an action is "closely linked" to insolvency proceedings. Consequently, this rule is potential to give rise to some uncertainties regarding its applicability in a Member States' courts and provoke divergent situations.

2.1.1.2. Forum shopping in cross-border insolvency

As legal persons can change the place of their economic activity and central administration and private individuals move from their place of residence the concept of COMI can be understood as mobile connecting factor[87]. As a main reason why insolvent person seeks for "more attractive" forum and what makes them more attractive is, first, procedural advantages for the debtor[88], such as legal costs, speed and mode of litigation[89] and second, differences in substantive law[90]. The issues of forum shopping can be best revealed through aims of international insolvency law. According to H. Eidenmüller first of all, insolvency law rules strive to maximize the net assets for creditors' claims, to minimize bankruptcy costs and to ensure speedy and simple procedures. Not the less important is foreseeability of the bankruptcy forum and applicable law in order to provide legal

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[86] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015, 16636/5/14 REV 5 Article 6 (1). [interactive] [accessed: 2015-04-19].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[87] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction. [interactive]. [accessed 2015-04-25] p.4. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[88] Szydło M. Prevention of Forum Shopping in European Insolvency Law [interactive]. *European Business Organization Law Review*. 2010, 11: 253-272. [accessed 2015-04-26] <http://journals.cambridge.org/abstract_S1566752910200046>.

[89] S. Pearl, 'Forum Shopping in the EEC', 15 International Business Lawyer (1987) p. 391, cited from: Szydło M. Prevention of Forum Shopping in European Insolvency Law [interactive]. *European Business Organization Law Review*. 2010, 11: 253-272. [accessed 2015-04-26] <http://journals.cambridge.org/abstract_S1566752910200046>.

[90] Szydło M. *op. cit.*

certainty and sufficient protection of creditors[91]. Forum shopping right before commencement of insolvency proceedings can cause serious problems – discrepancies between the applicable corporate and insolvency laws require additional time and costs, cause legal uncertainty and make it difficult to ensure proper execution of creditors' claims.

Interestingly, although the prevention of forum shopping is considered as one of the main goals of the Regulation as ensuring proper functioning of internal market, only recital 4 of the preamble emphasizes the necessity to avoid forum shopping within EU. It is nowhere further mentioned in the Regulation. Thus, the question arises on how Member States shall cope with forum shopping as no instruments are provided by the Regulation[92]. To clarify this issue and create instruments preventing forum shopping, the European Commission has entrusted to European Court of Justice by examining the case law.

2.1.1.2.1 Forum shopping preventing measures: ECJ case law and The Recast

As was clarified above, the main factor in prevention of forum shopping is COMI. Determination of COMI indicates which State's law will apply and what legal consequences can be predicted. Preventative role of COMI manifests through some its features: first, because it is not fully clear, sometimes it could be difficult to predict where the court will locate debtor's COMI and secondly, it is quite difficult to relocate it from one State to another quickly[93].

Current text of the Regulation does not define any specific moment which is relevant concerning the establishment of COMI. The necessity for such definition occurs in situations when debtor decides to move his COMI either (1) *between* the date when a request is submitted and insolvency proceedings are commenced or (2) right before commencement of the proceedings[94]. Then the judge and possibly, also third parties face divergent situation when they have to identify and distinguish between factual and "real" location of main interests. For further clarification already analyzed case of *Staubitz-Schreiber* shall be remembered as it have determined that location

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[91] Eidenmueller, H. Abuse of Law in the Context of European Insolvency Law [interactive]. *European Company and Financial Law Review, Forthcoming*. Oxford: 2009. [accessed 2015-04-30] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353932>.

[92] Szydło M. Prevention of Forum Shopping in European Insolvency Law [interactive]. *European Business Organization Law Review*. 2010, 11: 253-272. [accessed 2015-04-26] <http://journals.cambridge.org/abstract_S1566752910200046>.

[93] *Ibid.*

[94] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction. [interactive]. [accessed 2015-04-25] p.4. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

of debtor's COMI is in that state where it was at the time of submitting the request to start insolvency proceedings against the debtor[95]. Although, such determination does not prevent debtor c his COMI to a Member State with more attractive forum, the case provided grounds for further interpretation. Moreover, ECJ have declared that in case of relocation of debtor's COMI after the moment when the request to commence insolvency proceedings was submitted in certain Member State's court, which was competent at specific moment, retains its jurisdiction after transferring of main interests abroad[96]. Such situation can be illustrated by following facts of the case: Susanne Staubitz-Schreiber after the commencement of insolvency proceedings for her business in German court moved to Spain. ECJ held that at the time when she submitted a request to start insolvency proceedings her COMI was in Germany, hence the court retains jurisdiction even after the commencement of proceedings she moved her COMI abroad. Despite that, there remained the question whether the courts retain jurisdiction if COMI was shifted just before filling a request[97]. In addition, in *Eurofood* ECJ indicated that the expression "decision to open insolvency proceedings" is not explained clear enough by the Regulation. It defined that it is subject for Member States' national law and varies significantly from one state to another. As the determination was further developed, that not only decision which is an "opening decision" according to national legislation but also a decision which was handed down by request based on debtor's insolvency with the purpose to open insolvency proceedings and involving divestment of a debtor's assets and assignment of the liquidator.[98] A little later, it was detailed in *Interedil* case where a company shifted its registered office from Italy to United Kingdom, but retained some assets and a bank account in Italy. After COMI relocation a creditor of *Interedil* filled a request to start insolvency proceedings against that company. Following *Staubitz-Schreiber* decision ECJ held that when indicating place of COMI the relevant time is when the request is being filled. Consequently, there evolves a conclusion that relocation of COMI also shifts jurisdiction. As the court stated, the mere

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[95] Case C-1/04, *Susanne Staubitz-Schreiber* [2006] ECR I–701.

[96] *Ibid.*

[97] Bariatti S. Il regolamento n. 1346/2000 davanti alla Corte di Giustizia: il caso Eurofood. *Rivista di diritto processuale.* 2007, p. 203 *et seq*.; Weller .Die Verlegung des Centre of Main Interest von Deutschland nach England. *Zeitschrift für das gesamte Handels- und Gesellschaftsrecht.* 2008 p. 850; Eidenmüller H. Abuse of Law in European Insolvency Law. *European Company Financial Law Review.*2009 p. 13. Cited from: Mucciarelli F. The unavoidable persistence of forum shopping in European insolvency law [interactive]. London: 2013 [accessed 2015-04-27]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375654>.

[98] Case C-341/04, *Eurofood IFSC Ltd [2006] ECR I-3813.*

fact that debtor still has some assets in Italy was not sufficient to overcome presumption of COMI. Moreover, the court concluded that in general, center of main interests can be defined according to "closest relations" to the place which are ascertainable by third parties[99]. It is clear, that continuity can be identified between these two cases. Interestingly, as *Staubitz-Schreiber* case creates an obstacle for forum shopping, *Interedil* decision does the opposite – creates a favorable situation for COMI shifting. From the perspective of *Interedil*, center of main interests may be determined relying on factual situation which is at the moment of filling the request, not taking into account previous location of company's headquarters and registered office. Also, to this situation creditors must show that debtor's COMI is ascertainable by third parties even if this criterion only protects new creditors whose debts were incurred before relocation.[100]. Accordingly, it gives a possibility for the debtor to shift his COMI just before submitting the request to the court without any harmful consequences.

Also, several significant domestic cases of Member States more deeply examined concerns arising in situations of COMI shifting. For example, English court in the judgment *Official Receivers v Eichler* asserted that transfer of COMI have not changed international jurisdiction when a doctor who was practicing in Germany moved to United Kingdom. After the relocation he filled a request for insolvency proceedings in English court. In the judgment the court asserted that the period which he has lived in England was too short to declare that he moved his COMI. The court emphasized that few days or weeks are not enough to declare that a place of COMI has changed and he administers his interests permanently[101]. As a contrasting example, could be *Wind Hellas* case. Wind Hellas was a Greek company, registered in Luxembourg which has moved its COMI (but not the registered office) to London. Few moths later it submitted the request to London court for the administration order (it is a procedure related with insolvency which ensures better realization of assets for creditors than liquidation). London court held that the company properly moved its COMI from Luxembourg to England and is able to use English law for its administration procedure as a "main" proceeding in the view of Insolvency Regulation[102]. The court emphasized that the following conditions were important factors defining successful relocation of COMI: the company

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[99] Case C-396/09, *Interedil Srl v Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-9915.

[100] Mucciarelli F. The unavoidable persistence of forum shopping in European insolvency law [interactive]. London: 2013 [accessed 2015-04-27]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375654>.

[101] *Official Receiver v Eichler* [2007] BPIR 1636 (The High Court of Justice, Chief Registrar Baister, 19 June 2007.

[102] *Hellas Telecommunications* (Luxembourg) II SCA [2010] EWHC 3199 (Ch).

informed its creditors about moving to London, made a press announcement about that, opened a bank account, registered under its law as a foreign company and the most important - all negotiations between the company and its creditors have taken place in London[103]. *Wind Hellas* case could be taken as an example of proper relocation of COMI and which factors shall be evaluated by court in order to declare that a company successfully shifted its center of main activity and that it is ascertainable by third parties without a doubt.

Following the previous national or ECJ cases legal doctrine defined few measures which, possibly, could prevent malicious forum shopping, although each of them has its own concerns. First suggestion was to define the exact minimum period for the location of COMI in the new Member State before commencement of insolvency proceedings. But according to F. Garcimartin, it would cause some uncertainties and mainly because usually it is difficult to define precisely moment of COMI relocation because it does not happen overnight and can extend to several weeks or months. Secondly, he declares that the current definition of COMI is sufficient and effective to prevent forum shopping as it implies a "reality test" by requiring genuineness of a new location and stability factor (emphasizing that debtor has (1) to conduct certain activity and it has to be conducted (2) on a regular basis)[104]. For example, a case when the debtor moves his COMI just before commencement of insolvency proceedings would not pass that "reality test" and relocation of main activity would not be perceived as a ground for different jurisdiction than that which would be defined before relocation. As the next measure it is suggested the recognition of the principle of *perpetuation fori* declaring that if one the court of a Member State was declared as having international jurisdiction it continues to exist till the end of proceedings. This is seen as effective tool frustrating debtors to attempt COMI shifting to other Member States[105].

The Recast keeps that approach and in Recital 5 establishes necessity to maintain proper functioning of internal market and avoid forum shopping. Also, Recital 28 entrenches that "the Regulation should contain number of safeguards aimed at preventing fraudulent or abusive forum

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[103] Forum Shopping, Portable COMI and the Lessons of Wind Hellas. *Jones Day Business Restructuring Review*, 2010. [accessed 2015-04-28]. <http://www.jonesday.com/forum-shopping-portable-comi-and-the-lessons-of-iwind-hellas-jones-day-business-restructuring-reviewi-12-01-2010/>.

[104] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction [interactive]. [accessed 2015-04-28] p.4. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[105] Szydło M. Prevention of Forum Shopping in European Insolvency Law [interactive]. *European Business Organization Law Review*. 2010, 11: 253-272. [accessed 2015-04-26] <http://journals.cambridge.org/abstract_S1566752910200046>.

shopping". In the prior version of Regulation there was no such requirement and the Regulation did not contain any rules directly preventing forum shopping. This leads to a conclusion that the Recast will be more effective in the battle against forum shopping than its prior version, because it will contain direct rules created against forum shopping. Article 3 in its second paragraph entrenches a requirement that the presumption of COMI shall only apply if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of the insolvency proceedings.[106] Clearly, this rule have evolved from above analyzed cases where was defined a requirement of a specific time period of incorporation in the State where relocated COMI is situated. Even before this rule was evaluated as problematic because it is difficult to identify precisely moment when COMI was shifted, especially when it is done by relocating company's main activity (or other "interests" which can be declared as "main"), but not its registered office. There is still quite unclear how courts shall evaluate required 3 months period and which date exactly must be taken into account. Moreover, 3 months is seen as too weak and too short period, during which it is not able to alter the identification of the jurisdiction[107] and it is suggested to extend it at least to 6 months. Above all, it can be presumed that the Commission at the time of preparation of the Recast was not able to foresee all situations of COMI shifting and have left it for further development in the future case law. By creating quite vague rule EC enabled to apply it in various different situations and develop it further.

2.1.1.2.2 Freedom of establishment *v* forum shopping

One of main principles of European Union set in the article 49 of TFEU is freedom of establishment granting the right for enterprises to establish cross-border within EU. In *Centros* case[108] ECJ emphasized the purpose of freedom of establishment stating that making use of variations of national legal systems within internal market in order to get benefit for business is viewed as the key idea of EU internal market[109]. In contrast, the Insolvency Regulation implies

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[106] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Article 3, 16636/5/14 REV 5 [interactive][accessed: 27/04/2015].<http://bobwessels.nl/wp/wp-content/uploads/2015/04/2015-03-12-EIR-Recast-Council-first-reading.pdf>.

[107] Latella, D. The "COMI" Concept in the Revision of the European Insolvency Regulation (September 27, 2013) [interactive]. *European Company and Financial Law Review Forthcoming*. Oxford: 2013. [accessed 2015-05-01]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336470>.

[108] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[109] *Ibid.*

strong necessity to invoke specific measures directly preventing from relocation of company's main activity to another Member State having a purpose to benefit from its legal system in case of insolvency concentrating mainly on sham relocation of COMI and deprivation of creditors' right to enforce their claims. In order to ensure high level of creditor's rights protection Insolvency Regulation controls relocations of COMI[110]. Therefore, forum shopping is not always considered as bad or malicious practice. For example, in cases *Deutsche Nickel* and *Schefenacker* COMI was shifted from Germany to United Kingdom allowing companies to use flexible English insolvency law which resulted in successful restructuring of a company[111]. In these cases relocation of COMI facilitated to rescue the company from insolvency or bankruptcy by creating favorable conditions for the restructuring of a company which was not possible under the German law. Thus, obviously forum shopping cannot be declared harmful in all cases.

Contradiction between freedom of establishment granted as primary law to EU members and abusive forum shopping arise from lack of harmonization between different legal areas and create situation of uncertainty. Therefore, some authors suggest to apply the principle of freedom of establishment only to provisions of company law in order to eliminate such contradiction.[112] W. Ringe does not agree with this position, stating that company law and insolvency law cannot be separated because they both share generally the same objective – to ensure productivity of business in effective and fair manner, thus, they shall be considered in inseparable context[113]. Both freedom of establishment and forum shopping relates to transferring of business abroad for certain benefits. These factors lead to a discussion whether preventing forum shopping does not violate principle of freedom of establishment and where is the line distinguishing these two situations.

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[110] Eidenmueller, H. Abuse of Law in the Context of European Insolvency Law [interactive]. *European Company and Financial Law Review, Forthcoming*. Oxford: 2009. [accessed 2015-04-30] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353932>.

[111] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012. [accessed 2015-04-30] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[112] Ulmer P. Gläubigerschutz bei Scheinauslandsgesellschaften – Zum Verhältnis zwischen gläubigerschützendem nationalem Gesellschafts-, Delikts- und Insolvenzrecht und der EG-Niederlassungsfreiheit. 57 NJW 2004 p. 1201, at p. 1205. Cited from Ringe W. Forum Shopping under the EU Insolvency Regulation [interactive]. European Business Organization Law Review, 9, p 579-620. [accessed 2015-04-29] <http://journals.cambridge.org/abstract_S156675290800579X>.

[113] Ringe W. Forum Shopping under the EU Insolvency Regulation [interactive]. Legal Research Paper Series No. 33/2008. Oxford: 2008. [accessed 2015-04-29]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822>.

Insolvency Regulation does not forbid to move business cross-border and to establish in foreign Member State. Moreover, it is nowhere directly entrenched in the Regulation that relocation of COMI is illegal act and shall be avoided. What is forbidden by the Regulation – relocation of COMI to more favorable forum in case of insolvency in order to protect company's assets and avoid fulfillment of creditors' claims in abusive way and it seems quite fair requirement. Despite that, every attempt to discourage companies from migration or to make cross-border migration less attractive, especially in insolvency cases, is perceived as likely to violate freedom of establishment[114]. As Cologne Local Court held that debtor's migration to another Member State in order to benefit from its legal system cannot be considered as an abuse of the law, but opposite – as admissible exercise of freedom of establishment[115]. It is clear, that if a company faces insolvency regime after relocating its COMI, then it will be declared as restriction of freedom of establishment, however these restrictions can be justified taking into account rights of creditors and protection of workers[116]. Such situation creates divergence in law complicating the understanding and application of legal rules and provokes legal uncertainty.

W. Ringe suggests two possible ways which could be followed in order to amend existing insolvency law that it would be in accordance with the fundamental freedoms. First way is to eliminate the notion of rebuttable presumption and to establish only "head office" approach according to which jurisdiction and applicable law would be connected to the state of incorporation. According to him, this approach would make jurisdiction and applicable law questions easy predictable, moreover it will ensure harmonization of company and insolvency law within EU to the extent that both would be governed by law of incorporation. Moreover, it would affect creditors' rights which are from the state where debtor carries out its business – they would have to carry their claims in foreign country which would be more costly and complex.[117] Second suggested approach is not that strict and seeks to reform applicable law rule entrenched in Article 4 of the Regulation by

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[114] Ringe W. Forum Shopping under the EU Insolvency Regulation [interactive]. Legal Research Paper Series No. 33/2008. Oxford: 2008. [accessed 2015-04-29]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822>.

[115] Amtsgericht Köln, judgment of 19 February 2008, reported in [2008] NZI 257, 260. Cited from: Ringe W. Forum Shopping under the EU Insolvency Regulation [interactive]. Legal Research Paper Series No. 33/2008. Oxford: 2008. [accessed 2015-04-29]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822>.

[116] Eidenmueller, H. Abuse of Law in the Context of European Insolvency Law [interactive]. *European Company and Financial Law Review, Forthcoming*. Oxford: 2009. [accessed 2015-04-30] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353932>.

[117] Ringe W. *op. cit.*

stating that law of the state of origin shall apply to insolvency proceedings meanwhile jurisdiction rule (article 3) could remain the same[118]. There are certain dangers for both approaches: first one would create favorable conditions to forum shop considering that is it much more easy to relocate registered office than a "real" place of debtor's main business activities and interests and as a result it would violate one of the main principles of Insolvency Regulation. Moreover, second approach would cause some difficulties in case of "mailbox" company: the COMI court would have to apply foreign law of incorporation, which would be very complicated[119].

It would be better to distinguish forum shopping and the exercise of freedom of establishment by examining the main aim and genuineness of business relocation: if company's main business activities were moved in order to benefit from foreign legal system and to create better conditions for business, tax or etc. purposes and COMI shifting is genuine (based on certain real facts which prove that), then it shall be considered as a pure exercise of freedom of establishment and justifies the application of insolvency law of that other country[120]. In contrast, if company moves its COMI to another Member State and after a short period the request to start insolvency proceeding for that company is submitted, obviously it was done on purpose to benefit from more favorable insolvency proceedings what is avoidable by Insolvency Regulation. To conclude, COMI shifts that evidently do not aim to maximize the debtor's net assets are abusive especially in situations where relocations of COMI is only executed on purpose to benefit the debtor at the expense of its creditors or some creditors at the expense of others. COMI shifting from one Member State to another is protected under the freedom of establishment and by itself it is not abusive therefore, it does not authorize free choice of insolvency regime[121].

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[118] Ringe W. Forum Shopping under the EU Insolvency Regulation [interactive]. Legal Research Paper Series No. 33/2008. Oxford: 2008. [accessed 2015-04-29]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822>.

[119] *Ibid.*

[120] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012. [accessed 2015-04-30] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[121] Eidenmueller, H. Abuse of Law in the Context of European Insolvency Law [interactive]. *European Company and Financial Law Review, Forthcoming*. Oxford: 2009. [accessed 2015-04-30] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353932>.

2.1.2. Conflicts of jurisdictions in insolvency proceedings between Member States

It is possible that concerning one debtor two or more insolvency proceedings can be opened in different states which both have declared themselves as having jurisdiction to the case. EU jurisdiction corresponds to that country where insolvent company's COMI is located. The concept of COMI is uniform among all Member States, however, there is always a possibility that courts in different member states will interpret it differently even if having the same facts of the case. Legal measures have to be taken in order to resolve such legal uncertainty and to prevent harmful consequences for creditors (or the insolvent company) as well as to ensure adjudication of cases in the most effective and operative way. The decision on which country will handle main international insolvency proceeding determines which country's substantive and procedural law will govern the proceeding and will have a large impact on how the assets are realized for the benefit of creditors.[122] This issue concerns only main proceedings (it does not include territorial or secondary proceedings) and consequences of the main proceedings (which were described in the first chapter), emphasize the importance of the issue and require proper indication of competent court in one of the Member States. Despite the factors justifying relevance of proper indication of competent court to handle the case, there is no mechanism to invalidate any proceedings commenced in the wrong court. For example, under the Insolvency Act 1986 applicable in England and Wales it is stated that "Nothing <...> invalidates a proceeding by reason of its being taken in the wrong court. The winding up of a company by the court in England and Wales, or any proceedings in the winding up, may be retained in the court in which the proceedings were commenced, although it may not be the court in which they ought to have been commenced"[123]. This rule may be applied to validate proceedings when the case was brought to the court not having insolvency jurisdiction at all. In such case it is suggested that the court has power to order transferring of the case to another court which is competent to carry out the proceedings or, alternatively, it can continue to carry out the

[122] Bufford S., International Insolvency Case Venue in the European Union: The *Paramalat* and *Daisytek* Controversies [interactive]. The Columbia Journal of European Law 2006 Vol. 12, No. 2 [accessed 2015-04-10]. <http://iiiglobal.org/component/jdownloads/finish/39/4046.html>.

[123] Insolvency Act 1986 of England and Wales [interactive] art. 118. [accessed 2015-04-10]. <http://www.legislation.gov.uk/ukpga/1986/45/contents>.

proceedings itself or strike them out[124]. Even in the lack of uniform rule entrenched in Insolvency Regulation, similar procedure of sorting out the situation of non-competent court is invoked among all other Member States.

However, following general rule only proceedings regarding one state can be carried out in the court which is competent according to the place where the debtor's COMI is located, whereas there is allowed to bring as many secondary proceedings as there are establishments in different Member States. Between legal practitioners and researchers this situation is called conflicts of jurisdictions. In legal doctrine there are distinguished two types of conflicts of jurisdictions – positive (when two states considers themselves as a main territory of debtor's COMI) and negative (where the courts of the State where registered office consider the center of main interests to be located in another State, and the courts of the latter deny this)[125]. The current text of Insolvency Regulation does not provide any express rule to resolve cases where the courts of two States concurrently claim jurisdiction in accordance with Article 3(1), nor does the Recast. Such conflicts of jurisdiction are seen as an exception, given the necessarily uniform nature of the criteria of jurisdiction. The principle of mutual trust forms the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision.[126] This rule also parallels the solution to situation of positive conflicts of jurisdiction. If interested party does not agree that the court who took the decision had jurisdiction for such case, then it can be appealed on the grounds of national law concerning the appeal procedure. The primary choice of law rule is to be applied to the various issues listed in art. 4, while articles from 5 to 15 set out various exceptions to the primacy rule.[127] As it is explained by ECJ in *Eurofood*[128] judgment: "By

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[124] General right of transfer [interactive]. [accessed 2015-04-15].
<https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch1-12/Chapter7/part1/part1.htm>.

[125] Soriano V., Alférez F., The European Insolvency Regulation: Law And Practice. Hague: Kluwer Law International. 2004, p.51.

[126] Wessels B., *European Union Regulation on Insolvency Proceedings*, an introductory analysis [interactive]. 2006, p.12 [accessed 2015-04-13].
<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis,%20Bob%20Wessels.pdf>.

[127] Goode R., Miles R., *Principles of Corporate Insolvency Law*. 4th edition. London: Sweet & Maxwell, 2011, p.719-720.

requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognized in all other Member States from the time that it becomes effective in the State of opening of the proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favor of the opening decision which was handed down first"[129]. As the Recital 22 of the Regulation explains, "the decision of the first court to open proceedings should be recognized in the other Member States without those Member States power to scrutinize the court's decision"[130]. In case of positive conflict of jurisdiction the doctrine suggests to follow three basic rules: (1) if, once opening the insolvency proceedings in the State 1, in different Member State 2 it is requested to open the main proceedings, the second request shall be rejected; (2) if, second main proceedings were opened in the State 2 without prior knowledge of such proceedings opened in the State 1 which was first in time, then the second proceedings must be dismissed and transformed into territorial proceedings and (3) if the petition for opening main proceedings were first submitted in the State 1, but the proceedings have not been opened yet, and the same request is made in the State 2, then courts of State 2 must wait for the decision of the courts of State 1, despite that the Regulation takes the moment of opening of the proceedings as a general rule[131]. Consequently, in case of negative conflicts of jurisdiction the situation is closely related to previous one. If the court of Member State rejects the request to open insolvency proceedings on grounds of lack of international jurisdiction, other courts of different Member States cannot reject the request stating that court of first State had the jurisdiction to hear the case. It derives from the rule that court decisions of Member States shall be recognized among all European Union, thus they have to accept negative decision and take that into account when making a decision in insolvency case[132].

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[128] In the *Eurofood* case, according to Irish insolvency law, the main insolvency proceedings were opened in Ireland the 27 January 2004 (the date on which the application was submitted). A month later, an Italian judge opened insolvency proceedings against the same company, arguing that the debtor´s COMI was situated in Parma. In these circumstances, the Irish proceedings prevail.

[129] Case C-341/04, *Eurofood IFSC Ltd [2006] ECR I-3813*.

[130] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000.

[131] Soriano V., Alférez F., The European Insolvency Regulation: Law And Practice. Hague: Kluwer Law International. 2004, p.52.

[132] *Ibid.* p.53.

General understanding of the jurisdiction rules for opening the insolvency proceedings is that, first of all, it shall be examined if all conditions entrenched in national law as necessary to start insolvency proceedings are fulfilled[133]. Afterwards, it can proceed to the next stage by examining whether courts of that state are competent under the Regulation.[134] Consequently, in case of non-compliance with the mentioned conditions courts are not able to entertain the case, but if they comply, there is an obligation to accept it.[135] The rule for indicating competent court are only that which is entrenched in Insolvency Regulation and if under national law the set rule differs from what is set by the Regulation the national rule cannot be applied.

Analyzing in more detail, Virgos-Schmit Report must be taken into consideration. It is the main document assisting in interpretation articles of Insolvency Regulation, even if it is not officially enacted. Concerning the matter of conflicts of jurisdictions, Virgos-Schmit Report states that such situation „must be an exception, given necessary uniform nature of the criteria of jurisdiction used"[136]. Thus, in such situation it is suggested to take into account the following conditions: first of all, that each court before accepting an insolvency case shall examine their own international jurisdiction in accordance with the Regulation and also, by the principle of Community trust, under which once the first court of a Contracting State has adopted a decision other national courts of Member States must recognize it (under articles 202 and 220). Furthermore, in cases of conflicts of jurisdiction national courts have the possibility to request a preliminary ruling of the European Court of Justice guaranteeing the uniformity of the criteria for international jurisdiction and its proper interpretation. The last remedy indicated in Virgos-Schmit report is application of general principles of procedural law.[137] According to Bob Wessels[138], the principle of

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[133] Which is in case of UK includes UNICITRAL Model Law. See further - Roy Goode, Royston Milles Goode, Principles of Corporate Insolvency Law, Sweet & Maxwell, paras 16-17 et seq.

[134] See Goode R., Goode R., Principles of Corporate Insolvency Law, Sweet & Maxwell, 2011, paras 15-26. For an excellent overview, see Wessels B. *International Jurisdiction to Open Insolvency Proceedings in Europe*, in Particular against (Groups of) Companies, published by the International Insolvency Institute and available on <http://www.iiiglobal.org>.

[135] Goode R., Miles R., *Principles of Corporate Insolvency Law*. 4th edition. London: Sweet & Maxwell, 2011, p.719-720.

[136] Virgos M., Schmit E. *Report on the Convention on Insolvency Proceedings* [interactive]. DRS 8 (CFC), Brussels, 1996 [accessed 2015-04-16]. <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf>.

[137] Ibid.

[138] Wessels B. *Current topics of international insolvency law*. Deventer: Kluwer, 2004. p.177

mutual trust[139] shall refer only to recognition of Member State's Court judgment, but not to be understood also as "first in time rule" which shall be expressed separately. With the reference to article 3 (1) the abovementioned rule is understood as competence of the Court of the Member State in which COMI of insolvent company is located to open main proceedings and provide it with binding effect to all other Member States and an obligation to recognize such decision. Within this rule, the second courts can still be declared competent to open secondary insolvency proceedings related to the assets in those states.

As Insolvency Regulation does not involve any rule how to avoid conflicts of jurisdiction and act properly in such situation, some Member States had to enact such rules in their national legislation. For example, in German Insolvency Code there is a rule stating that „if several courts have jurisdiction, the court first requested to open the insolvency proceedings shall exclude any other jurisdiction"[140]. By this rule German legislators aim to make this mismanaged legal situations clear and easy to solve, that national courts could rely under the rule of national law which derived from general principles of EU law.

Even having the mechanism of general principles and specific rules helping to solve situations of conflicts of jurisdictions, European Union and the Member States must aim to create legal mechanism which is detailed and clear enough. Such well-defined rules might let national courts easily and uniformly understand and interpret it, what ensures proper application of laws and consequently, indicate only one competent court in specific situation.

2.2. Secondary proceedings before and after the Recast

After the commencement of main insolvency proceedings there can be opened secondary proceedings in any other Member State where debtor has an *establishment.* Secondary proceedings differ from main insolvency proceedings and that difference is mainly expressed through its purpose and jurisdiction rules. As it is clear from the first sentence, COMI is no longer main factor defining jurisdiction as it is in the main proceedings, instead there exists a requirement for a debtor to have an establishment in certain Member State. Hence, further in this chapter there will be

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[139] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000. Recital 22.

[140] German Insolvency Statute of 5 October 1994 (Federal Law Gazette I page 2866), as last amended by Article 19 of the Act of 20 December 2011 (Federal Law Gazette I p. 2854) [interactive] [accessed 2015-04-17]. <http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html>.

clarified why secondary proceedings are necessary and for what purpose these proceedings are commenced and what rules defining jurisdiction are applied under the Insolvency Regulation and its Recast.

2.2.1. Purpose of secondary proceedings

*S*econdary proceedings are created to protect rights of local preferential creditors whose claims would not be regarded as preferential under the law of main proceedings[141]. Thus, these proceedings are often used as a protection for local creditors from effects of foreign insolvency proceedings, but they can mean additional costs and delayed coordination of parallel (main) proceedings[142]. Although secondary proceedings are limited to local assets, but not limited only to local creditors. It means that creditors of main proceedings can also participate in the secondary proceedings (through the liquidator) but their claims would be satisfied only after local creditors' claims[143].

As can be noticed from the wording of articles defining secondary insolvency proceedings, its definition coincide with the definition of territorial proceedings. The difference between both proceedings was clearly explained in the ECJ judgment of *ZAZA Retail:* "The opening of secondary or territorial proceedings is subject to different conditions according to whether or not main proceedings have already been opened. In the first situation, the proceedings are described as 'secondary proceedings' and are governed by the provisions of Chapter III of the Regulation. In the second, the proceedings are described as 'territorial insolvency proceedings' and the circumstances in which proceedings can be opened are determined by Article 3(4) of the Regulation". It means two situations: first when it is not possible to open main proceedings because of the legal conditions and second when opening of secondary proceedings is requested by local creditors of that Member

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[141] McCormack G. Reforming The European Insolvency Regulation: A Legal And Policy Perspective [interactive]. *Journal of Private International Law* Vol 10 No 1: 41-67. Oxford: 2014. [accessed 2015-05-01] <https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-%202015/Literature/Session%20Four/McCormack%20JPIL%202014.pdf>.

[142] Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4 [interactive] [accessed 02/05/2015]. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

[143] Goode R, Milles R., *Principles of Corporate Insolvency Law*. Student edition. London: Sweet & Maxwell, 2005, p.595.

State[144]. Thus, obviously secondary proceedings are the same territorial proceedings which are opened after the main proceedings were commenced and distinguishing factor between them both are the existence of main proceedings. If territorial proceedings have been opened before main proceedings it will be referred to as "independent proceedings" which turn into secondary proceedings immediately after the main proceeding were opened.

As it is further explained in Recital 19 of the Regulation (Recital 40 of the Recast), "secondary insolvency proceedings may serve different purposes, besides the protection of local interests"[145]. Such cases may arise where the estate of the debtor is too complex to administer as a unit, or where legal differences are so great that difficulties may evolve from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires"[146]. Proper coordination of main and secondary insolvency proceedings can ensure the effective realization of total assets and the main requirement here is that various liquidators must cooperate closely and exchange relevant information[147]. The relevance of secondary proceedings is reflected not only by the possibility to protect creditors in other Member States (or to maximize total assets), but also by the fact that almost 700 enterprises with foreign establishments are entering into insolvency procedures every year. Insolvency of such companies is potential to provoke commencement of secondary proceedings where their establishments are located[148].

It can be summarized that there exists proved necessity for secondary insolvency proceedings and the main aim of such proceedings is to ensure higher protection of local creditors' rights and execution of their claims. Also, commencement of secondary proceedings can mean additional costs and become an obstacle to some extent for proper execution of main insolvency proceedings by interfering on claims of creditors in main insolvency proceedings. In order to ensure that secondary proceedings perform their function and bring benefits for creditors instead of

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[144] Case C-112/10, *Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV* [2011] ECR I-0000.

[145] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000. Recital 19.

[146] *Ibid.*

[147] *Ibid.* Recital 20.

[148] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012. [accessed 2015-05-01] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

affecting negatively, there is necessary to create clear and detailed rules defining how and when such proceedings shall be commenced.

2.2.2. Defining jurisdiction of secondary proceedings: before and after the Recast

The Insolvency Regulation sets out that, secondary proceedings can be commenced in a Member State where a debtor has an *establishment*. This term has provoked some confusion between Member States as it was not entirely clear. The Insolvency Regulation defines establishment as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods"[149]. Definition itself is not sufficiently clear, thus it was requested for ECJ to provide further clarification in the case *Interedil*. The main idea developed in the case was that it is not sufficient for the enterprise to have only a bank account or separate assets in a Member State that debtor would be declared as having an establishment here. The court emphasized that definition refers to presence of human resources[150] certain level of stability and organization is necessary to exist in order to provide legal certainty, adding that "the existence of an establishment must be determined, in the same way as the location of the center of main interests, on the basis of objective factors which are ascertainable by third parties"[151]. This decision was followed by *Burgo Group* judgment few years later where ECJ explained that if the main proceedings are commenced in a Member State other than where its registered office is located, secondary insolvency proceedings may be opened "in respect of that company in the Member State in which its registered office is situated and in which it possesses legal personality"[152]. Recast provides us with more detailed, more clear and effective definition set out in Article 3 (10): "establishment means any place of operations where a debtor carries out or has carried out in the three month period prior to the request to open main insolvency proceedings a non-transitory

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[149] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000. Article 2 (h).

[150] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction [interactive]. [accessed 2015-05-02] p.10. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[151] Case C-396/09, *Interedil Srl v Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-9915.

[152] Case 327/13, *Burgo Group SpA v Illochroma SA* [2014] not yet published. Judgment: OJ C 395 from 10.11.2014, p.17; Application: OJ C 226 from 03.08.2013, p.9.

economic activity with human means and assets"[153]. This definition includes minimal period of time requirement which establishment has to be carried out before commencement of main proceedings as it is also set for COMI. Obviously, it evolved from *Interedil* judgment and serves as a proof of stability and organization. Moreover, the Recast explicitly explains the meaning of "the Member State in which assets are situated" as follows: (a) tangible property - the Member State within the territory of which the property is situated; (b) property and rights ownership of or entitlement to which must be entered in public register - the Member State under the authority of which the register is kept; (c) registered shares in companies, the Member State within the territory of which the company having issued the shares has its registered office; (d) financial instruments - title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary, the Member State in which the register or account in which the entries are made is maintained; (e) cash held in accounts with a credit institution - the Member State indicated in the account's IBAN; (f) claims against third parties other than those relating to assets referred to in subparagraph (v) - the Member State within the territory of which the third party required to meet them has the center of his main interests, as determined in Article 3(1)[154]. In respect to this crucial importance is given to the new provision referring to location of a bank account which before had followed the criteria of debtor's COMI. Therefore, even though a bank account is opened with a branch of credit institution in one state, COMI would refer to a state where central administration of that credit institution is located. Recast located bank account in the Member State where corresponding branch is located[155].

Important to note, that opening of secondary proceedings have been evaluated as an obstacle to achieve aims of main insolvency proceedings. For this reason English courts created a mechanism helping to cope with such influence of secondary proceedings by implementing certain measures to avoid it. These measures were invoked in English case *Collins and Aikman* by

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[153] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Article 3 (10), OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-02]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

[154] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Article 2 (9), OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-02]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

[155] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction [interactive]. [accessed 2015-05-02] p.10. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

promising local creditors that their rights will be protected at the same extent (or, to be more precise – not worse) as it would be if "real" secondary proceedings would have been opened[156]. It empowers the court to postpone or refuse to open secondary proceedings if these proceedings are likely to obstruct proper administration of debtor's estate and further benefit local creditors[157]. This measure was accepted and applied by English courts but not permitted by Insolvency Regulation and procedural laws of most other Member States until the Recast[158]. It is called "synthetic" secondary proceedings and this notion is completely new and innovative definition in the light of Insolvency Regulation. "Synthetic" proceedings are entrenched in Article 36 of the Recast and sound the following: "the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realization, he will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State[159]. "Synthetic" proceedings empowers liquidator of the main proceedings to distribute the assets in different sequence than it is required by the law of the state where main proceedings are carried out. The possibility to invoke "synthetic" proceedings is evaluated as positive innovation as it may help to protect local creditors' rights without opening secondary proceedings and as a result to reduce legal costs of the proceedings[160]

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[156] *Collins & Aikman Europe SA and others* [2006] EWHC 1343.

[157] Executive Summary of the Impact Assessment, Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings. Commission Staff Working Document. [interactive]. Strasbourg, 2012 p.11 [accessed 2015-05-07]. <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[158] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012. [accessed 2015-05-07] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[159] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Article 36, OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-02]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG

[160] Norkus R., Kavalnė S. Mokslinio tyrimo *Pasiūlymo dėl Europos Parlamento ir Tarybos Reglamento, pakeičiančio 2000 m. Gegužės 29 d. Tarybos Reglamentą (EB) Nr. 1346/2000 dėl bankroto bylų, nuostatų galima įtaka bankroto procesams Lietuvoje ir galimas poveikis Lietuvos ekonominiams interesams bankroto srityje* galutinė ataskaita [interactive]. Mykolo Romerio Universitetas. Vilnius, 2013 p.112 [accessed 2015-05-07]. <http://www.ukmin.lt/uploads/documents/reglamentas%20MRU%20galutine%20ataskaita_1.pdf>

The Insolvency Regulation sets out in Article 27, that after opening of main insolvency proceedings it should be permitted to open secondary proceedings in another member State without additional examination of debtor's insolvency[161]. The right to request to open secondary proceedings belongs to a liquidator[162] in a main proceedings or any other person which is entitled to do so according to the law of a Member State where secondary proceedings is requested[163]. Actually, this article can be criticized because it is likely to create divergent understanding in its interpretation between different courts: the wording does not clearly define if re-examination of debtor's insolvency remains possible (even it is not necessary) or it is completely ruled out[164]. It leads to a conclusion that practical application of Article 27 due to its vagueness can possibly decrease legal uniformity between Member States to some extent.

Insolvency Regulation defines that secondary proceedings must be winding-up or liquidation and cannot be aimed on restructuring or rehabilitation of a company. This rule has provoked criticism towards the Regulation as incompatible with today's "corporate rescue" culture. Such definition of secondary proceedings is seen as an obstacle to the successful restructuring and continuation of business[165]. Moreover secondary proceedings are evaluated as potential to obstruct the effective administration of the estate and reorganization of an enterprise, because opening of secondary proceedings removes part of assets of the scope and control of main insolvency proceedings[166]. During the period of application of Insolvency Regulation turned put that these problems mainly are provoked because of lack of coordination between main and secondary proceedings. As cooperation between liquidators and coordination of main and secondary proceedings is one of the key problems in international insolvency law, the Commission during the preparation of Recast of Insolvency Regulation paid considerable attention for creation of a mechanism ensuring such coordination. The Recast was supplemented by articles 41, 42 and 43

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[161] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000. Article 27.

[162] In the Recast term "liquidator" is replaced by term "insolvency practitioner".

[163] *Ibid.* Article 29.

[164] ERA Conference, Speaker's Contributions. Cross-border Insolvency Proceedings: The EU Insolvency Regulation: Lastest Case Law And Revision. Trier: 18-19 March, 2013.

[165] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012. [accessed 2015-05-01] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

[166] *Ibid.*

which set out the requirement of cooperation between insolvency practitioners, between courts and between practitioners and courts. Required cooperation may take any form and shall include exchange of relevant information, examination of possibility to restructure the debtor, coordination of administration and realization of debtors assets, where it concerns the same debtor and is not incompatible with the rules applicable[167]. The Recast provides more detailed explanation comparing to Articles of Insolvency Regulation which existed before. It defines possible ways of cooperation what makes all mechanism more clear and easier to achieve. However, it is already criticized because it mainly emphasizes exchange of information and the notion of "cooperation" shall include much more. In international proceedings other parallel procedures are very important: coordination between main and secondary proceedings or cooperation towards restructuring of an enterprise (i.e. preparation of restructuring plan) and the mere exchange of information will not be able to ensure fulfillment of cooperation duty[168]. Positive assessment is given towards Article 42 of the Recast which defines cooperation between courts and emphasizes that it should be executed not only by exchange of information, but also coordination of related procedures, assets realization and execution of protocols.

To summarize, developments concerning secondary insolvency proceedings might be assessed as positively contributing factor to overall improvement of European insolvency law. The Recast expressly defines for what purposes secondary proceedings might be commenced and clarifies notion of establishment – the main indicating measure identifying jurisdiction of secondary proceedings. Also, by invoking possibility to carry out "synthetic" proceedings instead of "real" secondary proceedings the Recast ensures decreased legal costs and more effective proceedings as well as simplifying coordination between main and secondary insolvency proceedings and also, to maximize the efficiency of main proceedings without interference of secondary it opening of these proceedings is not necessary. Also, amendments made towards secondary proceedings promote new

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[167] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 articles 41, 42, 43; OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-02]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

[168] Norkus R., Kavalne S. Mokslinio tyrimo *Pasiūlymo dėl Europos Parlamento ir Tarybos Reglamento, pakeičiančio 2000 m. Gegužės 29 d. Tarybos Reglamentą (EB) Nr. 1346/2000 dėl bankroto bylų, nuostatų galima įtaka bankroto procesams Lietuvoje ir galimas poveikis Lietuvos ekonominiams interesams bankroto srityje* galutinė ataskaita [interactive]. Mykolo Romerio Universitetas. Vilnius, 2013 p.83 [accessed 2015-05-01]. <http://www.ukmin.lt/uploads/documents/reglamentas%20MRU%20galutine%20ataskaita_1.pdf>

approach to which amended Insolvency Regulation is dedicated – idea of corporate rescue. Recast refuses earlier concept that secondary proceedings refer only to winding-up proceedings and support the restructuring and continuation of business instead. Finally, by the amendments the Recast creates more efficient mechanism of coordination of main and secondary proceedings by provision of general guidelines how it can be performed and achieved. Despite that some of the newly defined features concerning secondary proceedings are still considered as quite vague and provoking divergent understanding between courts of different Member States, overall it shall be evaluated as a path that leads towards more effective cross-border proceedings.

3. EXAMINATION AS TO JURISDICTION

Despite the necessity of proper interpretation and application of jurisdiction rules, efficient mechanism examining, supervising and ensuring proper indication of competent court is indispensable. In this chapter, there will be provided overall analysis of existing situation of control mechanism, created by the rules of the Regulation. Analysis will include improvements provided by the Recast of Insolvency Regulation and evaluation of its efficiency in the future.

Despite the importance of proper application of jurisdiction rules, the Regulation does not provide any clear and detailed measures and sets out only a vague requirement for a seized court to "examine whether it has jurisdiction pursuant to Article 3"[169]. There are not given any further guidance and as a result, there are no comprehensive figures as to the examination of jurisdiction in insolvency cases. Moreover, from its wording the rule sounds more like a recommendation than an obligation for judges and is differently assessed by national courts. As European Commission have concluded from data collected from national reports, courts have formed twofold practice: some Member States accept the information provided by the debtor as sufficient only to indicate jurisdiction, without any further factual questioning; other examine *ex officio* if factual requirements are met or provision liquidator should be appointed for necessary inquiries[170]. According to the Heidelberg/Vienna study, in some Member States (such as Poland or Czech) judges not always examine their jurisdiction. The results of the research carried out by a Polish judge, revealed that although about 60% of all cases related with insolvency proceedings contained an international element making the EIR applicable, judges only examined their international jurisdiction in about 1% of cases[171]. Obviously, these results reflect very low level of efficiency and applicability of rules set out in the Regulation related to obligation of the court to examine its own jurisdiction in the insolvency case. Courts of Member States do not understand such requirement as obligation to

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[169] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30.6.2000. Article 16.

[170] Hess, B., Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding*. JUST/2011/JCIV/0049/A4 [interactive] [accessed 2015-05-03] p.63. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

[171] Commission staff working document, Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings SWD (2012) 416 final [interactive]. Strasbourg: 2012 p.27. [accessed 2015-05-03] <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

examine their jurisdiction *ex officio* and to lay down jurisdictional basis of their competence in the decision of opening of insolvency proceedings[172]. When national courts refrain from examining their own jurisdiction in each cross-border case, first of all, they threaten to violate main principles of efficiency and non-discrimination, moreover, create favorable conditions for forum shopping since courts do not carefully assess where actually debtor's COMI is situated and the Regulation obliges other Member States to recognize the decision taken without a possibility to question competence of that court[173]. Such recognition is based on principle of mutual trust which was explained in the *Eurofood* judgment as a main principle ensuring compulsory establishment of jurisdiction system, respected in all courts of Member States and as a ground on which domestic courts are bound to examine their own jurisdiction pursuant to Article 3 (1) by indicating if debtor's center of main interests is in that Member State[174]. Although such rule is not entrenched in articles of the Regulation and is described only in the recitals of the preamble, its importance is articulated in Virgos - Schmit Report by the following: "courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a Contracting State which claims jurisdiction under Article 3"[175] and is also admitted by numerous commentators[176]. The necessity to examine jurisdiction by the court itself was also emphasized in several cases. For example, in the *Bernicasa* judgment, ECJ highlighted such requirement as an instrument to ensure legal certainty: "the aim of legal certainty requires the national court seized to be able readily to decide whether it has jurisdiction, without having to consider the substance of the case"[177]. Later on, in *Folien Fischer* case, it was defined that "during the stage at which jurisdiction is verified, the court seized does not examine either the admissibility or the substance of the application for a negative declaration in the light of national law, but identifies only the points of connection with the State in which that court is sitting, which support

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[172] Report from the commission to the European parliament, the council and the European economic and social comitee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM (2012) 743 final [interactive]. Strasbourg: 2012 p.10. [accessed 2015-05-03]

[173] *Ibid.* p.10.

[174] Case C-341/04, *Eurofood IFSC Ltd [2006] ECR I-3813.*

[175] Virgos M., Schmit E. *Report on the Convention on Insolvency Proceedings* [interactive]. DRS 8 (CFC), Brussels, 1996 point 202(2) [accessed 2015-04-16]. <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf>.

[176] Opinion of Advocate General Jacobs delivered on 27 September, 2005, para 103. Case C-341/04, *Eurofood IFSC Ltd [2006] ECR I-3813.*

[177] Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767.

its claim to jurisdiction"[178]. Consequently, it was followed by *Kolassa* judgment, where it was held that for the determination of international jurisdiction the court is not obliged to conduct a comprehensive taking of evidence of disputed facts, even they are also relevant to the question of jurisdiction. Nevertheless, it is recommended for national court to examine its jurisdiction for a cross-border case relying on all available information[179]. The latter case reflects some contradiction to ECJ earlier expressed view in *Bernicasa* judgment, that a court seized should not review substantial facts of the case and only consider those, relevant to indicate jurisdiction. Opposite to it, in *Kolassa* court strongly recommends to take into consideration all relevant facts as such right of a court stems from both, respect for the independence of the national court in the exercise of its functions and the objective of the sound administration of justice[180].

Rules containing examination of jurisdiction were significantly amended by the Recast[181]. Provision of procedural framework regarding examination of jurisdiction of a requested court is perceived as one of the most important improvements[182]. It provides much more detailed guidelines as to examination of court's jurisdiction and lays down (a) court's obligation to examine jurisdiction ex officio; (b) provide declaration of jurisdictional basis and (c) right to appeal the decision to foreign creditors[183]. Recital 27 clearly sets out that requested court before opening the insolvency proceedings has to examine in its own motion whether debtor's COMI (or establishment) is actually located within its territory[184]. As the recital mentions not only location of debtor's center of main interests what refers to examination of court's jurisdiction in main insolvency proceedings, but also

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[178] Case C-133/11, *Folien Fischer AG, Fofitec AG v Ritrama SpA* [2012] published in the electronic Reports of Cases (court Reports - General). Application: OJ C 204 from 09.07.2011, p.12 Judgment: OJ C 399 from 22.12.2012, p.4

[179] Case C-375/13, *Harald Kolassa v Barclays Bank plc* [2015] not yet published. Judgment: OJ C 107 from 30.03.2015, p.4; Application: OJ C 274 from 21.09.2013, p.6.

[180] *Ibid.*

[181] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction [interactive]. [accessed 2015-05-04] p.7. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[182] Hess B. Oberhammer, P., Pfeiffer, T., Piekenbrock, A., Seagon, C. *External Evaluation Of Regulation No. 1346/2000/EC On Insolvency Proceeding.* JUST/2011/JCIV/0049/A4 [interactive] [accessed 2015-05-03] p.63. <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

[183] *Ibid.*

[184] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Recital 27, OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-04]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

includes location of an "establishment" which indicates that the court opening secondary (or territorial) proceedings shall examine their jurisdiction as well. Recital 32 develops the requirement and indicates that in case of any doubt that debtor's COMI (or establishment) is located within the territory where the claim was submitted, the court have power require debtor to submit additional evidence supporting its assertions and, where appropriate, give its creditors right to express their perception of jurisdiction[185]. It shows increased attention to creditors and attempt to significantly higher the existing level of their rights protection. This requirement also emphasizes the COMI's "ascertainability by third parties" criteria – if creditors would perceive debtor's COMI in certain Member State they will definitely declare it in that state, and if they define that it is located elsewhere, then the criteria of ascertainability is doubtful. This rule is further detailed in Article 4: "<…> the judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2)"[186]. Second part of the Article refers to situations when insolvency proceedings are opened without a court decision (only relying on national rules), then the obligation to examine jurisdiction of the state where request to open insolvency proceedings is pending is transferred to insolvency practitioner appointed to the proceedings[187]. As has been noted, the Recast provides sufficiently detailed rules how examination as to jurisdiction shall be performed in different situations and what exactly should be asserted in order to decide whether the court seized has jurisdiction to open insolvency case. However, it still remains not completely clear how liquidator's obligation to specify the grounds for jurisdiction should be executed in practice and where (e.g. in a specific document or else) exactly he shall explain his assertions on whether the jurisdiction is properly indicated and debtor's COMI is exactly where it is stated to be. Differently, from the court which can specify existence of COMI in the decision to open the proceedings, the liquidator does not take such decision. Moreover, the Recast does not indicate what consequences follow if the liquidator declares that proceedings were opened violating international jurisdiction rules. It is suggested that the regulation should expressly state that in case of violation of international jurisdiction rules

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[185] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Recital 32, OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-04]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

[186] *Ibid.* Article 4 (1).

[187] *Ibid.* Article 4 (2).

proceedings shall not be continued and it shall be closed according to the procedure provided by national law[188].

As regards to procedural framework, there was also criticism towards absence of foreign creditors' right to appeal the decision to open insolvency proceedings and although they formally had such right, they were not properly informed about the decision that could effectively use their right to appeal[189]. Article 5 of the Recast now provides right to challenge court's decision to open main proceedings for a creditor or other interested party, even if he has his habitual residence or registered office in foreign Member State[190]. Such creditors shall be informed by the court of insolvency practitioner in due time as to ensure their right to challenge such decision. The right of appeal shall be executed before or once the decision has been taken, depending on provisions of national law[191]. Such provision opens up the possibility that foreign creditors will be in a greater position than local concerning execution of the right to appeal decision to open insolvency proceedings[192].

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[188] Norkus R., Kavalnė S. Mokslinio tyrimo *Pasiūlymo dėl Europos Parlamento ir Tarybos Reglamento, pakeičiančio 2000 m. Gegužės 29 d. Tarybos Reglamentą (EB) Nr. 1346/2000 dėl bankroto bylų, nuostatų galima įtaka bankroto procesams Lietuvoje ir galimas poveikis Lietuvos ekonominiams interesams bankroto srityje* galutinė ataskaita [interactive]. Mykolo Romerio Universitetas. Vilnius, 2013 p.46 [accessed 2015-05-05]. <http://www.ukmin.lt/uploads/documents/reglamentas%20MRU%20galutine%20ataskaita_1.pdf>

[189] Report From The Commission To The European Parliament, The Council And The European Economic And Social Commitee On The Application Of Council Regulation (EC) No 1346/2000 Of 29 May 2000 On Insolvency Proceedings COM (2012) 743 final [interactive]. Strasbourg: 2012 p.10. [accessed 2015-05-04] <http://ec.europa.eu/justice/civil/files/insolvency-report_en.pdf>.

[190] Position Of Council At First Reading With A View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Article 5, OJ C 141, 28.4.2015 [interactive][accessed: 2015-05-05]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0001.01.ENG>.

[191] Garcimartín F. The EU Insolvency Regulation: Rules on Jurisdiction [interactive]. [accessed 2015-05-04] p.7. <http://www.refj.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[192] McCormack G. Reforming The European Insolvency Regulation: A Legal And Policy Perspective [interactive]. *Journal of Private International Law* Vol 10 No 1: 41-67. Oxford: 2014 p.10. [accessed 2015-05-05] <https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-%202015/Literature/Session%20Four/McCormack%20JPIL%202014.pdf>.

By the introduced amendments European Commission aims to create unitary judicial supervisory system in the EU and to ensure uniform practice on matters related to examination of court's jurisdiction. Establishing supervisory framework among Member States will help to prevent abusive application and violation of jurisdiction rules or at least to decrease it to the lowest possible level by imposing and obligation to judges or liquidators to re-examine the location of debtor's COMI or establishment. Also, during the preparation of Recast, it was taken into account the fact that the applicant sometimes provides very limited information proving his center of main interests in the state of requested court and in such way trying to circumvent rules of jurisdiction, so the amended rules define the possibility to request more evidence proving COMI of the debtor. The rules concerning examination as to jurisdiction which is created by the articles of Recast can be evaluated as setting strong background for effective mechanism which is expected to be developed in the future. Considering the fact that these rules are only first steps towards strong supervision mechanism of jurisdiction rules and its applicability between Member States it shall be perceived as significant contribution. However, it cannot be considered as complete mechanism for such supervision yet, because due to the lack of practice and inability of European Commission to foresee all possible legal situations which will arise in the future, ruled laid down are comparatively vague and there is still space left for the developments in the future.

CONCLUSIONS AND RECOMMENDATIONS

As in this Master Thesis were examined and concluded main issues concerning jurisdiction rules which have arisen during more than ten years of the application of the European Insolvency Regulation, there were no doubts left – the enactment of the Recast amending previously existed articles was absolutely necessary. While preparing amendments for the Regulation, the European Commission took a broad view on the issues concerned, and relied on various actors who contributed to the development of the insolvency law: Commission has followed not only the ECJ case law, but also a legal doctrine and recommendations provided by legal researchers and practitioners and even national case law within EU Member States. It was done in order to provide the amendments to the existing jurisdiction rules. This procedure was expected to solve all the identified issues as effectively as possible and eliminate the possibility of any unfilled gaps. The answer whether the amendments provided by the Recast will be truly effective and eliminate shortcomings of previously applied rules (focusing only on jurisdiction) can be found in the following conclusions:

1. First of all, the Recast solved the issue of vague definition of COMI which has provoked different interpretation and, consequently, divergence in national case law between Member States concerning similar situations. As a result, unclear definition of COMI was declared as one of the main obstacles to create uniformity between Member States and to ensure effective functioning of internal market. The Recast of Regulation provides more detailed definition of COMI relying on what has been developed in case law through years attempting to clarify what should be included in the notion of "center of main interests". The Recast not only defined the COMI of a company in more detail making it easier to understand and identify, but also created the definition of COMI of individuals. These developments are considered a really significant step towards increasing the clarity and more effective application of jurisdiction rules and as well, eliminating legal uncertainty which earlier existed in insolvency cases of individual persons.
2. The Recast clarified circumstances under which it is allowed to rebut the presumption of COMI in the place of registered office (in case of companies) or habitual residence (concerning private individuals). It sets out that the presumption can be rebutted if certain facts indicate that the place of registered office does not correspond to debtor's actual place of "main interests" and those facts have to be sufficient and ascertainable by third parties. By these amendments, the major goal is to prevent an abusive COMI shifting when a debtor

moves his registered office only to obtain more favorable legal conditions. The idea itself is evaluated positively as it seems effective tool against forum shopping, moreover, it provides flexibility for insolvency proceedings, but despite the recent improvements, from the wording of the Recast the exact situations when it is allowed to rebut the presumption of COMI remain not entirely clear. It is still necessary to determine more factors which can be declared as sufficient to neglect the presumption of COMI and for that more case law is needed.

3. Considering the fact that enterprises can change the place of their economic activity and individuals - their habitual residence, EC made specific amendments in order to prevent forum shopping. In the Recast there is invoked minimum time requirement for COMI to exist in a certain Member State: 3 months for companies or individuals carrying out professional activity and 6 months for private persons who do not carry any individual business. These provisions are going to prevent forum shopping to some extent undoubtedly, but there was also expressed some criticism toward them, as not able to fully achieve defined aims, because proposed period is too short and cannot reflect stability. Moreover, such rules are believed to be difficult to apply, considering that relocation of COMI does not happen overnight, can take up to few weeks or months and as a result, could be difficult to identify the exact moment when COMI was relocated. It is suggested to extend minimum time requirement at least to six months, which is considered as decent and more able to prove certain level of stability.
4. As another meassure to cope with forum shopping, there was also set out the requirement for COMI to pass the "reality test" which obliges the debtor to prove genuineness (evidence that certain activity is actually performed) and stability (on a regular basis) of a new location. This is considred as making malicious COMI shifting more complex and discouraging debtors from abusive relocation of COMI. Moreover, the fact that specific instruments now are directly entrenched in the Recast and there is expressly defined the aim of these meassures, brings more clarity on how it shall be done properly. In addition, such meassures now are easier to apply and can function more effectively.
5. Before the Recast situation of conflicts of jurisdictions was quite usual and the Regulation did not provide any guidance on how such situations might be solved. It was concluded from the case law, that the competent court is considered the first, that has adopted the decision to start the proceedings, but surprisingly, there are not any relevant rules set out in the Recast. Thus, it is strongly suggested to include such rules in the text of the Recast, so as

well-defined mechanism would help to solve the existing problem of conflicts of jurisdictions faster and more effectively as well as ensure higher level of uniformity between the Member States.

6. With Regard to secondary proceedings, the Recast defines in detail the notion of *establishment,* what was not done in the Regulation. The wording of Recast precisely follows ECJ decisions of *Interedil* and *Burgo Group,* where the court provided explanation of such term. There was emphasized the requirement, that there shall exist human means and goods in the economic activity, moreover, it has to be ascertainable by third parties in order to consider certain economic activity as an establishment. Current text of the Recast is seen sufficient, as well as sufficiently clear and understandable. As a result it eliminates the possibility of divergences between Member States or improper interpretation.
7. The Recast also intruduces the notion of "synthetic" secondary proceedings, which help to avoid a commencement of secondary proceedings which are seen as an obstacle for the effective main proceedings. Implementation of such provision will not only help to protect the creditors rights and maintain effectiveness of the proceedings, but also to reduce legal costs which might arise due to a commencement of secondary proceedings and increase effectiveness of the main proceedings.
8. Determination of rules obliging national courts each time to examine their own jurisdiction in insolvency cases with cross-border element is considered as one of the most significant recent developments in European insolvency law. As such mechanism was not previously entrenched in the Regulation, examination of jurisdiction every single time before commencement of insolvency proceedings was not a common practice for national courts. But since in the *Bernicasa* and *Kolassa* judgments ECJ highlighted the importance of such examination, acting as an instrument granting legal certainty and uniformity between Member States, there were no doubts left of the necessity to create a mechanism ensuring proper application of jurisdiction rules. However, the newly defined rules are still not completely clear and raise some questions regarding their application. Thus, it is important not only to invoke strict requirement for national courts to examine their own jurisdiction, but also, to set out detailed rules on how it shall be done properly and what procedure shall be followed in order to achieve its maximal possible effectiveness.

Considering the results which were concluded above, **hypothesis** of this Master Thesis that the Recast of Insolvency Regulation eliminates previously existed concerns regarding rules on jurisdiction, clarifies divergent or uncertain definitions and creates effective mechanism for

supervision and control of proper jurisdictional rules application among Member States of the European Union **has been proved**.

Of course, it cannot be denied that there is still space left for further improvements, first for all, starting from clarification of certain definitions. Despite that, it can be observed that Recast of Insolvency Regulation should function as successful instrument in the battle with divergent situations between Member States arising due to unclearly expressed rules, as well as abusive relocation of debtor's COMI.

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ANNOTATION

Topic of the Master Thesis: Rules of Jurisdiction in Cross-border Insolvency Proceedings within the EU

Author: Jūratė Randytė, student of the Master program of European and International Business Law in Mykolas Romeris University.

Academic supervisor: Doc. dr. Rimvydas Norkus

In the Master thesis there is given the analysis of jurisdiction rules of European Regulation on Insolvency, defined main issues of applicability of such rules and shortcomings. There is given detailed overview of relevant ECJ and national courts' case law and its impact on amendments of articles Insolvency Regulation made by its Recast. Later, the main focus is turned directly to the Recast of Insolvency Regulation, examining how effectively it will be able to eliminate existed issues concerning jurisdiction rules.

Keywords: *insolvency, jurisdiction, COMI, forum shopping*.

SUMMARY

When more than ten years ago the European Commission enacted Regulation on Insolvency, it was a great step forward in European Insolvency law. Its main aims were to harmonize national insolvency laws of the Member States and to ensure uniformity in cross-border insolvency cases. The Regulation fulfilled its aims greatly, nevertheless, during a decade of its application specific issues were identified which led to difficulties to apply rules of the Regulation between Member States. In order to adapt to changed economic situation and developments of national insolvency law there was a proposal to amend existing Regulation. Regarding that, the main purpose of this Master thesis is to identify main problems concerning jurisdiction, which were identified during the application of the Regulation to examine recent changes and evaluate whether the articles of Recast helped to eliminate such problems and increase efficiency of insolvency proceedings within Member States.

One of the main concerns was vague definition of center of main interests of the debtor, which is the main factor identifying jurisdiction for the main insolvency proceedings with a cross-border element. This issue is examined in the second chapter in the Master thesis relying on case law of ECJ and legal doctrine. Consequently, there is provided evaluation of provisions given by the Recast regarding definition of COMI, as now there is provided not only a clear and detailed definition of COMI of single company, but also rules on how to identify where the center of main interests is (in case of group of companies and private individuals). Further there is overviewed and assessed new provision enabling to rebut the presumption of COMI if there is a lack of evidence, that debtor's actual center of main interest corresponds to the location of its registered office (or habitual residence). This provision is considered as an effective tool to complicate and discourage debtors to relocate their COMI before filing for insolvency in order to benefit from foreign legal regime, although it is seen as not clear enough and possibly, its application can provoke divergence between Member States.

There is also examined a provision of The Recast concerning insolvency related actions. The rule itself is not new, but it was not entrenched in the Regulation before. In the Master thesis there is given assessment of effectiveness of this provision, moreover overviewed criticism expressed towards it.

Later in this Master thesis the attention is focused on malicious COMI shifting (also called forum shopping) and possible measures to eliminate its prevalence. There is given an overview first, of the case law where measures coping with forum shopping have evolved and second, how they

are entrenched in the Recast. There are identified shortcomings of the provided instruments and given certain recommendations on how to improve them.

Moreover, this Master thesis contains analysis of jurisdiction rules applicable to identify which court is competent to open secondary insolvency proceedings. There is revealed purpose of secondary insolvency proceedings, examined rules which were defined in the Insolvency Regulation and assessed amendments made by the Recast. Also, there is provided definition and analysis of a possibility to commence "synthetic" insolvency proceedings, assessed its efficiency and necessity.

In the third chapter of the Master thesis, the focus turn to mechanism of examination as to jurisdiction which prior the Recast was not defined and not functioning very effectively. There is given an overview of the case law which contributed to the development of idea that courts shall examine their jurisdiction before commencement of insolvency proceedings in cases with a cross-border element. Consequently, there is given an assessment of the rules provided by the Recast concerning this matter and identified possible threats or uncertainties regarding its application.

In the end, the author of this Master thesis provides overall assessment of the amended jurisdiction rules which the Recast provides. There are identified strengths and weaknesses of certain articles and their ability to solve existed issues in regard to jurisdiction and given recommendations for further development.

Master thesis finished 2015-05-12, Jūratė Randytė
E-mail: juratei.ra@gmail.com

SANTRAUKA

Kai daugiau nei prieš dešimtmetį Europos Komisija išleido Reglamentą dėl bankroto bylų, tai buvo vertinama kaip svarbus žingsnis pirmyn Europos nemokumo teisėje. Reglamento pagrindinis tikslas buvo harmonizuoti nacionalinę valstybių narių teisę bei užtikrinti vienodą teisės aiškinimą ir taikymą bankroto bylose. Reglamentas keliamus tikslus įgyvendino tinkamai, tačiau nepaisant to, per visą jo taikymo laikotarpį buvo identifikuoti konkretūs trūkumai, keliantys sunkumų taikant Reglamento normas valstybėse narėse. Siekiant pritaikyti teisę pasikeitusiai ekonominei situacijai bei pašalinti tam tikrus trūkumus, atsirado neabejotina būtinybė parengti Reglamento atnaujinimą. Atsižvelgiant į tai, pagrindinė šio magistro baigiamojo darbo užduotis yra nustatyti pagrindines Reglamento taisyklių, nustatančių jurisdikciją, taikymo problemas, ištirti naujausius pakeitimus šioje srityje bei įvertinti, ar Reglamento redakcijoje įtvirtintos naujos taisykles pašalins egzistavusias problemas bei padidins nemokumo procedūrų tarp valstybių narių efektyvumą.

Vienas pagrindinių diskusijas keliančių klausimų yra neaiškiai apibrėžta skolininko pagrindinių turtinių interesų vietos (PTIV) sąvoka, kuri atlieka pagrindinį vaidmenį nustatant jurisdikciją pagrindinėje bankroto byloje, turinčioje užsienio elementą. Šiam klausimui išaiškinti, remiantis Europos Teisingumo Teismo praktika bei teisės doktrina, yra skirtas antrasis magistro baigiamojo darbo skyrius. Taip pat, šiame skyriuje yra įvertinamo Reglamento redakcijos naujai įtvirtintos normos detaliai apibrėžiančios ne tik įmonės PTIV sąvoką, tačiau taip pat ir nustatančios taisykles, kaip turi būti nustatoma įmonių grupės arba fizinių asmenų PTIV. Antrame baigiamojo darbo skyriuje taip pat yra skiriamas dėmesys naujai sukurtai normai, suteikiančiai galimybę paneigti prezumpciją, jog įmonės ar fizinio asmens pagrindinių interesų vieta yra jo registruotoje buveinėje, jeigu skolininkas negali pateikti įrodymų, kurie būtų pakankami nustatyti, jog tikroji skolininko turtinių interesų vieta sutampa su jo registruotos buveinės vieta. Manoma, jog šios taisyklės įtvirtinimas Reglamento redakcijoje taps efektyviu instrumentu užkertančiu kelią skolininkui ieškoti palankesnio teisinio rėžimo perkeliant savo PTIV, nors kol kas ji nėra pakankamai aiškiai apibrėžta ir, tikėtina, gali būti skirtingai suprantama ir taikoma valstybių narių teismuose.

Šiame magistro baigiamajame darbe yra ištiriama ir Reglamento redakcijoje įtvirtinta taisyklė, nustatanti, jog pagrindinę bankroto bylą nagrinėjantis teismas taip pat turi jurisdikciją nagrinėti ir su pagrindine bankroto byla susijusius ieškinius. Nors ir ši taisyklė ES bankroto teisėje

apskritai nėra nauja, tačiau pirminėje Reglamento versijoje ji nebuvo įtvirtinta. Taigi, šiame darbe yra pateikiamas naujai įtvirtintos taisyklės būsimo efektyvumo vertinimas bei kritika.

Toliau magistro baigiamajame darbe yra koncentruojamasi į piktybiško PTIV perkėlimo siekiant palankesnio teisinio rėžimo bankroto byloje problemą bei galimus instrumentus šios problemos pašalinimui. Pateikiama susijusios teismų praktikos apžvalga, kurioje pirmiausia buvo sukurti ir išvystyti būdai kovai su šiuo reiškiniu, vėliau apžvelgiama ir įvertinama kaip tai buvo įtvirtinta Reglamento redakcijoje, apibrėžiami įtvirtintų instrumentų trūkumai bei pateikiamos rekomendacijos tolesniam jų tobulinimui.

Taip pat, šiame darbe yra atliekama jurisdikcijos taisyklių, taikomų šalutinės bankroto bylos iškėlimo atveju, analizė. Atskleidžiama šalutinės bylos reikšmė bankroto procese, aptariamos pirminėje Reglamento versijoje egzistavusios taisyklės bei įvertinami Reglamento redakcijoje įvirtinti pakeitimai. Taip pat aprašoma galimybė iškelti „sintetinę“ (arba „tariamą“) šalutinę bylą, įvertinamas jos efektyvumas bei reikalingumas.

Trečiame šio magistro baigiamojo darbo skyriuje pagrindinis dėmesys yra skiriamas aprašyti ir įvertinti machanizmą, užtikrinantį tinkamą jurisdikcijos taisyklių taikymą ir galimas jo pažeidimo pasekmes. Ankstesnėje Reglamento versijoje tokios taisyklės nustatytos nebuvo ir buvo tik užsiminta, jog teismai prieš iškeldami nemokumo bylą skolininkui, turėtų patikrinti savo jurisdikciją bylose su užsienio elementu, ir dėl savo neaiškumo bei neapibrėžtumo ši taisyklė buvo neefektyvi ir retai taikoma. Taigi, šiame skyriuje yra pateikiama teismų praktikos apžvalga, kur ir buvo išvystyta idėja, jog visi nacionaliniai teismai prieš imdamiesi nagrinėti bankroto bylą, turinčią užsienio elementą, privalo pirmiausia patikrinti, ar jie turi jurisdikciją nagrinėti tokią bylą. Skyriaus pabaigoje yra pateikiamas taisyklių, kurios įtvirtintos Reglamento redakcijoje ir yra skirtos sukurti efektyvų jurisdikcijos tikrinimo mechanizmą tarp ES šalių, vertinimas, nustatomi jų trūkumai keliantys grėsmę sudėtingam ir nevienodam jų taikymui nacionaliniuose teismuose.

Magistro baigiamojo darbo pabaigoje pateikiamas bendras Reglamento redakcijos normų, susijusių su jurisdikcijos nustatymu, vertinimas, pateikiamos jų stipriosios ir silpnosios pusės bei įvertinamas Reglamento redakcijos būsimas efektyvumas sprendžiant ir pašalinant problemas, egiztavusias pirminėje Reglamento versijoje, pateikiamos rekomendacijos tolesniam normų tobulinimui.

Darbas baigtas 2015-05-12, Jūratė Randytė

El. paštas: juratei.ra@gmail.com