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OPENING OF INSOLVENCY PROCEEDINGS PURSUANT TO COUNCIL REGULATION (EC) NO. 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS

Abstract

Insolvency proceedings opened in a EU Member State where the provisions of the Regulation apply include: 1) main insolvency proceedings, 2) territorial insolvency proceedings (secondary or independent proceedings). The main insolvency proceedings are opened in the Member State where the debtor has the centre of his/her main interests(COMI). The effects of the territorial insolvency proceedings are limited to the state in which such proceedings were opened. Territorial insolvency proceedings acquire specific features where they are opened after the opening of the main insolvency proceedings thereby becoming secondary insolvency proceedings. The most important point which characterizes secondary insolvency proceedings is that the opening of these proceedings imposes restrictions on the main insolvency proceedings. The universal effects of the latter become therefore limited. A conclusion can be drawn that the Regulation rests on a premise that there exists only one insolvency as a social and economic phenomenon, and this insolvency needs to be treated as a whole. The Council Regulation is based on the principle of automatic recognition of judgments concerning the opening, conduct, and closure of insolvency proceedings and judgments handed down in direct connection with such insolvency proceedings. There is a potential risk of a jurisdiction conflict if the courts of two or more Member States claim to have jurisdiction over the case. Conflicts of jurisdiction stem from different interpretations of the COMI in the practice of courts of individual Member States. To avoid it the Council Regulation should regulate the matter relating to the ex officio examination by the courts of Member States the existence of international jurisdiction in a given case as provided for in the provisions of said

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Regulation. Furthermore, there is a need for a provision requiring a clear specification in the judgement of the type of insolvency proceedings opened. It should be also considered whether filing an application for the opening of insolvency proceedings in one of the Member States, provided that the application refers to the main insolvency proceedings, is an obstacle to recognising such an application filed later in another Member State. The Regulation should adopt a rule that jurisdiction existing at the time of filing an application for the opening of insolvency proceedings is retained even if the grounds for such jurisdiction have been changed or removed.

Keywords
international insolvency law – European insolvency law – jurisdiction

I. Introductory Remarks

The provisions of Council Regulation (EC) No. 1346/2000 on insolvency proceedings (InsReg) refer to cross–border insolvency. While this idea was not expressed verbatim in the said provisions, there is no doubt that this was precisely the assumption behind its adoption. As laid down clearly in Recital 3 of InsReg: "The activities of undertakings have more and more cross–border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets".

It is assumed in doctrine that insolvency is cross–border in nature if it is related to foreign legal systems. This may be evidenced in the following: 1) the assets of the debtor are situated in more than one state, 2) the debtor conducts his/her business activity in more than one State, 3) obligations of the debtor exist in more than one state, 4) the debtor is a party to judicial proceedings in more than one state, etc.[1]. Where the debtor's activity is performed across borders, his/her insolvency will, in principle, generate cross–border effects. National provisions on insolvency proceedings are,

[1] I. F. Fletcher, [in:] I. F. Fletcher (eds), *Cross–Border Insolvency: National and Comparative Studies, Reports Delivered at the XIII International Congress of Comparative Law, Montreal 1990*, Mohr Siebeck: Tubingen 1992, p. IX; M. Szydło, *Jurysdykcja krajowa w sprawach upadłościowych* [*International Jurisdiction in Insolvency Cases*], Warszawa: C. H. Beck 2009, p. 53 et seq.; T. Chilarski, *Upadłość transgraniczna w prawie Unii Europejskiej* [*Cross–Border Insolvency in European Community Law*], Warszawa: C. H. Beck 2008, p. 3.

for obvious reasons, limited to the state in which they are binding. Therefore, such national provisions were usually based on the territoriality principle. Insolvency proceedings whose effects extend over national borders may be effectively introduced only on an international level (international agreements and conventions)[2]. Given the scope and nature of the European Union, it was possible to lay down regulations concerning cross–border insolvency based on the universality principle.

It was not the purpose of this Regulation to introduce uniform insolvency proceedings in the entire Community. Nor was it to harmonise national provisions on insolvency and insolvency proceedings. It was rather to establish provisions that would lay down the foundation for the international jurisdiction of courts to open insolvency proceedings and to determine the relation between different insolvency proceedings pending with respect to the debtor in different Member States of the European Union.

II. Types of insolvency proceedings under Council Regulation (EC) No. 1346/2000

Insolvency proceedings opened in a Member State[3] where the provisions of the Regulation apply include:

1) main insolvency proceedings,
2) territorial insolvency proceedings (secondary or independent proceedings).

1. Main territorial insolvency proceedings

The main insolvency proceedings are opened in the Member State where the debtor has the centre of his/her main interests (COMI).

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[2] A. Jakubecki, *O naturze głównego i terytorialnego insolvency proceedings w prawie upadłościowym Unii Europejskiej* [*On the Nature of Main and Territorial Insolvency Proceedings in the European Union Law*], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana* [*Legal Theses. Liber Amicorum for Professor Maksymilian Pazdan*], Kraków: Zakamycze 2005, p. 613.

[3] To be precise, this refers to states where the provisions of the Regulation are binding. Said provisions do not apply in Denmark.

The key feature of the main insolvency proceedings is their universality. The opening of main insolvency proceedings produces, as the rule, the same effects in all the Member States as it does in the Member State within the territory of which such proceedings are opened. The main proceedings are based on the idea of "single proceedings with a universal effect"[4]. The universal effect of main proceedings is created by automatic recognition (recognition by force of law). This universal nature of the main insolvency proceedings is exemplified in the following features.

- The main proceedings cover all assets belonging to the debtor which are situated in the State of opening of proceedings as well as those situated within the territory of another Member State.
- The liquidator appointed in the main proceedings may exercise all powers conferred upon him by the law of the State of the opening of proceedings in another Member State – Article 18(1). Thus, he has authority to act in all Member States as well as remove assets from the Member State in which they are situated.
- All creditors are encompassed within proceedings.
- Individual execution is not possible against the assets of a debtor located in any Member State[5].
- The effects which are generated in all Member States are determined by the law of the State within the territory of which the main proceedings are opened. Article 4(1) of InsReg provides for that "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (…)". It means that law applicable to main insolvency proceedings and its effects is, as a rule, *lex concursus*.

2. TERRITORIAL INSOLVENCY PROCEEDINGS

The effects of the territorial insolvency proceedings are limited to the state in which such proceedings were opened; furthermore, under the provisions of Article 3(2) of InsReg – these effects are restricted to the

[4] G. Moss, I. F. Fletcher, S. Isaacs, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, Oxford: Oxford University Press 2002, p. 167.

[5] See *inter alia* B. Wessels, *International Insolvency Law*, Deventer: Kluwer 2006, p. 244.

assets of the debtor situated in the territory of the Member State within the territory of which such proceedings are opened. The judgment concerning the opening of territorial insolvency proceedings is automatically recognised with no further formalities in other Member States. The significance of this recognition is, in practice, far less than those referring to the main insolvency proceedings because the effects of the territorial proceedings are basically limited to the territory of a state in which such proceedings are opened.

Territorial insolvency proceedings acquire specific features where they are opened after the opening of the main insolvency proceedings thereby becoming secondary insolvency proceedings. Secondary proceedings as a rule must be winding–up proceedings (Article 3(3) of InsReg) and must be one of the proceedings listed in Annex B. This, however, does not constitute their specific feature. The name of such proceedings reflects the dependence of the same on the main proceedings, and it is expressed in the following regulations.

- The opening of secondary proceedings may be requested by the liquidator in the main proceedings (Article 29(a) of InsReg),
- The opening of secondary insolvency proceedings is permitted without the debtor's insolvency being examined (Article 27 of InsReg),
- Closure of secondary proceedings without liquidation shall not become final without the consent of the liquidator in the main proceedings (Article 34(1) of InsReg subparagraph 2),
- Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation (by a rescue plan, a composition, or a comparable measure), the liquidator in the main proceedings shall be empowered to propose such a measure himself (Article 34(1) of InsReg subparagraph 1).
- If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings (Article 35 of InsReg).

- The liquidator appointed in the main proceedings may request that the court in secondary proceedings stay the process of liquidation in whole or in part.
- The law applicable to secondary proceedings is that of the Member State within the territory of which the secondary proceedings are opened (Article 28 of InsReg).

Although the powers of liquidators in the territorial proceedings (including secondary proceedings) are restricted to the territory of the State in which they were appointed, it should be stressed that they may in any other Member State claim through the courts or out of court that moveable property be removed from the territory of the State of the opening of territorial proceedings to the territory of that other Member State after the opening of the insolvency proceedings. They may also bring any action to set aside which is in the interest of the creditors. Thus, they may also exercise some of their powers in other Member States.

The most important point which characterizes secondary insolvency proceedings is that the opening of these proceedings imposes restrictions on the main insolvency proceedings. The universal effects of the latter become therefore limited. The liquidator appointed in the main proceedings may no longer exercise his powers in the Member State in which secondary insolvency proceedings have been opened. He may no longer remove the debtor's assets from the territory of the Member State in which secondary proceedings have been opened. That is why it is said that secondary insolvency proceedings serve the protection of local interests[6]. It is also true, though, that secondary proceedings ultimately function as supportive proceedings for the main insolvency proceedings[7].

In the light of this short presentation of the main and secondary insolvency proceedings, a conclusion can be drawn that the Regulation rests on a premise that there exists only one insolvency as a social and economic phenomenon, and this insolvency needs to be treated as a whole. This premise is expressed by the principle of unity and the principle of

[6] Wessels, supra note 5, p. 350.
[7] Ibid.

universality[8]. These principles are reflected in the main insolvency proceedings. However, it is not possible to separate the main insolvency proceedings from the secondary ones, since there is a certain hierarchy between them[9]. This hierarchy is evidenced in the powers of the liquidator appointed in the main proceedings to perform the activities mentioned above with respect to secondary insolvency proceedings, in the obligation for liquidators to cooperate closely with each other, and the obligation to transfer to the main proceedings the assets that remain after the creditors have been satisfied in the secondary proceedings. For these reasons, the opening of secondary insolvency proceedings cannot be considered as excluding the universal nature of the main insolvency proceedings, but rather as some restriction thereto. This specific feature of European insolvency proceedings is reflected in the descriptive terminology used in literature. Relevant terms include a combined model, limited universality, mitigated universalism, controlled universality, mixed approach, or coordinated universalism[10].

In my view, the adoption of such a universal model of cross–border insolvency proceedings in EU law was fully justified. Another approach to cross–border insolvency can be exemplified by the solutions adopted in EU directives concerning insurance undertakings and credit institutions. In these cases universality of insolvency proceedings is unlimited, which means that territorial insolvency proceedings cannot be opened at all.

3. INDEPENDENT TERRITORIAL PROCEEDINGS

Territorial insolvency proceedings may be opened also prior to the opening of the main insolvency proceedings. In such a case, they are not secondary in nature, since there are no main insolvency proceedings pending on which territorial insolvency proceedings depend. Such

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[8] P. L. C. Torremans, *Cross Border Insolvencies in EU, English and Belgian Law*, The Hague/London/New York: Kluwer Law Intenational 2002, p. 163; I. F. Fletcher, H. Anderson, [in:] M. Bridge, R. Stevens (eds.), *Cross–Border Security and Insolvency*, Oxford: Oxford University Press 2001, p. 263.

[9] Ibid.

[10] Wessels, supra note 5, p. 241. In the German literature see e.g. K. Pannen, *Europäische Insolvenzordnung*, Berlin: De Gruyter Rechtswissenschaften Verlag 2007, pp. 14–15.

territorial proceedings are dubbed free–standing or independent territorial proceedings[11].

It should be borne in mind that pursuant to the provisions of Article 3(4) of InsReg: "Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment".

At first sight it might appear that instituting territorial insolvency proceedings without the prior opening of the main insolvency proceedings is quite exceptional. However, this is not so, given the fact that territorial insolvency proceedings may be opened at the request of the creditor who has his domicile, habitual residence, or registered office in the Member State in which the establishment of the debtor is situated or whose claim arises from the operation of that establishment. Therefore, a question arises whether in the analysed situation the debtor himself can file for bankruptcy assuming that all his creditors have their domicile, habitual residence or registered office in the Member State in which the establishment of the debtor is situated or whose claims arise from the operation of that establishment. The wording of Article 3(4) of InsReg seems to exclude such a construction[12].

A particular situation occurs where upon the opening of territorial insolvency proceedings, the main insolvency proceedings are opened, since pursuant to the provisions of Article 36 of InsReg: "Where the proceedings referred to in Article 3(1) are opened following the opening of the

[11] I. F. Fletcher, *Insolvency in Private International Law*, Oxford: Oxford University Press 2005, p. 370.
[12] A. Jakubecki, supra, p. 620.

proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits. In this case territorial insolvency proceedings become secondary".

III. TYPES OF INSOLVENCY PROCEEDINGS AND INTERNATIONAL JURISDICTION IN INSOLVENCY MATTERS

The type of insolvency proceedings under the Council Regulation is strictly connected with the notion of international jurisdiction in matters concerning the opening of insolvency proceedings. In the relevant provisions a distinction is made between primary and secondary jurisdiction[13]. Under the provisions of Article 3(1) of InsReg, the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Proceedings opened before the court of a Member State which has primary jurisdiction in the matter constitute the main insolvency proceedings.

Irrespective of the existence of primary jurisdiction specified in paragraph 1, jurisdiction in the matter concerning the declaration of insolvency also belongs to the courts of the Member State within the territory of which no centre of a debtor's main interests is located but his/her establishment. Such jurisdiction can be described as supplementary.

Pursuant to Article 3(2) of Insreg: "Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. According to Article 2 (h) of InsReg: "an establishment" shall mean any place of operations where the debtor carries out a non–transitory economic activity with human means and goods".

[13] Torremans, supra note 8, pp. 151–155.

Insolvency proceedings opened by a court of a Member State which has secondary jurisdiction (as referred to in Article 3 (2) of InsReg) are territorial proceedings; where the opening of territorial proceedings followed the opening of the main insolvency proceedings, such proceedings are secondary in nature.

The provisions cited here indicate that the primary jurisdiction hinges on COMI whereas possessing an establishment is the basis for secondary jurisdiction. Insolvency proceedings opened before the court of a Member State where the centre of a debtor's main interests is situated, are the main insolvency proceedings, whereas proceedings opened before the court of a Member State where the debtor's establishment is situated, are territorial insolvency proceedings.

The centre of a debtor's main interests may, by its nature, be located exclusively in one Member State. It follows that there can be only one set of main insolvency proceedings opened against the debtor. Determining in which Member State the centre of a debtor's main interests is located, and, by extension, which Member State has primary jurisdiction, is a different issue.

While we can talk of only one centre of a debtor's main interests in a Member State, it is possible that the debtor may possess his/her establishment in several Member States. Therefore, the courts of each of such States shall have the jurisdiction to open territorial insolvency proceedings. Consequently, there may be several territorial (including secondary) insolvency proceedings carried out. Such a situation is admissible, since the effects of each of them are restricted to the assets situated on the territory of a respective Member State.

It should be stressed that the courts of a Member State in which a debtor's assets are located, but no COMI or establishments are within the territory, do not have jurisdiction to open insolvency proceedings. Moreover, even if national insolvency regulations so allow, insolvency proceedings cannot be opened in such Member States. A case in point is provided in the provisions of the Polish Insolvency and Rehabilitation Law of 2003, which stipulate that: "if debtor conducts commercial activity in the Republic of Poland or holds a place of residence or seat, or has assets in the Republic of Poland, Polish courts shall also have jurisdiction to open insolvency proceedings".

Declaration of insolvency in a Member State in which a debtor has his/her assets but no COMI or *establishment* may only be possible where no provisions of the Council Regulations apply, i.e. where the debtor has no COMI within the territory of any of the Member States to which the provisions of the Council Regulations apply but in another state. I. F. Fletcher states that "the displacement of national rules of jurisdiction is limited to those cases where the Regulation itself properly applies: in other situations, national rules of jurisdiction continue to be applicable"[14].

A debtor's assets situated in a Member State in which he/she has no COMI or *establishment* will be covered by the main insolvency proceedings opened by a court in a Member State which has the jurisdiction as referred to in Article 3, paragraph 1 of InsReg. Such assets may not be covered by any territorial insolvency proceedings opened in a Member State in which a debtor has his/her establishment.

As far as the relation between main insolvency proceedings of a universal nature and territorial proceedings is concerned, the opening of secondary insolvency proceedings by a Member State which under the provisions of Article 3(2) of InsReg has secondary jurisdiction in such matters actually restricts the universality of the main insolvency proceedings. Pursuant to the provisions of Article 17(1) of InsReg: "The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State".

IV. Jurisdiction–related conflicts in the light of Council Regulation No. 1346/2000

The Council Regulation is based on the principle of automatic recognition of judgments concerning the opening, conduct, and closure of insolvency proceedings and judgments handed down in direct connection

[14] Fletcher, supra note 11, p. 365.

with such insolvency proceedings[15]. As is explained in Recital 22: "This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust".

According to Article 16 of InsReg: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States".

This approach does not exclude, though, the potential risk of a jurisdiction conflict if the courts of two or more Member States claim to have jurisdiction over the case. This refers exclusively to the main jurisdiction specified in Article 3(1) of InsReg if the courts of two different Member States may both form conclusion that a debtor's COMI is located within their respective territories. The Regulation does not provide any obvious solution, since the assumption behind it is that the court of the Member State which initially opened insolvency proceedings shall have jurisdiction in the matter.

Conflicts of jurisdiction stem from different interpretations of the COMI in the practice of courts of individual Member States. Indeed, the concept of the COMI is not defined in the provisions of the Council Regulation[16]. Recital 13 specifies the same as follows*:* "The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".

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[15] Wessels, supra note 5, p. 419.

[16] According to Fletcher, supra note 11, p. 365; this omission may be a source of confusion and misunderstanding, and as such is to be regretted.

At this point, however, I wish to state that both in the doctrine and in practice there exist two basic theories relating to the COMI. One is the head of management theory (head office functions)[17] and the other the *business activity theory*. According to the former, a debtor's COMI is located in a state in which the most important strategic decisions concerning the debtor are made or in which key management functions with respect to the debtor are performed. According to the latter theory, the COMI is located where a company or a legal person conducts its regular business operations, and this place is perceived and identified as such by third parties.

Different ways in which the COMI is understood by courts of various Member States may lead to a situation where the jurisdiction to open insolvency proceedings in one Member State as the main insolvency proceedings may be questioned by another Member State. The Council Regulation does not deal with the conflict of jurisdictions and does not provide for any method of resolution, the reason for that being the acceptance of the "first in time" rule (priority principle). Under this rule the court which first opens insolvency proceedings will be the court with the appropriate jurisdiction[18]. As has already been indicated, the principle of automatic recognition of a judicial decision concerning the opening of the main insolvency proceedings made in one Member State excludes the possibility of opening the main insolvency proceedings in another. It follows that any questioning of the decision to open the main insolvency proceedings may take place only in the Member State whose court opened such proceedings, and the relevant decision to do so was based on the provisions in force in this State. It also means, as confirmed in the provisions of Article 17(1) of InsReg that the effects of opening the main insolvency proceedings may not be challenged by courts in other Member States[19].

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17 Szydło, supra note 1, p. 229; Moss, Fletcher, Issacs, supra note 4, p. 169, in connection with *the Enron Directo Sociedat Limitada case*.

18 Wessels, supra note 5, p. 327; Pannen, supra note 10, pp. 120–125.

19 Torremans, supra note 8, p. 191.

V. Examination of the cross–border nature of insolvency proceedings by a national court which opens insolvency proceedings

One of the theoretical considerations that falls within the terms of reference of civil procedure law is whether international jurisdiction is a general formal condition for civil proceedings in each and every matter, or only in a matter in which, besides an adequate link with the state, another state or states are involved; in other words, whether there exists a foreign or international element relating to the matter in question[20].

A similar issue is whether the provisions of international jurisdiction apply to each case considered by a court or only to cases where such a foreign or international element is present.

The doctrine offers various approaches to this interesting issue. If you analyse the opinions of those who took a stance in this matter, you will conclude that there are two contradictory schools of thought. One claims that international jurisdiction occurs only in matters in which the international element appears[21]. Holders of a contrary view maintain that international jurisdiction cannot be limited to matters where a foreign element occurs[22]. There are also those who believe that although the problem of international jurisdiction exists in each matter, its significance is seen only in those matters that have a foreign element[23]. I personally side with those who claim that international jurisdiction occurs in all civil proceedings irrespective of the presence or absence of any international element. However, where such an element is missing, the existence of international jurisdiction of a court in a state with which a given case is

[20] K. Weitz, *Jurysdykcja krajowa w postępowaniu cywilnym* [*International Jurisdiction in Civil Proceedings*], Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza 2005, p. 98.

[21] See *inter alia* F. Reu, *Die Staatliche Zuständigkeit im Internationalen Privatrecht*, Marburg: Elwert 1938, p. 85; W. J. Habscheid, *Jurisdiction. Gerichtsbarkeit and Zuständigkeit im internationalen Kontext – eine rechtsvergleichende Skizze/ Deutschland–USA*, [in:] *Festschrift für H. F. Gaul*, Bielefeld: Gieseking 1997, p. 169.

[22] H. M. Eckstein, *Zur Lehre von der Gerichtsbarkeit und der internationalen Zuständigkeit im deutschen Zivilprozess*, Freiburg: Breisgau 1951, p. 20.

[23] See more Weitz, supra note 20, pp. 100–103.

connected is so obvious that practically there is no need to examine such issues any further.

Such issues and approaches presented can refer to the issue of jurisdiction in the light of the Council Regulation. In this context, theoretical issues acquire an important practical value.

A question arises as to whether the national court which received an application for the opening of insolvency proceedings where the presence of a foreign element is not clearly evidenced should take action *ex officio* to determine whether any foreign element is present, which means that a relevant insolvency is cross–border in nature.

Assuming the existence of a foreign element, further questions can be posed as to (i) whether the provisions of the Council Regulation apply in this matter and (ii) whether in the light of these provisions the national court has jurisdiction to open insolvency proceeding and whether said jurisdiction is under the provisions of Article 3(1) or Article 3(2).

VI. SHOULD THE JUDICIAL DECISION OF A NATIONAL COURT ON OPENING INSOLVENCY PROCEEDINGS EXPRESSLY SPECIFY WHAT TYPE OF INSOLVENCY PROCEEDINGS WERE OPENED?

Once the existence of a cross–border element and the application of the provisions of the Council Regulations have been determined, another question comes to the fore: should the court expressly specify in its judgment that the opened insolvency proceedings are main, secondary, or independent territorial proceedings? The inclusion of such information in the court judgment seems to be required only with the assumption that the issue of international jurisdiction requires consideration irrespective of visible foreign elements in the matter.

As things stand now, the Council Regulation does not regulate the above mentioned issues at all, which indicates that the competence of a court in matters concerning the opening of insolvency proceedings and the contents of the court decision on opening insolvency proceedings fall within the terms of reference of national insolvency laws. The problem, however, is that not all national regulations binding in the Member States have relevant provisions. Polish Insolvency and Rehabilitation Law is a case in point.

The issue outlined here was under debate in the Netherlands. Initial draft acts aiming to introduce some provision to make the Council Regulation compatible with Dutch law (or Polish law for that matter), did not stipulate the need for the courts to relate to the issue of jurisdiction, and, consequently, to the type of insolvency proceedings. After all, the Council Regulation does not require that the recognition of a decision concerning the opening of insolvency proceedings depend on a clear indication in the decision itself as to what type of insolvency proceedings are opened[24]. It was, nevertheless, suggested that the Council Regulation assumes that the judge should verify *ex officio* the applicability of the Regulation and the type of insolvency proceedings opened. Such an approach is evidenced in the Vigrós/Schmit Report in which we read the following: "Because of the binding nature of the regulation, the provisions of which, including the rules on conflict of law, should be applied by the court on its own motion even if they are not invoked by the parties concerned. (…) However, it is for the national law to determine whether the judge is himself bound to establish the facts or whether it is for the interested parties to establish them"[25].

This view is also supported by the provisions of Article 21(1) of InsReg which provide for the following: "The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2)".

The view that the court should *ex officio* examine the issue of international jurisdiction in the light of Article 3 of the Council Regulation is dominant in literature[26]. The only discrepancy is whether the court should specify expressly in its judgement that its jurisdiction is under

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[24] See Wessels, supra note 5, p. 304.

[25] M. Virgós, E. Schmit, *Report of May 1996 on the Convention of Insolvency Proceedings*, para 47, available at http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf [last accessed: 22.07.2013].

[26] Wessels, supra note 5, p. 304; A. Hrycaj, [in:] F. Zedler, A. Hrycaj, P. Filipiak, *Europejskie prawo upadłościowe. Komentarz* [*European Insolvency Law – Commentary*], Warszawa: Wolters Kluwer 2011, p. 118.

Article 3 of InsReg[27] or whether it is sufficient to state that the court examined its jurisdiction and ascertained that relevant conditions were fulfilled[28]. Accepting the latter, it should however be recommended that the court should in its judgment concerning the opening of insolvency proceedings indicate expressly that it has jurisdiction under the provisions of Article 3 of InsReg or that the insolvency proceedings opened are main or territorial in nature. Some Member States have introduced provisions that are more or less directly linked to this issue. In the UK, for example, the amended forms used in insolvency proceedings as of 31 May 2002 require that the applicant, in each kind of insolvency application to which the Regulation could potentially apply, enter averments stating whether it is considered that the Regulation will or will not apply, and whether the proceedings will be main or territorial (independent or secondary) as defined in Article 3 of InsReg[29].

In the court practice of individual Member States the issue discussed is not defined in a uniform manner[30]. It should be underlined here that the cross–border nature of insolvency is not always clearly shown in the application for the opening of insolvency proceedings, unless national provisions require that the applicant submit statements, description of facts and evidence in this respect. Assuming that the judgment opening insolvency proceedings did not specify the type of insolvency proceedings, and it would turn out later that the provisions of the Council Regulation apply, a question would invariably be posed as to whether the insolvency proceedings originally opened were main or territorial in nature. And this question is of utmost importance in recognising the proceedings in another Member State.

Where the judgement concerning the opening of insolvency proceedings does not indicate the grounds for court jurisdiction nor is the type of insolvency proceedings specified, the matter must be resolved

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[27] V. Lorenz, *Annexverfahren bei Internationalen Insolvenzen*, Tübingen: Mohr Siebeck 2005, p. 92.

[28] J. Haubold, *Europäische Insolvenzverodnung*, [in:] M. Gebauer, T. Wiedmann (eds.), *Zivilrecht unter europäischen Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetz, Erläuterung der wichtigsten EG – Verordnungen*, Stuttgat: Boorberg Verlag 2005, p. 160; Szydło, supra note 1, p. 284; Hrycaj, [in:] Zedler, Hrycaj, Filipiak, supra note 26, p. 118.

[29] Fletcher, supra note 11, p. 379.

[30] See judgments referred to in: Wessels, supra note 5, p. 306.

in another Member State in which the effects of such judgements are caused. However, the idea of introducing specific proceedings in Member States in order to determine whether the recognition of judgement opening the insolvency proceedings handed down by a court in another Member State is automatic should undoubtedly be rejected[31].

The effects of automatic recognition of such a judgement, as referred to in Article 16(1) of InsReg, will not, in fact, be complete if it is unclear whether such recognition relates to universal or territorial insolvency proceedings. If this be the case, the examination of the existence of the COMI may be in fact transferred over to subsequent proceedings concerning the opening of insolvency proceedings in another Member State. This, in turn, stands in breach of the "first in time" rule.

Given the problems indicated above, it seems that the Council Regulation should regulate the matter relating to the *ex officio* examination by the courts of Member States of the existence of international jurisdiction in a given case as provided for in the provisions of said Regulation. Furthermore, there is a need for a provision requiring a clear specification in the judgement of the type of insolvency proceedings opened. Such provisions will dispel any doubts connected with these issues. The fact remains that the rationale behind the Council Regulation is not to introduce the European insolvency law nor is it to harmonise insolvency laws binding in the Member States. Nevertheless, it is possible to implement the proposed recommendations without any bearing on these two underlying principles.

VII. The Decisive moment to determine the existence of jurisdiction to open insolvency proceedings

An adequate application of the "first in time" principle, which, in fact, is the only way to resolve the jurisdiction issue, requires a clear indication in the judgment opening insolvency proceedings as to whether they are main or territorial in nature. In addition to that, it needs to be clearly defined which moment is the moment of the opening of the main

[31] This suggestion is raised in Szydło, supra note 1, p. 284 et seq.

insolvency proceedings. It is my strong belief that the opening of the main insolvency proceedings begins as of the day on which the judgement opening such proceedings became effective under the laws of a Member State whose court handed down said judgement. More often than not, this is the judgement issue date. The same principle will refer to judgements opening territorial insolvency proceedings.

It is underlined in literature that the terms of the Council Regulation suggest that "opening" insolvency proceedings is contrasted with a "request" for the opening of insolvency proceedings. It seems, therefore, that a petition for opening insolvency proceedings will be regarded as a "request" and only handing down the judgement relating to opening of insolvency proceedings will be regarded as the "opening" of the relevant proceedings[32].

This view is well grounded in the provisions of Article 16(1) in connection with Article 2(f) of InsReg. Pursuant to Article 16(1) of InsReg: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. Pursuant to Article 2(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not".

Thus, a judgment opening insolvency proceedings can have extra–territorial effects even if it is not a final judgment, provided that its effects have not been stayed by the court which granted it[33].

With this assumption in mind, measures undertaken by the court such as the appointment of a temporary administrator, as referred to in Article 38 of InsReg will have no bearing on the existence of primary jurisdiction in the matter relating to the opening of insolvency proceedings. The appointment of a temporary administrator does not indicate opening insolvency proceedings within the meaning of Article 2(a). It should be added that pursuant to the provisions of Article 2(a): "insolvency proceedings shall mean the collective proceedings referred to in

[32] Moss, Fletcher, Isaacs, supra note 4, p. 173.
[33] Fletcher, supra note 11, p. 421.

Article 1(1). These proceedings are listed in Annex A". Consequently, the appointment of a temporary administrator by a court of a Member State would finally settle the fact of opening insolvency proceedings, only if such an appointment were deemed to be the opening of proceedings listed in Annex A.

Such a stand is not undermined by the provisions of Article 25(1) of InsReg under which: "Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities (…) The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings". Taking the preservation measures after the request for the opening of insolvency proceedings does not mean the opening of the insolvency proceedings.

A question arises whether filing an application for the opening of insolvency proceedings in one of the Member States, provided that the application refers to the main insolvency proceedings, is an obstacle to recognising such an application filed later in another Member State. Admitting competition of such proceedings, assuming that the main insolvency proceedings are sought in each case, would lead to some kind of a "jurisdiction race".

This issue is not clearly regulated in the Council Regulation either, and such a state of affairs leads to different approaches adopted in various Member States. In German jurisprudence, for instance, some scholars believe that filing an application for the opening of the main insolvency proceedings in one Member State excludes the admissibility of filing subsequent applications for opening main insolvency proceedings against a debtor in another Member State[34]. Interestingly enough, such a stand is frequently denied in Poland[35]. Different approaches may be conditioned by a different approach of the doctrine in a more general issue, i.e. whether

[34] B. Knof, *Perpetuatio fori und Attraktivkraft des Erstantrags im Europäischen Insolvenzrecht?*, Zeitschriftfür das gesamte Insolvenzrecht 2005, no. 11, p. 756; id, *Europäisches Insolvenzrecht und Schuldbefreiungs – Tourismu*s, Zeitschrift für das gesamte Insolvenzrecht 2005, no. 19, p. 1024; as cited by Szydło, supra note 1.

[35] Szydło, supra note 1, pp. 242–243.

the institution of civil proceedings abroad gives rise to a *lis pendens* rule (pleas of *lis pendens*). Naturally, *lis pendens* rule would be an obstacle to institute proceedings in the same matter.

The coherence of the system established by the Council Regulation seems to support the first approach described as a natural extension of the "first in time" principle. However, assuming that the first application is filed with the court in a Member State which does not have the jurisdiction under the provisions of Article 3(1) of InsReg, the exclusion of examining jurisdiction by a court in another Member State may at this stage in the matter not have any viable grounding. Consequently, there is a pressing need to reconsider this issue in depth and to introduce relevant provisions to the Council Regulation.

It should be indicated that, similarly to the existence of a prior judgement concerning the main insolvency proceedings, the practical implication of this issue heavily relies on the access to information concerning the applications filed and insolvency proceedings opened.

This issue should be distinguished from determining the date at which the existence of the COMI should be defined as well as a debtor's establishment (as far as territorial insolvency proceedings are concerned). The literature of the subject indicates that in determining the existence of the COMI three possible dates can be taken into consideration: 1) the opening of the main insolvency proceedings, 2) handing down the judgement relating to preservation measures, and 3) filing an application for the opening of insolvency proceedings[36].

This issue has been resolved in a variety of ways in judicial decisions passed by national courts. An acceptable resolution was presented in the decision by the Court of Justice of the European Union of 17 January 2006 (Susanne Staubitz–Schreiber)[37], in which it was determined that "Article 3(1) of Regulation No 1346/2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor

[36] Wessels, supra note 5, p. 324.
[37] Case C–1/04, *European Court Reports 2006,* pp. 1–00701.

moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened".

Such a stand is quite accurate, and the majority of doctrine representatives accept the same[38]. Jurisdiction existing at the time of filing an application for the opening of insolvency proceedings is retained even if the grounds for such jurisdiction have been changed or removed. This principle is dubbed as *perpetuatio fori*[39] although, in fact, a *perpetuatio jurisdictionis* seems to be far better a term.

VIII. SUMMARY

Despite some problems that may occasionally arise in connection with the application of the Council Regulation, it needs to be stated that the solutions adopted are, as evidenced in practice, highly beneficial. The issues mentioned above could easily be dispelled by supplementing rather than changing some of the provisions of the Council Regulation. It is also highly recommended that national insolvency laws be enriched with provisions that would ensure an *ex officio* examination by the courts in the Member States competent in insolvency matters of the existence of international jurisdiction as defined in the Regulation and would require information as to the type of insolvency proceedings opened included in court judgements. A good example of such regulations is the provisions of Article 102 of the German Introductory Act to the Insolvency Statute which regulates *inter alia* the examination of jurisdiction and avoidance of conflicts jurisdiction[40].

The need for such provisions should be communicated to the relevant authorities of the Member States competent to initiate the changes described. There is no doubt that there is also a pressing need to disseminate the provisions of the Council Regulation and also the practice relating thereto among judges and lawyers who deal with

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[38] Knof, *Europäisches*, supra note 34, p. 1023; C. Wiedermann, *Kriterien und massgeblicher Zeitpunkt zur Bestimmung des COMI*, Zeitschrift für das gesamte Insolvenzrecht 2007, no. 19, p. 1016, as cited by Szydło, supra note 1, p. 237. Also see Pannen, supra note 10, pp. 116–117.

[39] Knof, *Perpetuatio fori*, supra note 34, p. 88.

[40] See E. Braun, *Commentary on the German Insolvency Code*, Düseldorf: IDW–Verlag GMBH 2006, pp. 625–628.

insolvency-related matters. To this end, wider access to court judgements made in other Member States would be highly beneficial.

There is yet another issue which has not been mentioned before, namely the laying down within the European Union of legal provisions concerning cross-border insolvency of enterprises. Relevant requirements concerning the implementation of such regulations in the national legal systems of individual Member States could be determined by way of council directives.