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The Jurisdiction over Cross-Border Insolvency

Prof. Nicola de Luca

RELATORE

Prof. Vincenzo De Sensi

CORRELATORE

Eleonora Fodde Matr.
139913

CANDIDATO

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INDICE

INTRODUZIONE

L'oggetto della tesi è la competenza giurisdizionale internazionale per quanto concerne l'insolvenza transfrontaliera.
L'argomento trattato è stato suddiviso in tre capitoli: La competenza giurisdizionale internazionale nello scenario europeo, le principali caratteristiche dell'Articolo 3 del Regolamento (UE) 2015/848 e i problemi dell'universalismo modificato, prospettive e soluzioni.

Nel primo capitolo è stata preliminarmente trattata la competenza transnazionale tra gli Stati Membri in applicazione dell'Articolo 3 del Regolamento (UE) 2015/848 e l'interpretazione della dottrina e della giurisprudenza sulla competenza giurisdizionale internazionale con riferimento alle teorie più autorevoli che si sono formate sull'argomento, ed in particolare il "territorialismo", l'"universalismo", il "territorialismo cooperativo" e l'"universalismo modificato". Ciascuna delle predette teorie delinea modalità differenti di approccio ai procedimenti di insolvenza transfrontaliera.
Sempre nel primo capitolo si è trattata l'origine storica e l'evoluzione che ha portato all'emanazione del Regolamento (CE) 1346/2000 ed al successivo Regolamento (Ue) 2015/848, emanato dal Parlamento Europeo e dal Consiglio che ha sostituito integralmente il precedente Regolamento adottando un nuovo approccio all'insolvenza per adattarlo meglio allo scenario moderno.
Per quanto riguarda la giurisdizione, il Nuovo Regolamento (UE) 2015/848 ha mantenuto il concetto degli interessi principali del debitore ma sono stati previsti degli elementi aggiuntivi per la sua identificazione. I cosiddetti procedimenti secondari, ad oggi, in linea con il nuovo ambito di applicazione del regolamento, sono volti anche alla ricostruzione e alla ristrutturazione delle società e non unicamente alla loro liquidazione.
Un paragrafo del primo capitolo è stato specificamente dedicato alla analisi di tre casi significativi risolti dalla Corte di Giustizia con l'applicazione dell'Articolo 3 del Regolamento, che hanno costituito un primo orientamento per gli Stati Membri.
Successivamente sono stati analizzati due casi concernenti l'applicazione e l'interpretazione del nuovo Articolo 3, le cui pronunce della Corte di Giustizia hanno

determinato il nuovo orientamento interpretativo della norma, seguito dagli Stati Membri.

Il primo capitolo si conclude con una breve esposizione delle ragioni per le quali il Legislatore europeo, a seguito delle criticità riscontrate nell'applicazione del precedente Regolamento ed alla luce delle pronunce della Corte di Giustizia, ha ritenuto necessario procedere ad una nuova predisposizione del regolamento.

Nel secondo capitolo viene specificamente analizzato l'articolo 3 del nuovo Regolamento del 2015 ed in particolare è stato trattato il concetto di centro degli interessi principali (articolo 3 primo paragrafo), di dipendenza (articolo 3, secondo paragrafo), del procedimento principale e secondario (articolo 3, terzo paragrafo), dei procedimenti territoriali indipendenti (articolo 3, quarto paragrafo).

In relazione al centro degli interessi principali del debitore (COMI) è stata fatta un'analisi riguardo alla sua definizione e alle presunzioni, sempre presenti nell'articolo che consentono di stabilire dove si trovi il COMI per le varie categorie di debitori, e quindi per le società, per gli individui che esercitano un'attività indipendente o un'attività professionale nonché per le persone fisiche.

È stato analizzato anche il concetto di dipendenza, in quanto anch'esso criterio di ripartizione della competenza giurisdizionale, necessario ai fini dell'apertura del procedimento, in questo caso, secondario.

Si è successivamente argomentato sulla concreta attuazione del principio dell'universalismo modificato, che costituisce la principale teoria su cui si fonda la interpretazione dell'articolo 3 del Regolamento (UE) 2015/848 ed in particolare sulla possibilità di aprire due tipi di procedimenti, uno principale e uno secondario, che hanno rispettivamente una portata universale e una portata territoriale.

Inoltre, è stata fatta un'analisi del rapporto tra questi due tipi di procedimenti e l'effetto territoriale dei procedimenti secondari. Sono stati inoltre esposti i procedimenti territoriali indipendenti, che rappresentano una forma di procedimenti secondari, che opera in via d'eccezione qualora si verifichino determinate circostanze.

Il secondo capitolo si conclude con l'introduzione dell'argomento inerente alle problematiche conseguenti alla pratica del cosiddetto forum shopping, consistente, nel caso dell'insolvenza transfrontaliera, nello spostamento del COMI da uno Stato Membro ad un altro.

Il terzo capitolo si apre con un approfondimento della problematica del forum shopping ed in particolare è stata trattata la sua definizione e i motivi che si possono celare dietro questa pratica.
Sono state poi analizzate le varie salvaguardie adottate dal Regolamento 2015/848.
Ulteriore argomento trattato nel terzo capitolo è la risoluzione del conflitto di giurisdizione tra Stati Membri che per unanime orientamento dottrinario può essere positivo o negativo.
La tesi si conclude con un'analisi della connotazione del forum shopping, prendendo spunto dalla considerazione che si tratta di una pratica molto diffusa negli stati membri ma che non sempre è utilizzata per finalità legittime. Sono state riportati i vari orientamenti dottrinari, favorevoli e critici sulla possibilità di esercitare la predetta pratica. Alcuni, infatti, associano il forum shopping all'abuso del diritto mentre altri lo considerano lecito se correttamente posto in essere in attuazione di sinergie imprenditoriali.

INTRODUCTION

The subject of the dissertation is the international jurisdiction over cross-border insolvencies.

The topic is divided in three chapters: The international jurisdiction in the European scenery, the main features of Article 3 of the Regulation (EU) 2015/848 and the problems of modified universalism, perspectives and solutions.

The first chapter concerns the international jurisdiction of the Member States, according to Article 3 of the Regulation (EU) 2015/848 and the interpretation of the doctrine and the jurisprudence concerning the most influential theories, specifically territorialism, universalism, cooperative territorialism and modified universalism. Each theory outlines different ways of approach to cross-border insolvency proceedings.

Moreover, it was described the history and the evolution of the Regulation (EC) 1346/2000, until the adoption of the Regulation (EU) 2015/848 of the European Parliament and the Council, which has integrally replaced the previous Regulation, adopting a new scope in order to be more consistent with the modern scenery.

On the matter of jurisdiction, the new Regulation (EU) 2015/848 maintained the concept of centre of the debtor's main interests (COMI) but it established additional elements for the COMI identification. The so-called secondary proceedings are now aligned with the new scope of the Regulation, in fact, they aim to the rescue and reconstruction of the companies and are not limited to winding-up proceedings.

One of the paragraphs of the first chapter is specifically dedicated to the analysis of three important cases of the Court of Justice concerning the application of Article 3 of the Regulation (EC) 1346/2000, which constituted a first orientation for the Member States.

Subsequently, it follows the analysis of two cases concerning the interpretation of Article 3 of Regulation (EU) 2015/848, which determined the new interpretation of the provision, followed by the Member States.

The first chapter ends with a brief overview of the reasons for the adoption of the new Regulation (EU) 2015/848, following weaknesses detected in the application of the Regulation (EC) 1346/2000.

The second chapter analyses in details Article 3 of Regulation (EU) 2015/848, specifically the concept of the centre of main interests (COMI) (Article 3(1)), the establishment (Article 3(2)), main and secondary proceedings (Article 3(3)), independent territorial proceedings (Article 3(4)).

Concerning the centre of the debtor's main interests (COMI) it was analyzed its definition and the presumptions, which allow to find the location of the COMI for the different categories of the debtor, thus, companies and legal persons, the individual exercising an economic activity or an independent business, and any other individual.

It was also analyzed the concept of establishment, given its role as jurisdictional link for international jurisdiction, required in order to open secondary insolvency proceedings.

Moreover, it was argued the implementation of the principle of modified universalism, which constitutes the principal theory on the interpretation of Article 3 of the Regulation (EU) 2015/848, and the possibility to open two types of proceedings, main and secondary, which have respectively a universal and a territorial reach.

Moreover, it was analyzed the relationship between these two proceedings and the effects of secondary proceedings. It was also addressed the subject of independent territorial proceedings, which operate as an exceptional measure whenever some situations may occur.

The second chapter ends with the introduction of the topic concerning the issues caused by the so-called forum shopping practice, which entails the movement of the COMI from one Member State to another.

The third chapter explores the matter of forum shopping, specifically its definition and the reasons behind this practice.

Moreover, it follows an analysis of the safeguards adopted by Regulation (EU) 2015/848.

Another subject of the third chapter is the conflict of jurisdiction between Member States, which according to the literature may be positive or negative.

The dissertation ends with an analysis of the connotation of forum shopping, taking into account its diffusion among the Member States and, occasionally, its unlawful purposed. Hence, the report of the doctrinal orientation on the matter, either favourable and opposed. Some authors associate the forum shopping practice abuse of law, others believe that the practice is lawful if its purpose is the implementation of entrepreneurial synergies.

CHAPTER ONE - INTERNATIONAL JURISDICTION IN THE EUROPEAN FRAMEWORK

1. A BRIEF OVERVIEW OF CROSS-BORDER INSOLVENCIES

Cross-border insolvency is an issue that still keeps its relevance as of today.
Insolvencies are increasing in number, especially in 2022[1], and the current events that are happening in these critical years may lead to an asymmetric economic growth.
Economic growth is promoted by cross-border activities that can be better safeguarded with a uniform approach to regulate international insolvency.[2] One inevitable consequence of the surging growth of transnational enterprises is the emergence of worldwide defaults.[3]
Insolvency law provides for an equitable distribution of an insolvent debtor's assets to its creditors. As the world's economies has become more consolidated and interdependent, the effect and reach of a State insolvency laws has become more important.[4] Almost all nations with substantial market economies have laws that address the problem of general financial default by a commercial enterprise, which provide comprehensive systems for dealing with defaults.[5]

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[1] The Global Bankruptcy Report – 2023, made by Dun & Bradstreet International, documents the increasing numbers in bankruptcies. In 2022 global bankruptcies increased 10.8% vs 0.6% in 2021.
Available at https://www.dnb.com/content/dam/english/economic-and-industry-insight/DnB_Global-Bankruptcy-Report_2023.pdf
Source: Dun & Bradstreet Worldwide Network, 7 July 2023
Moreover, Allianz Research in its Insolvency Report states that their Global Insolvency Index is set to jump up by +21% in 2023 and +4% in 2024.
Available at https://www.allianz.com/en/economic_research/publications/specials_fmo/global-insolvency-report-2023.html
Source: Allianz Trade, 11 April 2023

[2] FRANKEN S., *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, in *Oxf. J. Leg. Stud.,* Vol. 34, No. 1 (2014), 98-99

[3] WESTBROOK JL., *Theory and Pragmatism in Global Insolvencies: Choice of Laws and Choice of Forum,* in *Am. Bankr. L. J.,* Vol. 65 n. 4 (1991), 458

[4] HANNAN N., *Cross-Border Insolvency. The Enactment and Interpretation of the UNCITRAL Model Law,* Springer Nature Singapore Pte Ltd. (2017), 1

[5] WESTBROOK JL., *supra,* at 458-459 (1991)

On a European level, thanks to the so-called EU freedoms, legal relations often go beyond the legal area of one state, leading to cross-border effects, even in the area of insolvency proceedings.[6]

The European Union is becoming more aware that regulating cross-border insolvency issues would improve the internal market and contribute to establishing an area of freedom, security, and justice.[7]

International economic cooperation is of vital importance for the development and proper functioning of the internal market, making the effective and efficient operation of insolvency proceedings one of the goals of the European Union. In fact, as laid down in Recital 4 of the Regulation 2015/848 on insolvency proceedings, the Union law is increasingly regulating the activities of undertakings which have more cross-border effects.[8]

Cross-border insolvencies, nowadays, imply a new series of challenges that the laws of any one jurisdiction are not capable to resolve *in toto.*[9]

The term '*cross-border insolvency*', according to the literature, it simply means insolvency with a foreign element.[10] Substantially, it embodies a circumstance in which a debtor who has assets distributed across different States and sometimes this may cause some problems in the identification of the courts with the international jurisdiction to open insolvency proceedings, which can result in conflicts of jurisdiction.

The international jurisdiction and the importance of its identification will be the focus of this thesis.

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[6] FILIPIAK P., HRYCAJ A., ZEDLER F., *European Insolvency Proceedings: Commentary on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast*), Kluwer Law International (2021), 73

[7] BORK R., MANGANO R., *European Cross-Border Insolvency Law,* Oxford, OUP (2016), 3

[8] Regulation (EU) 2015/848, Recital 4

[9] BORK R., VAN ZWIETEN K., *Commentary on the European Insolvency Regulation,* Oxford, Oxford Academic (2022), 6

[10] ANDERSON H., '*Cross-border Insolvency', The Framework of Corporate Insolvency law,* New York, Oxford Academic (2017), 272

2. INTERNATIONAL JURISDICTION

The term 'jurisdiction', in the older doctrine of procedural law, meant a situation in which a court decides what is to be the law for a particular case.[11]

The norms concerning jurisdiction are formulated by each State according to their cultural and political sensitivities, in the respect of their constitutional values. The criteria, chosen by each State, may differ: some rules concerning jurisdiction may be common between States, others may not. Through the work of the judges, each State can manifest their state authority as well as shape the boundaries of their action as guarantor of the relationship between people and businesses.[12]

Nowadays, according to the highly respected doctrine, the term 'jurisdiction' is close in meaning to 'judicial application of the law', implying the sovereign actions of state authorities applying the law and exercising their powers in this respect. Thus, international jurisdiction is an aspect of general judicial jurisdiction distinguished by the existence of other states whose courts have their own jurisdiction.[13]

The EIR Recast[14] restricts the concept of 'international jurisdiction' solely to the determination of international jurisdiction, as stated in the Recital 26.[15] This provision has a double meaning: the EIR Recast does not interfere with the territorial jurisdiction of the courts of the forum state, which maintain their autonomy to choose its own procedural norms. Moreover, the concept of 'international jurisdiction' allows the court of the Member State to open insolvency proceedings covered by the scope of the Regulation.[16]

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[11] FILIPIAK P., HRYCAJ A., ZEDLER F, *supra*, at 73 (2021)

[12] FRANZINA P., *Introduzione al diritto internazionale privato*, Giappichelli, Torino (2023), 49, 50

[13] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 73, 74 (2021)

[14] European Insolvency Regulation (EU) 2015/848

[15] Regulation (EU) 2015/848, Recital 26: '*The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State should be established by the national law of the Member State concerned*'.

[16] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra*, at 75 (2021)

2.1 TERRITORIALISM, UNIVERSALISM, COOPERATIVE TERRITORIALISM AND MODIFIED UNIVERSALISM

It has been authoritatively supported that the approach to cross-border insolvency has evolved over time, and there has been growing recognition of the difficulty to control cross-border insolvency efficiently by relying only on national laws that usually have preserved the problem of diversity and conflict between national laws.[17]

On the matter of cross-border insolvency proceedings there are two prevailing theories: universalism and territorialism. These two theories are not the only existing in the scenery of cross-border insolvency, there are, in fact two other theories: cooperative territorialism and modified universalism. Academics have vigorously debated which approach is best. The center of the discussion usually revolves around the issues of predictability, certainty, national sovereignty, fairness and efficiency.[18]

Despite the progressive research of integration among the States, there are still some substantive differences in national insolvency laws that have precluded the development of a uniform approach to multinational default.

Visualizing the two principal theories of territorialism and universalism as an antithetical system, territorialism can be seen as the antithesis of universalism.

The theory of territorialism, or pure territorialism, relies on territorial notions of sovereignty, concept within which is very much imbued but in the recent years, it also welcomes co-operation in insolvency proceedings and harmonization in choice-of-law rules.[19]

In a territorial regime, in fact, each country would have jurisdiction over the portion of the debtor's assets within its borders. In each case, each country's insolvency court would decide whether to participate in a transnational effort at reorganization or liquidation or to conduct a local reorganization or liquidation according to local law.[20]

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[17] MEVORACH I., *Modified universalism as a customary international law*, in *Tex. L. Rev,.* Vol. 96 (2018), 1418

[18] GHIO E., *Cross-border insolvency and rescue law theory: moving away from the traditional debate on universalism and territorialism*, in *Int'l Company & Com. Law Rev.,* Vol. 29, Issue 12 (2018), 1

[19] FRANKEN S., *supra*, at 102-104 (2014)

[20] LOPUCKI LM., *Cooperation in International Bankruptcy: A Post-Universalist Approach*, in *Cornell L. Rev*. (1999), 701

Each State opening insolvency proceedings applies its own substantive insolvency law to the administration of the firm's assets located in its jurisdiction. It also applies its own distributive rules to the division of the proceeds of the assets located in its jurisdiction. Creditors will have to file their claims in each state in which an insolvency proceeding is opened. As a result, they will be confronted with diverging distributive rules and policies. This territorial approach guarantees that each state can apply its own distributive rules and policies to assets located within its jurisdiction.

Whenever territoriality is applied to the insolvency of a multinational company, it entails that the jurisdiction over the portions of the company that are within the border of a specific country falls to the insolvency courts where that company is located.

Some nations claim "extraterritorial effect" for their bankruptcy systems, but they recognize that – absent treaties or convention to the contrary – they can enforce their laws only against the assets or persons within their own border respect to bankruptcy, such treaties and convention are virtually non-existent.[21]

According to legal practice, States prefer the application of their own insolvency law to cross-border insolvency for two reasons. First, it reduces the costs of learning foreign insolvency law for their constituents who enter into cross-border transactions. Second, even if there were no learning costs, the high cost of relinquishing the preferred distributional outcomes of their own insolvency law is reduced. Therefore, States are usually, by nature, in favor of an extra-territorial reach of their own insolvency law and a territorial reach of the insolvency law of the other States.[22]

The advantages of the territorialist theory detected by the doctrine are focused on three fundamental points. Territorialism appears to be cost effective, since part of the direct costs of insolvency are reduced. Local creditors are more safeguarded by a sort of domestic shield, as they will not have to lodge a claim before foreign courts. Moreover, it has been observed that this approach allows for a better administration and distribution of the debtor's assets, which will be a fairer opportunity for the local creditors to receive assets.[23]

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[21] LOPUCKI LM., *The Case for Cooperative Territoriality in International Bankruptcy,* in *Mich. L. Rev., Vol. 98 n.7* (2000), 2218-2219

[22] FRANKEN S., *supra*, at 99 (2014)

[23] JL. WESTBROOK, *Choice of Avoidance Law in Global Insolvencies*, in *Brook. J. Int'l. L.*, Vol. 17, Issue 3 (1991), 514; CLARK LM. & GOLDSTEIN K., *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, in *Tex. L. Rev.*, Vol. 46 (2011), 518; HOWELL JL., *International Insolvency Law*, in *International Lawyer,* in *Int. Lawyer,* Vol. 42

According to the literature, there are no conditions of reciprocity when applying territorialism. Thus, a State can choose territorialism, regardless of those choices made by others.[24]

Some problems may arise because the insolvency laws of certain countries do not provide for cooperation, even when cooperation would increase the value of the local estate.[25]

The advocates of universalism highlighted some problems and costs deriving from the application of this theory.[26] Territorialism could generate uncertainty with respect to the choice of law. This type of uncertainty will induce risk averse creditors to demand a higher expected return to capital in exchange for accepting a greater variance in the distribution of return, and increasing the rate of interests required for investment, that will raise the threshold return required in order to induce investment, implying that the total amount of investment will be reduced.

Albeit a regime of strict territoriality is very predictable and will not generate the same level of uncertainty, there will still be some of it left.

The second type of cost is more direct one that arise out of the bankruptcy itself.

Under territorialism can occur the additional costs of information gathering, adjudication, and international race to the courthouse. Since the applicable law is determined by the country in which the assets are located, the creditor must be familiar not only with the laws of every country in which there are assets, it must also concern itself with the possibility the assets will be moved to a different jurisdiction in the world.

Another cost imposed by territorial laws is the large increase in the cost of actually adjudicating the bankruptcy and distributing the assets. For example, if we consider the position of the creditors, they must file in multiple jurisdictions and litigate and negotiate in all of these jurisdictions, often simultaneously.

Creditors, at the beginning of the proceedings, will scramble to attach assets in jurisdictions which have not yet begun bankruptcy proceedings.

(2008), 115; BARTELD L., *Cross-Border Bankruptcy and the Cooperative Solution,* in *BYU L. Rev,* Vol. 9 Issue 1 (2012), 30

[24] FRANKEN S., *supra*, at 99 (2014)

[25] LM. LOPUCKI, *supra*, at 2219 (2000)

[26] WESTBROOK JL., *A Global Solution to Multinational Default, in Mich. L. Rev., Vol. 98, Issue 7* (2000), 2282-2302

A final cost imposed by territorialism is fairness cost. The argument is that a single proceeding ensures that all creditors receive a fair percentage of the assets. Favoritism for local creditors is reduced.[27]

LoPucki[28], one of the main advocates of the territorialism, believes that the theory in its purest form needs to be revised in order to be adopted by more States.

He has proposed a more feasible variant of the territorialism model. He advocates for a territoriality that is more "cooperative" in two senses. First, a variety of matters will remain upon which countries will need to cooperate through treaty or convention.

Second, this system is designed to serve as a foundation for mutually beneficial cooperation with the representatives of particular insolvency estates.

Under this system of cooperative territoriality, the insolvency courts of a country will administer the assets of a multinational debtor within the borders of that country as a separate estate. Several independent insolvency cases might result whenever a debtor has significant assets in several countries, but none of them will be classified as main, secondary or ancillary. Each of the courts would decide whether the assets within its country's borders would be reorganized or liquidated. The debtor would file for insolvency in each of the countries in which it had operations. Each of the insolvency courts would assume jurisdiction over the local assets, would determine whether to cooperate in a multinational reorganization or liquidation, and in case of the latter, each would distribute the assets of the company among creditors and shareholders under local law.

Moreover, LoPucki claimed that the location of the assets for bankruptcy purposes will be made with reference to the sovereign power to a country that has the *de facto* power over them. This prerequisite will reduce the number of conflicting claims over assets. According to this rule, an insolvency estate in a country could include only property that the government had the sovereign power to marshal without the assistance of other nations. In case of international movements of the debtor's assets, the cooperative territoriality model advocates to treat them as it they were transferred to a separate entity in the destination country. The rationale is that the effect of the debtor moving property to another country would be the same as the effect of the debtor transferring

[27] GUZMÁN, *A Better Argument for Universalism in Transnational Bankruptcies*, in *Discussion Paper No. 183, 4/96*, Harvard Law School, 1-51

[28] Security Pacific Bank Distinguished Professor of Law Emeritus

property to another entity. Implementing this rule would necessitate treaties that require the return of fleeing assets, but negotiating these treaties should not be difficult. Cooperative territoriality, thus conceived by LoPucki, would also imply the elimination of the tension between the countries, vesting each with insolvency power congruent with its sovereignty. There will be no need to recognize the foreign authority over domestic assets or sacrifice the interests of local debtors or creditors in particular cases.

A cooperative territorial system and a universalist one will differ less in practice than in theory, in fact, they both yield the same result in most cases. One can think of cooperative territoriality as a simplification of universalism.

The advantages of cooperative territoriality are that it solves the corporate group problem by severing the firm at the national border, providing multinationals with an incentive to compartmentalize by country.

It offers also greater predictability to lenders; they will know which entities are indebted to them. The only additional information lenders would need to predict their treatment in bankruptcy would be the countries in which their debtors' assets were located and the distributional priorities of these countries.

Cooperative territoriality will also offer transactional simplicity; indeed, domestic law would govern wholly domestic transactions.

LoPucki has theorized four weakness of cooperative territoriality. The first one is the possible need for creditors to file and prosecute claims in all jurisdictions in which insolvency proceedings were pending against their debtors. This would imply that creditors might each have to deal with local procedures, in each country where the debtor has assets, regarding the proof of their claim, and that the parties may have to litigate a disputed claim in each of the proceedings in which the creditor has filed that claim.

The second is the need for cooperation among courts and representatives to effect a multinational liquidation or reorganization may cause some delays in the opening of the proceedings in each country.

The third is the possibility of strategic removal assets from the country on the eve of insolvency, that could be more severe under territoriality. This problem would necessitate treaties to ensure the return of fleeing assets to the country in which they were located during the relevant period preceding the insolvency filing.

The fourth is the need for protection of involuntary creditors. In a territorial system, countries might choose to protect foreign involuntary creditors either because they agree with the foreign policies that led to the judgements or because they seek reciprocity with regard to their own policies. Once again, in order for such reciprocity to come about, the countries granting the judgements realistically would have to negotiate for it.[29]

According to the doctrine, the theory of universalism, on the other hand, promotes a situation in which each legal system and their courts are compelled to enforce the orders of the court which manages the case.[30]

The core concept of universalism is that a single court should have control over the assets of a bankrupt multinational firm. This court should apply its nation's law when deciding whether to reorganize or liquidate and determining priorities among creditors. It should also control the administration of the assets of the debtor and should make the distributions to creditors worldwide.[31] The insolvency court in question may be the court of the country designated in the debtor's articles of incorporation, the court of the country in which the debtor has its headquarters, or the court of the country in which the debtor has the bulk of its assets or operations. However, the proper forum chose by most universalist is the court of the "home country" or the "center of the debtor's interests". The other states need to accept that foreign law may apply to assets located in their jurisdiction. The court will have jurisdiction opens a single 'universal' insolvency proceeding with respect to a multinational firm. Creditors have to file their claims only once with the main proceeding and they are confronted with a single set of distributive rules and policies[32].

In literature, the proponent[33] of the universalist model for cross-border insolvency focus on the benefits of this model. Five benefits are emphasized. The first one is an increase of legal predictability ex ante, that would significantly reduce the costs of

[29] LoPUCKI LM., *supra,* at 749-759 (1999)

[30] GHIO E., *supra,* at 1-10 (2018)

[31] LoPUCKI LM., *supra,* at 700 (1999)

[32] FRANKEN S., *supra*, 98 (2014)

[33] WESTBROOK JL., (2000), at 2282-2302 (2000)

borrowing and other credit for multinationals and allow creditors to anticipate that one law will control most aspects of a default.

The second is the facilitation of restructuring cases, the reorganization of the viable multinational firm often requires the coordinated use of assets located in different countries. Without universalism creditors would have distorted incentives when choosing between reorganization and liquidation.

The third is the decrease of costs, since each domestic court is dealing with only the assets located within its own jurisdiction. Creditors' claims are contained in a local forum, entailing a reduction in overall costs, both private and public, deriving from the costs of every international transaction and from the insolvency process itself.

The fourth is the increase of the overall asset value, because a single representative will have the authority to sell all the assets. This representative can sell them either together or separately, whichever will bring the highest price.

The last advantage is an increase in equality and fairness for all stakeholders, especially in the distribution among creditors. A universalist regime can easily achieve a pro rata distribution among creditors because a single court makes the distribution to all members of the class simultaneously.

Universalism is not exempt from critics. The literature[34] has detected four problems. The first one is that in a universalist system, foreign law and courts govern wholly domestic relationships, confusing domestic markets since the laws of various countries differ widely in resolving issues like the priority of the creditors.

The second is that the home country standard is indeterminate in many cases. In a universalist system, the determination that one country rather than another is the debtor's home country is of crucial importance. Universalists acknowledge that it is difficult to state a precise rule for determining a debtor's home country. However, they believe that the identity of the home country will be obvious in the large majority of cases. Most courts and commentators seem to regard the country of incorporation as having the strongest claim to the home country status. Without a clear resolution of this issue, the country's law that would govern the distribution in a bankruptcy case would be unpredictable, making universalism less reliable.

The third problem is that there is no workable rule which can be devised for determining the extent to which the home country is to have jurisdiction over corporate

[34] LOPUCKI LM., *supra,* at 709-725 (1999)

groups. Principal rationales for the adoption of the universalist approach require that the home country bankruptcy court takes jurisdiction over other members of the group whose operations are integrated with those of the debtor. This jurisdiction may need to include members of the corporate group that are financially sound. Otherwise, the insolvency court of the home country may not control all of the assets necessary to recognize the business or to liquidate it for the best price.

The fourth is that the home country standard is vulnerable to strategic manipulation. Debtors who anticipated filing for insolvency could change their attributes to assure jurisdiction over their cases in debtor-friendly countries, implementing the practice of forum shopping.

According to legal practice, few countries will adhere to either 'universalism' or 'territorialism' in their purest forms.[35]

In practice, neither approach has been adopted in its pure form. The two approaches are best seen as the two very theoretical ideals with several modified forms appearing somewhere in the middle.[36]

Nowadays, the dominant approach for addressing cross-border insolvency is modified universalism, which is universalism adapted to the various requirements of the different countries.[37] This theory contemplates a single proceeding, pending at the debtor's centre of main interest (COMI), drawing inspiration from the universalist concept of the 'home country'.[38] The aim of modified universalism is to achieve a global collective process with an efficient level of centralization of insolvency proceedings. It thus requires the identification of a country where proceedings would be centralized, except where it is efficient to open additional proceedings elsewhere. This outbound aspect of modified universalism is complemented by a choice-of-law norm that, in principle, refers to the *lex fori concursus* with limited exceptions.[39] The most important task of a system of modified universalism is to identify the jurisdiction

[35] MCCORMACK G., *Universalism in Insolvency Proceedings and the Common Law,* in *Oxf. J. Leg. Stud.,* Vol. 32, No. 2 (2012), 329

[36] GHIO E., *supra*, at 2-10 (2018)

[37] WESTBROOK JL., *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, in* (2018), 5

[38] JANGER EJ., MADAUS S., *Value Tracing and Priority in Cross-Border Group Bankruptcies: Solving the Nortel Problem from the Bottom Up* (2020), 336

[39] MEVORACH I., *supra*, at 1403 (2018)

that should host the central proceeding.[40] Modified universalism forms the basis both for the UNCITRAL Model Law on Cross-Border Insolvency, and the European Union Insolvency Regulation.[41]

3. THE EUROPEAN UNION'S EFFORTS TO ADMINISTER CROSS-BORDER INSOLVENCIES

3.1 THE SCENARIO OF THE ENACTMENT OF THE EUROPEAN INSOLVENCY REGULATION

The period of the first attempts to transplant the principle of 'universality' to the European context was characterized by a period of rapid advance along the path toward European integration, where the Community, comprising the six founding members, and being guided by a Commission, was imbued by a generally favorable political climate.[42] On October 1959 the Commission of the European Economic Community wrote a document outlining the need for cooperation between the Member States in the field of insolvency law, as well as the recognition and enforcement of judgements in civil and commercial matters to give effect to Article 220[43]. By this means, two different Committees were appointed in 1960, but, due to the special difficulties that the reciprocal enforcement of bankruptcy and insolvency judgments presented, a second Committee was constituted in 1963. This bankruptcy committee produced a preliminary draft convention in 1968, which was followed by a revised draft in 1970, accompanied by a detailed explanatory report. The 1970 draft Convention on Bankruptcy, Winding-

[40] WESTBROOK JL., *supra*, at 1478 (2018)

[41] JANGER EJ., MADAUS S., *supra*, at 336 (2020)

[42] BORK R., MANGANO R., *supra*, at 13 (2016)

[43] Treaty of Rome, Article 220: "*Members States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: (a) the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; (b) the abolition of double taxation within the Community; (c) the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; (d) the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards*."

Up, Arrangements, Compositions, and Similar Proceedings was strikingly ambitious.[44] The committee recognized that the only way to facilitate the collective deployment and *pari passu* distribution of a debtor's assets would be to open insolvency proceedings in every State in which a debtor had assets or creditors. This type of system, that resembles a territorial one, was perceived to have numerous flaws. For instance, the cessation of the debtor's powers to deal with his property and suspension of individual proceedings do not occur everywhere at the same time, some very unequal distributions may occur, and the multiplicity of insolvency proceedings may cause some increases in costs.

The committee, instead of resolving this problem by proposing uniform rules on cooperation and coordination between Member States to reduce the costs of securing this bilaterally, replaced the multiple proceedings with a single set of proceedings, opened in only one Member State but effective in relation to assets and creditors, trying to combine the unity principle with the universality principle.

The committee, afterword, considered the possibility of a unified set of insolvency proceedings for the Community, but the unification of the insolvency laws of the contracting States would take far too long to achieve due to the disparity across the Community.

The new convention would endow with Community-wide scope and effects the procedures already available under the domestic laws of Member States, developing and annexing a list of national procedures to the 1970 draft convention in a protocol.

The proper place for the opening of the proceedings would be determined by the convention's rules of jurisdiction and the compliance with those would be a prerequisite for the opening.

Under the convention, the law of the forum would apply to determine the conditions under which proceedings could be opened, the procedure for their conduct and closure, and the effect of the proceedings on the debtor, creditors, and third parties. The insolvency practitioner would be able to exercise the powers conferred on her by local law in other contracting States.

The committee also developed a range of alternative uniform conflict of laws rules and recommended the replacement of some domestic substantive insolvency law rules with new rules developed by reference to a 'uniform law' annexed to the convention. Contracting States would be required to standardize their laws in conformity with the

[44] BORK R., VAN ZWIETEN K., *supra,* at 1-41 (2022)

uniform law, having the possibility to express their right not to do so at the time of signature or ratification.

This strategy would reduce diversity in Member States, thus making the predictability of the insolvency forum less salient [45].

Several years of negotiation on the text were followed by the release of the 1970. The task of securing agreement on the uniform law proved difficult and it became more challenging after the accession of three more States to the EEC in 1973.

Around 1980 a new revised draft was finalized and published in a 1982 edition of the Bulletin of the European Communities. This new convention retained the 'unity' and 'universality' model, which implied the concentration of proceedings in one forum with Community-wide effects. The drafters, in this convention, removed nearly all of the proposals for standardization that were presented in the 1970 draft.

Meanwhile, the Council of Europe had begun its own project on cross-border insolvency law. The result was the drafting of another convention, the Istanbul Convention, opened for signature in 1990. The drafters decided to abandon the unity model in favor of a form of regulated plurality, the Istanbul Convention, in fact, would regulate some of the effects of the multiple insolvency proceedings and their interrelationship. The contracting States would also be permitted to opt out of some of the most significant provisions of the convention by making a declaration at the time of signing or ratification.

Under the convention, one set of proceedings would be designed as 'main', and their effectiveness would be enhanced by endowing the insolvency practitioners with limited powers in relation to certain assets in the contracting States. In case rival proceedings had been opened in the contracting states, these powers would not be exercisable. Any distribution would be limited to preferential creditors, secured creditors, and those with 'public claims'. The drafters designed also the 'secondary' proceedings as a system of compromise between a complete procedure carried out in each state while being coordinated with the main insolvenct, and a procedure which amounts to the transfer of the surplus of the assets to the main bankruptcy for the payment of all other creditors once the payment of the sole privileged creditors has been made.

The Istanbul Convention did not receive sufficient ratifications to enter into force, but, after a time of quiescence, the convention project for the EEC had been revived.

[45] BORK R., VAN ZWIETEN K., *supra,* at 1-41 (2022)

An *ad hoc* working party was appointed under the guidance of Dr. Balz[46] and, in 1995, it proposed the text of a 'Convention on insolvency proceedings'[47].

This Convention was a compromise between the 'unity and universality' model of the early EEC convention drafts and the regulated plurality of the Istanbul Convention.

However, main proceedings would enjoy much stronger extraterritorial privileges, designed to endow main proceedings with 'universal' scope, embracing all of the debtor's assets and creditors. The scope of main proceedings was not limited by the commencement of 'secondary' proceedings in other Member States, which would complete insolvency proceedings whenever the creditors, situated in any other Member State, would be entitled to participate. The Convention also provided for autonomous secondary proceeding as a form of protection of local interests, but they would be subject to some restrictions. The jurisdiction would be limited to Member States in which the debtor had an 'establishment', the scope would be explicitly restricted to local assets, and their character confined to winding-up proceedings.

The Insolvency Convention, however, did not obtain all the signatures of the Member States, required for its approval.

The European Parliament, aware of the difficulty of finding signatures, instructed the Commission to 'covert' the text of the Insolvency Convention into a regulation. By 2000 the Council Regulation on insolvency proceedings No. 1346/2000 had been enacted.

The expansion of the powers of the European Union allowed to overcome the missing signature of the United Kingdom. [48]

3.2 THE INTERNATIONAL JURISDICTION IN REGULATION (EC) No. 1346/2000: ARTICLE 3

The Regulation No. 1346/2000 applies to all the insolvency proceedings opened in the Member States, starting from the 31 of May 2002.

[46] Dr. Balz is now a member of the executive board of the German Bundesbank

[47] BORK R., MANGANO R., *supra*, at 1-24 (2016)

[48] DI AMATO S., *Le procedure di insolvenza nell'Unione Europea: competenza, legge applicabile ed efficacia transfrontaliera*, in *Fall*. (2002), 697

Its scope revolves around the topics of: (a) competition; (b) debtor's insolvency; (c) total or partial dispossession of the debtor; (d) appointment of the liquidator.[49]

The European legislator tried to define the scope of the new regulation in order to overcome the differences among the Member States' insolvency systems. Therefore, the Regulation includes some definitions and an annex to withdraw uncertainties on its scope.

The Regulation addresses the matter of jurisdiction, giving common rules which applies to all the Member States[50].

On the matter of jurisdiction, the Regulation No. 1346/2000 provides for the allocation of international jurisdiction concerning insolvency proceedings in Article 3, which represents one of the pillars of the entire legislative system on insolvency, working also as a remedy for the solution of positive conflicts of jurisdictions.[51] It states a uniform set of jurisdictional rules, applicable to all cases which are included in the scope of the Regulation. The jurisdictional rules operate in an exclusive manner, and not as an additional basis of jurisdiction to operate in parallel with national rules[52].

This Article also illustrate the tension between the desire that in relation to each debtor there should just be a single set of insolvency proceedings with a universal effect, and the requirement to give effect to the demands of individual Member States to uphold some control of proceedings commenced against a debtor who has interests within their jurisdiction[53].

Article 3 identifies which court has the jurisdiction to open insolvency proceedings, establishing the concept of the 'centre of a debtor's main interests' (COMI) as the distinguishing feature. It also provides for the possibility to open secondary proceedings where the debtor has an 'establishment', and it regulates specifically the two situations when territorial insolvency proceedings can be opened.

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[49] CAPONI R., *Il regolamento comunitario sulle procedure di insolvenza*, in *Foro It*., Vol. 125, n. 11 (2002), 222

[50] With the exception of Denmark

[51] DE CESARI P., *Il rapporto tra procedura principale e procedure secondarie nel Regolamento n. 1346/2000: un aiuto dalla Cassazione, ma molti sono i problemi ancora aperti*, in *Fall.,* n. 10 (2016), 839

[52] MOSS G., *supra*, 51 (2016)

[53] MOSS G., *supra*, at 300 (2016)

This Article introduces for the first time the principle of modified universalism, which (as stated in the paragraph 2.1) is a type of universalism adapted, in this case, to the European scenario. The principle of universality remains the main principle underlying the Regulation. It requires that when the insolvency proceedings are commenced, all of the debtor's assets are comprised in them. However, the possibility to open more sets of insolvency proceedings, with a territorial effect, limits the universal scope with the introduction of the territorial element. This type of proceedings is subject to rules of co-ordination with the main proceeding, moderating the principle of universality.

3.2.1 The Concept of the 'Centre of the Debtor's Main Interests' (COMI) in the Regulation No. 1346/2000

The first paragraph of Article 3 provides that the courts of the Member State where the centre of a debtor's main interests is located shall have jurisdiction to open insolvency proceedings. Whenever the debtor is a company, or a 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.

The Article, for instance, fails to define the concept of the centre of main interests (COMI), but the Regulation overcomes this deficiency with the Recital 13, whose wording is taken from the first sub-paragraph of paragraph 75 of the Virgos-Schmit Report. However, Recital 13 helps to identify better the COMI providing that it should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties.[54]

The literature suggested that it can be seen as a connecting factor intended to provide a test in which the attributes of transparency, continuity, and objective ascertainability that are the main features.[55]

The COMI may vary on the basis of the nature of the debtor.

In the case of a company or 'legal person' the place of the registered office is presumed to be the COMI in the absence of proof to the contrary. The presumption in this case is that a debtor's COMI will be found in the place of its registered office, which normally corresponds to the debtor's head office. The inquiry as to where the COMI

[54] MONTELLA G., *Riconoscibilità e abitualità del COMI*, in *Fall*., n.11 (2013), 447

[55] MOSS G., *supra*, at 52 (2016)

is actually located is more focused on where the head office functions are carried out, since it may not be the same place where the head office is situated. The case law uses the head office functions test to locate the place where a debtor administers his interests on a regular basis. The presumption involving the place where a debtor administers his interest on a regular basis may be rebutted if the place in which a company's central administration is located is not the same as that of its registered office. It will also be taken into account the places where the debtor pursues economic activity and the places where the debtor's assets are situated, as both places are ascertainable by third parties. The crucial criterion is, therefore, where the company's actual centre of management and supervision is situated.

The COMI for natural persons will generally be their place of habitual residence, whereas, in case of 'professionals' it will be the place of their professional domicile, as stated in paragraph 75 of the Virgos-Smith Report.

The fact that the presumption concerning the location of the COMI of a corporate debtor is expressed to be rebuttable gives rise to the logical possibility that the location of the COMI may change through time. It has been highlighted by the doctrine that the mobile nature of a debtor's COMI is consistent with the principle of establishment within the EU, but it may raise some important questions of law, as to which the Regulation is silent, but which carry profound practical implications.[56] A debtor may choose to move its COMI to take advantage of ore favorable restructuring laws which exist in a particular Member State, engaging in a "forum shopping" practice.

Recital 4 mentions the policy against "forum shopping", which provides that the Member States shall avoid incentives for the transfer of assets or judicial proceedings of the debtor, in order to obtain a more favorable legal treatment.

The debtor's COMI, under Article 3 (1), confers jurisdiction to open main proceedings in the Member State where it is situated. However, the location is to be assessed at the time of the request for the opening of the proceedings. Therefore, the debtor can legitimately eventually move its COMI and alter the place where there is jurisdiction to open main proceedings prior to the filing of the request for the opening of the proceedings.

The Regulation does not deal with the position of groups of companies consisting of a number of related companies. There are no provisions which provide for any degree

[56] MOSS G., *supra*, at 64,65 (2016)

of co-operation between the different proceedings, it will only be possible to open main insolvency proceedings in relation to each individual company.
Article 3 comprises a wide spread of activities which extend beyond commercial, industrial, and professional activities, along with the general economic activities of private individuals, due to the use of the term 'interests'. Consequently, to private individuals who do not carry on a business, the concept of a debtor's COMI still applies.

3.2.2 Main and Secondary Proceedings

The Regulation 1346/2000 envisages only two categories of insolvency proceedings, main proceedings and territorial proceedings, opened in accordance, respectively, with Article 3 (1) and Article 3 (2).
The first paragraph of the article uses the concept of COMI to enable the courts of the Member State, within whose it is located, to open insolvency proceedings having the character of main proceedings. This type of proceedings has a universal scope and is intended to comprise the debtor's assets worldwide. The Regulation 1346/2000 accords them the fullest benefits and extraterritorial effects.
In order to qualify an insolvency proceeding as 'main' it is necessary to establish that the place where the COMI is located is based on objective elements and is ascertainable by third parties.[57]
If main insolvency proceedings have previously been commenced in relation to the debtor, Article 3 (2) provides that the local insolvency proceedings (secondary insolvency proceedings) can only be opened, which are regulated by the *lex fori*, in the Member States in which the debtor has an 'establishment'. The aim of the secondary insolvency proceedings is to safeguard local creditors and to limit the scope of the main insolvency proceedings[58]. Such jurisdiction provides an important exception to the universality principle which underlines the scope of the Regulation and is also accorded to main proceedings opened under the first paragraph of the article. The

[57] BOGGIO L., *COMI, dipendenza e procedure secondarie a carico di società controllate nel Reg. CE n. 1346/2000 (e del Reg. UE n. 848/2015)*, in *Giur. it*., n.8-9 (2016), 1934

[58] PANZANI L., *L'insolvenza in Europa: uno sguardo d'insieme*, in Fall., n.10 (2015), 1014

effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the State in which they are opened. The criteria used in case of a secondary proceeding to identify the location of the court is the territory in which the debtor has an establishment. The concept of establishment is defined in Article 2(h) which provides that an 'establishment' is to be interpreted as any place of operation where the debtor carries out a non-transitory economic activity with human means and goods.

The literature argued that it is the result of a deliberate decision to restrict the number of opportunities for creditors to avail themselves of the personal and tactical advantages to be gained by means of secondary proceedings.[59]

Article 3(4) provides for a special type of proceedings that may be opened even if main proceedings have not yet been commenced in relation to the debtor. Two alternative conditions need to be satisfied: main insolvency proceedings cannot be commenced against a debtor in the Member State in which he has the COMI; or when there is a request from a creditor who is domiciled or who has his habitual residence or registered office in the Member State where an establishment of the debtor is situated.

The system laid out assures the predictability of the solutions and delimits the areas of possible frauds and abuses, in favor of all the people affected from the insolvency. The Regulation stands out for the realistic nature of its solutions, its intervention is limited, consistently with the different legal frameworks at the European level.[60]

The doctrine stated that the general reaction to the adoption of Regulation No. 1346/2000, in certain Member States, was a reasonably optimistic one especially concerning the effects of its application in the national framework.[61]

[59] MOSS G., *supra*, at 60 (2016)

[60] FUMAGALLI L., *Il regolamento comunitario sulle procedure di insolvenza*, *in Riv. dir. proc*., n. 3 (2002), 708

[61] PROTO V., *Il regolamento comunitario sulle procedure di insolvenza*, Fall., n.7 (2002), 13

3.3 THE WEAKNESS OF THE REGULATION AND THE PROPOSAL FOR ITS AMENDMENT

While the Regulation No. 1346/2000 was considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union, the Parliament raised the question of harmonizing the substantive insolvency laws in the EU to cope with the continental dimension of many companies.[62]

The Commission has put the revision of the EIR in its Work Program for 2012, which would be also linked in with the broader issue of improving the efficiency of justice in the European Union.

The overall objective of the revision was to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises[63].

DJ Justice[64] contracted two external studies to support the impact assessment: an evaluation study performed by the Consortium Heidelberg/Vienna University and an impact assessment study by the Consortium GHK/Milieu; both used for the Impact assessment accompanying the document for the revision of Regulation (EC) No. 1346/2000 on insolvency proceedings.

A public consultation of the stakeholders' consultation, containing 31 questions related to the scope and the functioning of the Regulation was made. The majority of respondents considered that, even though the EIR works relatively well in general, it should accommodate national pre-insolvency procedures, it does not work for the insolvency of a group of companies, and it lacks the mandatory publication of decisions relating to insolvency procedures.[65]

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[62] MUCCIARELLI FM., *Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension*, in *European Business Organization Law Review*, in EBOR, Vol. 14, n. 6 (2013), 176

[63] *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings /*COM/2012/0744 final – 2012/0360 (COD) */*, 3

[64] Now the Directorate-General for Justice and Consumers, a Commission department responsible for EU policy on justice, consumer rights and gender equality

[65] *Commission Staff Working Document Impact Assessment Accompanying the document revision of Regulation (EC) No. 1346/2000 on insolvency proceedings /*SWD/2012/0416 final*/*

The evaluation showed that a range of problems existed in the implementation of the Regulation, which, in addition, did not sufficiently reflected the EU priorities and national practices in insolvency law, in particular, promoting the rescue of firms in difficulties. The key problems identified were: (a) obstacles to the rescue of companies and to the free movement of entrepreneurs and debt-discharged persons; (b) difficulties in determining the appropriate jurisdiction to open proceedings; (c) inefficiency of cross-border procedures; (4) no legal framework to cover insolvency of groups of companies.

Three policy options were designed to solve the arisen problems. The first one was maintaining the status quo, hence, the baseline scenario, which implied no modifications to the Regulation. The second, Option A, consisted in the modernization of the existing Regulation while trying to preserve the current balance between creditors and debtors and between universality versus territoriality. The third, Option B, sought to modify the fundamentals of the Regulation and require some approximation or convergence of national insolvency laws and proceedings. Some of the elements composing these options are common, in fact, Option A and Option B provide for an extension of the scope, for the introduction of national insolvency registers and for the simplified procedures for lodging a claim.

After a comparison of the possible options for the amendment of the Insolvency Regulation, the ultimate choice fell to Option A.

The Proposal highlighted that, on the matter of jurisdiction, the problem emerged from the implementation of the Regulation. To determine the jurisdiction to open main insolvency proceedings the Regulation grants it to the courts of the Member State where the debtor has its centre of its main interests (COMI), however, it fails to offer a definition of it. Recital 13 only provides for a presumption that the COMI of a company is located at the place of the registered office, where the company conducts the administration of its interest on a regular basis in an a manner ascertainable by third parties.[66] The COMI standard set by the Regulation has been criticized for being too vague and unclear, making impossible for the parties concerned to predict the decision on jurisdiction and for the courts involved to decide in a coherent manner. The jurisdiction rules have also been criticized for allowing companies and natural persons abusing COMI-relocation, enacting forum shopping practices.

[66] Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, Recital 13

The proposal for the new Regulation complements the definition of COMI, introducing, also, a provision determining the COMI of natural persons. The circumstances, in which the presumption that the COMI of a legal person is located at the place of its registered office can be rebutted, are clarified in a new recital.[67]

Moreover, the Proposal, also provides for the improvement of the procedural framework for the determination of jurisdiction for the opening of proceedings. Accordingly, jurisdiction has to be examined by the court ex officio prior to opening insolvency proceedings and the court in question has to specify in its decision on which grounds it based its jurisdiction. The opening decision can be challenged by all foreign creditors, informed of the opening decision. These changes aimed to reduce the cases of forum shopping through abusive and non-genuine relocation of the COMI.

By way of conclusions, the Proposal stated that jurisdiction for the opening of insolvency proceedings also includes the actions which derive directly from insolvency proceedings or are closely linked with them such as avoidance actions.

3.4 ANALYZING KEY CASES TO UNDERLINE SOME PRACTICAL ISSUES

3.4.1 THE TRANSFER OF COMI UNDER REGULATION No. 1346/2000: THE STAUBITZ-SCHREIBER CASE (C-01/04)

The first ruling of the Court of Justice regarding the Council Regulation No. 1346/2000 is the Staubitz-Schreiber case.

The Staubitz-Schreiber case concerns an applicant in the main proceedings, Mrs Staubitz, who was resident in Germany where she operated a telecommunications equipment and accessories business as a sole trader.

She requested the opening of insolvency proceedings regarding her assets before the Amstgericht-Insolvenzgericht Wuppertal (Local Court, Wuppertal) after ceasing to operate that business in 2001.

[67] *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings /*COM/2012/0744 final – 2012/0360 (COD) */*, 48

On April 2002, she moved to Spain in order to live and work there.

The Amstsgericht-Insolvenzgericht Wuppertal refused to open the insolvency proceedings applied for, since it found that there were no assets. Afterwards, the appellant brought an appeal before the Landgericht Wuppertal (Regional Court), which was dismissed on the grounds that the German courts did not have jurisdiction to open insolvency proceedings in accordance with Article 3(1).

The applicant, in order to have the orders set aside and the case referred back to the Landgericht Wuppertal, subsequently brought an appeal before the Bundesgerichtshof (Federal Court of Justice, Germany), submitting that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, by taking into account of her domicile in Germany in December 2001.

The court pointed out that the applicant in the main proceedings moved the centre of her main interests to Spain after she had requested the opening of insolvency proceedings in Germany, but before such proceedings were opened or produced their effects under German law.

The Bundersgerichtshof decided to stay the proceedings before it and to refer to the Court for a preliminary ruling.

The Court did not focus on the concept of the 'centre of the debtor's main interests', but it clarified the scope *ratione temporis* of the Regulation.

In fact, the Court stated that Article 3(1) of the Regulation does not specify whether the court originally seized retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered. Clarifying that a transfer of jurisdiction from the court originally seized to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation. Thus, it ruled that Article 3(1) must be interpreted as meaning that the jurisdiction to open main insolvency proceedings belongs to 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, even if the debtor moves the COMI in another Member State after lodging the request but before the proceedings are opened[68].

[68] Case C-1/04, Susanne Staubitz-Schreiber, ECLI:EU:C:2006:39

The Court also stated that the intention of the Community legislature is to avoid incentives for the parties to transfer assets or judicial proceedings from on Member State to another, pursuing a more favourable legal position, as stated in Recital 4[69].
Moreover, it also repeated that such a transfer of jurisdiction would also be contrary to the objective, specified in Recital 2[70] and 8[71] of the Regulation, as creditors would be obliged to be in continual pursuit of the debtor wherever he chose to establish himself, and the proceedings would be prolonged, ensuring the creditors a greater judicial certainty if the first court seized retained the jurisdiction[72].
According to the Advocate General, admitting the movement of the centre of the debtor's main interest during the period between the request for the opening of the main proceedings, and the actual opening would jeopardize the basic principles of the Regulation[73].
The doctrine agreed that the adoption of a different opinion by the Court would have allowed the thrive of forum shopping practices, and highlighted that the Court, in its judgement, ruled the effectiveness of the principle of *perpetuatio fori,* meaning that once the request for the opening of the proceedings before the court of the Member State in whose territory the centre of the principal interests of the insolvent debtor, the subsequent transfer to another Member State of that same centre of interest shall not deprive the court originally seized of jurisdiction to rule on that application[74].

[69] Case C-1/04, Susanne Staubitz-Schreiber, ECLI:EU:C:2006:39, par. 25

[70] Regulation (EC) 1346/2000, Recital 2: "*The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty*.".

[71] Regulation (EC) 1346/2000, Recital 8: "*In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States*.".

[72] Case C-1/04, Susanne Staubitz-Schreiber, ECLI:EU:C:2006:39, par. 26, 27

[73] DIALTI F., *Trasferimento del centro degli interessi principali del debitore nel territorio di un altro Stato membro successivamente alla proposizione della domanda di apertura di una procedura di insolvenza*, in *Dir. fall.* n. 3-4 (2006), 20413

[74]MACRÌ F., *Trasferimento del centro degli interessi principali e competenza giurisdizionale nel Regolamento (CE) 1346/2000*, in *Fall*, n. 8 (2006), 910; MONTANARI M., *La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure di insolvenza*, in *Int'l Lis*, n.1 (2007), 22

3.4.2 THE JURISDICTION TO OPEN A MAIN INSOLVENCY PROCEEDINGS: THE EUROFOOD CASE (C-341/04)

The Eurofood case[75] concerned a positive conflict of jurisdiction caused by the different determination of the centre of main interests of a company. It involved two courts, the High Court of Ireland and the Tribunale Civile e Penale di Parma (District Court, Parma). In order to determine the COMI, the Irish judges attributed significance to the location of the registered office, whereas the Italian judges relied on the actual management of the company. The assessment of the courts also differed on the moment when the main proceedings were supposed to be opened.[76]

The time between the request of the opening of the proceedings and the decision to open it, in fact, may vary across the Member States.[77]

The events have occurred in parallel, both in Italy and in Ireland.

Eurofood was a 'company limited by shares' registered in Ireland in 1997 with its registered office in the International Financial Services Centre in Dublin, and a subsidiary of Parmalat SpA, a company incorporated in Italy.

In Italy, Parmalat SpA, the controlling company of Eurofood, was admitted, in December 2003, to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator.

Since Eurofood was a wholly owned subsidiary of Parmalat SpA, in February 2004, the company was admitted to the extraordinary administration procedure with Mr. Bondi as the extraordinary administrator. Subsequently, a declaration for the insolvency of Eurofood was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma). The District Court held that it had international jurisdiction to determine whether Eurofood was in a state of insolvency since its centre of main interests was located in Italy.

In Ireland, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator, since the company was considered insolvent.

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[75] Case C-341/04, Eurofood IFSC Ltd ECLI:EU:C:2006:281

[76] CATALOZZI P., *Il regolamento europeo e il criterio del comi: la parola alla corte*, in Fall. n. 11 (2006), 1256

[77] BARIATTI S., *Il regolamento n. 1346/2000 davanti alla Corte di giustizia: Il caso Eurofood*, in Riv. dir. proc., n. 1 (2007), 208-210

On the same day, the High Court appointed Mr. Farrel as the provisional liquidator. After finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr. Farrel as the liquidator. The Irish judges considered the center of main interests (COMI) of Eurofood to be in Ireland, and, as such, the international jurisdiction and the opening of the main insolvency proceedings to belong to them.
The Italian extraordinary administrator, Mr. Bondi, appealed against that judgement, but the Supreme Court, before its ruling, considered necessary to stay the proceedings and to refer some questions to the Court of Justice for a preliminary ruling.
The Supreme Court asked what were to be considered the decisive factors for the identification of the centre of main interests (COMI) of a subsidiary company, whenever it and its parent have their respective registered offices in two different Member States[78].
According to Article 3(1) of the Regulation, the centre of main interest of a company shall be presumed to be where the registered office is located, in the absence of proof to the contrary. The system established by the Regulation for determining the competence of the courts of the Member States provides that each debtor constitutes a distinct legal entity, subject to its own court jurisdiction.[79]
The Court has provided that the determining factors for the rebuttal of the presumption laid down in the second sentence of Article 3(1) of the Regulation[80] are provided for by Recital 13 of the Regulation, whereby the centre of main interest must be objective and ascertainable by third parties. This is considered valid also in the case of a company not carrying out any business in the territory of the Member State in which its registered office is located. Otherwise, the fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough

[78] BACCAGLINI L., *Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera*, in *Int'l Lis*, n. 3-4 (2006), 123-124;

[79] Case C-341/04, Eurofood IFSC Ltd ECLI:EU:C:2006:281, par 29; PERSANO F., *Il caso Eurofood, ovvero la contestuale apertura di due procedure principali di insolvenza nello spazio giudiziario europeo*, in *Fall*.,n. 11 (2004), 1243; WINKLWER MM., *Le procedure concorsuali relative ad imprese multinazionali: la Corte di giustizia si pronuncia sul caso Eurofood*, in *Int'l Lis*, n. 1 (2007), 18

[80] Regulation 1346/2000, Article 3(1), second sentence: "*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*".

to rebut the presumption laid down by the Regulation if the company carries on its business in the territory of the Member State where its registered office is situated[81].
The Court also clarified the core elements to identify the autonomous notion for the 'opening of the proceedings'.
It stated that, for the purposes of the Regulation, a 'decision to open insolvency proceedings' must be regarded as not only a decision formally described as opening decision by the legislation of the Member State, but also a decision which was handed down following an application seeking the opening of the proceedings, according to Annex A and Annex C of the Regulation.[82]

3.4.3 THE CRITERIA FOR THE RECOGNITION OF THE COMI: THE INTEREDIL CASE (C-396/09)

The Interedil case concerned the transfer, from one Member State to another, of the registered office of a company, along with its assets and the titles of the properties. This transfer raised problems on the matter of the jurisdiction to open main insolvency proceedings and on the interpretation of the concepts of 'COMI' and 'establishment', within the meaning of Article 3 of the Regulation.
Some authors claimed that the Court, with this judgement, tried to give a less rigid and more open version of the interpretation of the concept of 'centre of main interests', providing some conditions to overcome the presumption of the connection of the centre of main interest and the registered office.[83]
Interedil was a 'società a responsabilità limitata' under the Italian law with its registered office in Monopoli (Italy). On July 2001 its registered office was transferred to London (United Kingdom), and the company was removed from the register of companies of the Italian State. After the transfer, Interedil was registered in the United Kingdom register of companies, entering as a 'Foreign Company' (FC).
At the same time of the transfer of the registered office, Interedil was acquired by the British group Canapous. After a few months, the title of the properties, owned in

[81] Case C-341/04, Eurofood IFSC Ltd ECLI:EU:C:2006:281, par 37

[82] Case C-341/04, Eurofood IFSC Ltd ECLI:EU:C:2006:281, par 54

[83] DE CESARI P., *Procedura principale e procedure territoriali nel diritto dell'unione europea*, in *Fall.* n.5 (2012), 546

Taranto (Italy), was transferred to Windowmist Ltd as part of the assets of the business transferred.

Interedil was subsequently removed from the United Kingdom register of companies.

On October 2003, Intesa filed a petition with the Tribunale di Bari (Italy) for the opening of insolvency proceedings against Interedil.

The company challenged the jurisdiction of that court on the ground that, since the company's registered office was transferred to the United Kingdom, jurisdiction to open insolvency proceedings did not belong to the Italian court. Thereafter, Interedil requested the Corte Suprema di Cassazione to give a ruling on the preliminary issue of jurisdiction.

The Tribunale di Bari, without waiting for the decision of the Corte Suprema di Cassazione, ordered the winding up of Interedil.

Subsequently, Interedil lodged an appeal against the winding-up order before the Corte Suprema di Cassazione, which held that the Italian courts had jurisdiction.

Doubting the validity of the Corte Suprema di Cassazione's finding, considering the criteria established by the Court in the Eurofood case, the Tribunale di Bari decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling.

The questions referred by the Tribunale di Bari concerned the interpretation of the concept of the centre of main interests (COMI), including the conditions required to rebut the presumption laid down in Article 3(1) of the Regulation.

By the first question the Court of Justice underlined the need for the uniform application of European law. The question raised was related to the reference to give to the COMI whether it was the European Union law or the national law.

The Court held that the terms of the provision must normally be given autonomous and uniform interpretation throughout the Union. Therefore, the term 'the centre of a debtor's main interests', according to Article 3(1) of the Regulation, and as already specified at paragraph 31 of Eurofood IFSC[84], must be considered peculiar to the Regulation, having an autonomous meaning, hence, it must be interpreted in a uniform way, independently of national legislation.[85]

[84] EUROFOOD IFSC, paragraph 31: "*The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation*".

[85] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 42, 43

The Tribunale also asked what the decisive factors or considerations for the identification of the 'centre of main interests' are, the requirements to rebut the presumptions laid down in Article 3(1) and the relevance of the immovable property of the company located in a Member State other than that in which it has its registered office.

The Court provided that, as already stated in Eurofood IFSC, the scope of the term COMI is to be found in Recital 13 of the Regulation and that the intention of the European Union legislator was to attach greater importance to the place in which the company has its central administration, which is a connective factor ascertainable by third parties.[86]

The requirements of objectivity and ascertainability by third parties, which ensure legal certainty and foreseeability for the determination of the jurisdiction of the court, are met when the material factors taken into account for the purpose of establishing the COMI are made public, or sufficiently accessible to enable third parties, as stated in paragraph 33 of Eurofood IFSC.[87]

The Court also stated that if, from the point of view of third parties, the place of the registered office is not the same in which a company's central administration is located, the presumption may be rebutted. Among the factors to be taken into account are included all the places in which the debtor company pursues economic activities and those where it holds assets[88]. The location of immovable property owned by the debtor company, concluded by lease agreements, and the existence of a contract concluded with a financial institution, may be regarded as objective factors, ascertainable by third parties, notwithstanding if it is located in a Member State other than that in which the registered office is situated. However, in order to rebut the presumption, there must be a comprehensive assessment of all the relevant factors, which makes it possible to establish that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State[89].

[86] Opinion of the Advocate General Kokkot delivered on 10 March 2011, point 69, ECLI:EU:C:2011:132

[87] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 49

[88] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 52

[89] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 53

The Court with this judgement had the chance to further clarify, in order to provide a full answer on the matter of which court had jurisdiction, how to identify the relevant date for the purpose of determining the centre of the debtor's main interests.

It provided that, in light of the general terms of Article 3(1), the last place in which the debtor's centre of interests was located must be regarded as the relevant place for the purpose of determining the court having jurisdiction. Whenever the COMI is transferred after the lodging of a request to open insolvency proceeding, but before the proceedings are opened, the jurisdiction to rule on main insolvency proceedings belongs to the courts of the Member State within the territory of which the centre of main interest was situated at the time when the request was lodged, as also stated in Staubitz-Schreiber, paragraph 29[90]. Therefore, where a debtor's company registered office is transferred before the lodging of a request to open insolvency proceedings, the COMI of the company is presumed to be the place of its new registered office.

This also apply where the debtor company has been removed from the register of companies and ceased all activity at the date on which the request to open insolvency proceedings is lodges[91].

Moreover, the Tribunale di Bari asked how to interpret the term 'establishment' within the meaning of Article 3(2).

The Court established that, the definition of 'establishment', given by Article 2(h), links the pursuit of economic activity to the presence of human resources, implying the requirement of a minimum level of organization and a degree of stability.

The Court provided that, in order to have an 'establishment' there must be the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity[92].

[90] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 55

[91] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 57

[92] Case C-396/09, Interedil Srl, ECLI:EU:C:2011:671, par. 64

4. THE NEW GUIDELINE ON INTERNATIONAL JURISDICTION IN THE EUROPEAN INSOLVENCY REGULATION RECAST (EU) No 2015/848

The revision of the Regulation 1346/2000 aimed to ensure a smooth functioning of the internal market and its resilience in economic crises, having also regard to the case law of the Court of Justice meanwhile developed around the same Regulation.

According to the literature, the Recast[93] reflects the new European approach on insolvency and business failure, which parallels and fosters policies that certain Member State had earlier implemented[94].

Moreover, it was claimed that the European institutions with the new Regulation (EU) No. 2015/848 of 20 May 2015 aimed at more modern goals concerning insolvency proceedings, which determined the adoption of a new scope, providing for the reorganization and restructuring of the companies, seeing liquidation as a mere option.[95]

In the Regulation 1346/2000 the focus was almost exclusively on liquidation. For instance, secondary proceedings commenced after main insolvency proceedings had been opened, could only be liquidation proceedings and secondary proceedings initiated before main insolvency proceedings had been opened had to be converted into liquidation proceedings at the request of the liquidator in the main proceedings. The person who took control of a debtor's affairs was referred to throughout the Regulation as a liquidator. The new Regulation opts for the expression of "insolvency practitioner" (IP), and does not require that secondary proceedings should be liquidation proceedings.

On the matter of jurisdiction, the Recast Regulation maintains the concept of centre of main interests (COMI) to confer jurisdiction to open main insolvency proceedings and, in most cases, the applicable law. It also adds a number of provisions by way of clarification and to combat improper forum shopping, implicitly building on a distinction between 'good' and 'bad' forum shopping.

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[93] Regulation 2015/848

[94] LEANDRO A., *A First Critical Appraisal of the New European Insolvency Regulation*, in *Dir. Unione Eur*., n. 2 (2016), 215-251

[95] DE CESARI P., *Il Regolamento 2015/848 e il nuovo approccio europeo alla crisi dell'impresa*, in *Fall.* n. 10 (2015), 1026-1038

Under the new Article 4 there is now a duty on a court to examine ex officio whether or not it has jurisdiction in the particular case, and to specify whether the proceedings opened are main or secondary.

The preamble now adds some details on COMI determinations, suggesting assertations about COMI by the debtor. It also suggests that the COMI presumption may be rebutted, and lays emphasis on giving it publicity.

Another novelty is the introduction of so called 'look back' periods as presumptive elements.

Case law of the European Court on COMI has been codified in the new Recitals.

Secondary proceedings may be opened where the debtor has an 'establishment', a concept defined by Article 2(h).

Under the OR, they had to be liquidation proceedings. This limitation, which acted as an impediment to the 'rescue culture', has now been removed.

The doctrine argued that the Recast makes a number of changes to improve the practical operation of the Regulation and the coordination between main and secondary proceedings, but the realty seems that, given the fact that these changes are essentially modest.

5. KEY CASES AFTER THE APPROVALOF THE EUROPEAN INSOLVENCY REGULATION RECAST

5.1 THE IDENTIFICATION OF THE COMI: THE NOVO BANCO CASE (C-253/19)

The dispute in the main proceedings of the Novo Banco case concerns a married couple who have been resident in Norfolk (United Kingdom) since 2016, but they had immovable assets in Portugal. The couple pursued an activity as employed persons in the United Kingdom, but they applied to the Portuguese courts to open insolvency proceedings against themselves. The court of first instance declined international jurisdiction to hear that application on the grounds that, as stated in the fourth

subparagraph of Article 3(1) of Regulation 2015/848[96], the centre of the main interests of the applicants in the main proceedings was in the United Kingdom, accordingly, the courts of that Member State had jurisdiction to open insolvency proceedings.

The couple lodged an appeal against the judgment claiming that that judgment was based on a misinterpretation of the rules laid down in Regulation 2015/848. They claimed that the center of their main interest was indeed in Portugal, since it was the Member State where the sole immovable asset which they own is located and where all the transactions and all the contracts leading to their insolvency were conducted and concluded. Moreover, the events that led to their insolvency, which occurred entirely in Portugal, had no connection with their place of habitual residence. Thereby asked they asked that the Portuguese authorities be recognized as having international jurisdiction.

In those circumstances, the Tribunal da Relação de Guimarães (Court of Appeal, Guimarães, Portugal) decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling.

The Court of Justice was asked whether the fourth subparagraph of Article 3(1) of Regulation 2015/848 must be interpreted as meaning that the presumption established in that provision for determining international jurisdiction for the purposed of opening insolvency proceedings is rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence.

The Court claimed that, the centre of main interest, as stated in the first subparagraph of Article 3(1), is the general connecting factor for determining international jurisdiction for the purposes of opening insolvency proceedings. The fourth subparagraph of Article 3(1) establishes a rebuttable presumption that the centre of that person's main interests is his or her habitual residence.

It moreover argued that, since Article 3(1) contains no reference to the law of the Member States, the terms contained in that provision must be given an autonomous and uniform interpretation, since the term 'centre of main interests' is specific to the Regulation, and must be interpreted accordingly, independently of national legislation.

[96] *"In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings."*

The Court, also in view of Recital 13 of the Regulation 1346/2000, has concluded that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, requirements necessary to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. It has further claimed that the same interpretation must be used to determine the meaning and the scope of the term 'centre of main interests' for the purposes of Regulation 2015/84, and that the latter must be determined following an overall assessment of all the objective criteria ascertainable by third parties, and which are capable of determining the actual place where the debtor conducts the administration of his or her interests on a regular basis.

The Advocate General agrees that for the determination of the court jurisdictiom the use of objective criteria remains essential.[97] Moreover, in points 45 and 49 of his Opinion, states that the relevant criteria for determining the centre on the main interests of individuals not exercising an independent business or professional activity are those connected with their financial and economic situation which corresponds to the place where they conduct the administration of their economic interests or the majority of their revenue is earned and spent, or the place where the greater part of their assets is located.

From the actual wording of Article 3(1), he argued that individuals not exercising an independent business or professional activity are presumed, in the absence of proof to the contrary, to conduct the administration of their interests on a regular basis in the place of their habitual residence, since there is a strong possibility that that place corresponds to the centre of their main economic interests. Therefore, the courts of the Member States where that residence is located have international jurisdiction to open insolvency proceedings against that individual.

In point 55 of his Opinion the Advocate General stated that, the mere fact that the circumstances referred to in Recital 30[98] are present, is not sufficient to rebut the presumption set out in the fourth subparagraph of Article 3(1) of Regulation 2015/848.

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[97] Advocate General Opinion Szpunar, ECLI:EU:C:2020:328, point 29.; Recital 5 of Regulation (EU) 2015/848. Useful clarification is also provided for by Recital 28 of Regulation (EU) 2015/848

[98] *"Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In 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 centre of management and supervision and*

The fact that the only immovable property of an individual not exercising an independent business or professional activity is located outside the Member State of his or her habitual residence is not sufficient on its own to rebut that presumption, since it may be reversed only following an overall assessment of all the objective criteria. It falls to the referring court to take into consideration all objective factors, ascertainable by third parties which are connected with that person's financial and economic situation.

The Court answered to the question, ruling that the presumption established in the first and fourth subparagraphs of Article 3(1) of the Regulation concerning the determination of the international jurisdiction to open insolvency proceedings, according to which the COMI of an individual not exercising an independent business is his or her habitual residence, is not rebutted just because the only immovable property of that person is located outside the Member State of habitual residence.[99]

The Novo Banco case can be used as a benchmark on the interpretation journey of the Regulation 2015/848.

It shows that the Court of Justice took into consideration the previous case-law regarding the interpretation of Regulation 1346/2000. From the Interedil case, where the Court remarked the autonomous and uniform interpretation throughout the Union for the purpose of determining the meaning and the scope of the Regulation, in order to comply with the need for uniform application of European Union law and the principle of equality, since the law does not make express reference to the law of the Member States. From the Eurofood IFSC case, where the Court stated that the concept of the centre of main interests is peculiar to the Regulation, and, therefore, has an autonomous meaning and bust be interpreted in a uniform way.

The Court of Justice had to take a further step, since the matter at hand concerned individuals and their habitual residence.

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of the management of its interests is located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealing with the debtor took place prior to the relocation."

[99] Case C-253/19, MH and NI v OJ and Novo Banco SA, ECLI:EU:C:2020:585, par 31

5.2 THE TRANSFER OF COMI: THE GALAPAGOS CASE (C-732/20)

The Galapagos case concerns the movement of the central administration of a company which raised question on the identification of the court holding international jurisdiction to open the main insolvency proceedings. The movement has resulted in a conflict of jurisdiction because the request to open main insolvency proceedings was lodged before two different courts.

Galapagos is a holding company with its registered office in Luxemburg. After the movement of its central administration to Fareham (United Kingdom), in August 2019, its directors lodged a request to open insolvency proceedings before the High Court of Justice (England and Wales), Chancery Division, United Kingdom.

The following day, those directors were removed at the instigation of a group of creditors holding a share pledge, and subsequently were replaced by a new director. The new director set up an office in Düsseldorf (Germany) for Galapagos and instructed the lawyers representing Galapagos to withdraw the request to open insolvency proceedings. However, that withdrawal did not take place since a group of creditors had joined that request.

On August 2019, Galapagos lodged another request to open insolvency proceedings before the Amstsgericht Düsseldorf (Local Court, Düsseldorf, Germany), which appointed DE as the temporary insolvency administrator and ordered preservation measures. However, the following month, after hearing an immediate appeal brought by its creditors, the court revoked its order and dismissed Galapagos's request as inadmissible on the ground that it lacked jurisdiction.

On the same day, two other companies, creditors of Galapagos, lodged another request to open insolvency proceedings with the Amtsgericht Düsseldorf, which appointed, again, DE as temporary insolvency administrator, issuing an order for interim measures, taking the view that the centre of Galapagos's main interests was in Düsseldorf when that request was made.

Galapagos Bidco., which is at the same time a subsidiary and a creditor of Galapagos, brought an immediate appeal before the Landgericht Düsseldorf in its capacity as a creditor by which it sought to have the order of the Amtsgericht Düsseldorf set aside, claiming that the court did not have international jurisdiction, since the Galapagos's central administration had been transferred to Fareham in June 2019.

The appeal was dismissed, and Galapagos BidCo. subsequently brought an appeal

before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court. The Bundesgerichtshof stated that the appellate court concluded that the Amtsgericht Düsseldorf was correct in accepting that it had international jurisdiction, since the centre of Galapagos's main interests was in Germany when the request was lodged. It also stated that the request to open insolvency proceedings brought before the High Court did not prevent it from having such jurisdiction.

The referring court states that the outcome of the appeal before it depends on the interpretation of Article 3(1) of Regulation 2015/848.

Given the circumstances of the case, the Bundesgericht decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling.

The referring court asked whether Article 3(1) of Regulation 2015/848 must be interpreted as meaning that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is moved to another Member State after that request has been lodged, but before that court has delivered a decision on it.

The Court noted that, as is apparent from Recital 1 of Regulation 2015/848[100], the Regulation 2015/848 is a recast of Regulation 1346/2000. Moreover, one of the objectives of the Recast is to improve the efficiency and effectiveness of insolvency proceedings having cross-border effects as it contains provisions on jurisdiction, recognition, and the applicable law.

Another objective of the Recast, set out in Recital 5 is to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position to the detriment of the general body of creditors (forum shopping), for the proper functioning of the internal market.

As Recital 29 clarifies, it seeks in particular to establish safeguards aimed at preventing fraudulent or abusive forum shopping.

The Court's case-law on the interpretation of the rules laid down by Regulation No 1346/2000 on international jurisdiction remains relevant for the purposes of

[100] *"On 12 December 2012, the Commission adopted a report on the application of Council Regulation (EC) No 1346/2000. The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Since that Regulation has been amended several times and further amendments are to be made, it should be recast in the interest of clarity."*

interpreting Article 3(1) of Regulation 2015/848. Consequently, Article 3(1) of Regulation 2015/848 confers exclusive jurisdiction to open main insolvency proceedings on the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.

The Court also recalled that, in paragraph 25 of the judgment on Staubitz-Screiber, the objective of Regulation 1346/2000, which is identical to that pursued by it Recast, is to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position, which would not be possible if the debtor could move the centre of his or her main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgement opening the proceedings was delivered.

Such transfer of jurisdiction would also be contrary to the objective set in Recitals 3 and 8 of the Regulation 2015/848.

The Court stated that only one set of main proceedings may be opened, which have effects in all the Member States in which the Regulation is applicable. Moreover, in order to assess the validity of the decision of the Amtsgericht Düsseldorf to accept that it has international jurisdiction, the referring court will have to take account of the effects of the lodging of that request before the High Court in the light of the findings set out in the judgements of the Court of Justice.

Moreover, the Court stated that the court of a Member State hearing a request to open main insolvency proceedings does not, in such circumstances, have to examine whether the centre of the debtor's main interests is situated in that Member State.

In this judgement, the Court mentions multiple time the first judgement concerning the Regulation 1346/2000, the Staubitz-Schreiber case, which is also crucial for the interpretation of the term 'centre of main interests' and the possibility to transfer it. More specifically the court held that the court of the Member State within her 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 moves the centre of his or her main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

In conclusion, the Court of Justice ruled that Article 3(1) of Regulation 2015/848 grants exclusive jurisdiction to open main insolvency proceedings to the court of a

Member State where the request has been lodged even when the COMI is moved to another State after the request has been lodged, but before that court has delivered a decision on it. Consequently, the court where the request is lodged cannot declare that it has jurisdiction to open main insolvency proceedings if the other court where the request has not delivered its decision and declined jurisdiction.[101]

6. OUTLINE OF THE WORK: WHAT CHANGED?

The Regulation 2015/848 is the result of the attempts of the European Union to create a secure environment for the internal market and its possible downfall. This Regulation is nothing more than a recast, as stated in Recital 1.

The European legislator maintained the structure, at the same time, treasuring the reports of the problems made during the process of the amendment of Regulation 1346/2000.

The case-law played an important role, in the recent cases concerning Regulation 2015/848, it is shown how the previous case-law was a reference point to further clarify some concepts open to a wider interpretation.

In the next two chapters the key features of Article 3 of the Insolvency Regulation Recast will be analyzed, showing their evolution through time, and also ponder over some issues that are yet to be solved.

[101] Case C-732/20, Galapagos BidCo. S.a.r.l. v DE and Others, ECLI:EU:C:2022:209, par 40

CHAPTER TWO - KEY FEATURES OF ARTICLE 3 REGULATION (EU) 2015/848

1. THE CENTRE OF MAIN INTEREST. THE IMPORTANCE OF ITS DEFINITION

The centre of main interest (COMI) represents the connecting factor[1] for the determination of international jurisdiction to open main insolvency proceedings.[2]

It is pacifically established that the idea of creating a new connecting factor, independent of the traditions of the various national countries, first came to the writers of the 1980 Draft Convention, and, even though the Draft was not successful, the concept of COMI was maintained and adopted in all the drafts that followed. The independence and the close correlation of the concept with the European legal framework implies that the COMI, under Article 3(1) of Regulation 2015/848, shall apply exclusively to the determination of international jurisdiction. Domestic law can be applied if the Regulation is not applicable, i.e. when the COMI is located outside its territorial scope.[3]

Furthermore, the doctrine claimed that, in addition to its function as a connecting factor, the concept of COMI has various functions, serves as a criterion for the application of the Regulation and as the title of jurisdiction for the opening of main insolvency proceedings.[4]

The doctrine argues that the COMI concept in its practical consequences resembles the 'real seat' theory instead of the 'incorporation theory'. This choice is somewhat qualified by the (rebuttable) presumption in favor of the 'registered office'.[5]

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[1] The connecting factors are used by the countries as links at expressing the closest connection between a case and a country.

[2] BELOHLAVEK AJ., *EU and International Insolvency Proceedings: Regulation (EU) 2015/848 in insolvency proceedings. Commentary*, The Hague, Lex Lata (2020), 159

[3] BELOHLAVEK AJ., *supra*, at 159-160 (2020)

[4] LEANDRO A., *Il centro degli interessi principali del debitore tra regolamento (UE) 2015/848 e codice della crisi d'impresa e dell'insolvenza*, in *Riv. dir. int*., Vol. 103, n. 2 (2020), 364

[5] BORK R, VAN ZWIETEN K., *Commentary on the European Insolvency Regulation,* Oxford, Oxford Academic (2022), 131

The concept of COMI differs from the real seat theory because the concept refers also to individuals and is designed to regulate cross-border insolvency cases in order to protect creditors and not to improve company business.[6]

According to the Commission, the concept guarantees the connection between the debtor and the jurisdiction, entrusted with the case at hand. In such manner, the view that both jurisdiction and applicable law should correspond to what most creditors either expect or are familiar with is supported.[7] As stated by the Virgós-Schmit Report in paragraph 75, international jurisdiction should be based on a place known to the debtor's potential creditors, thus, enabling the legal risks to be calculated.

The general definition of COMI is now found in the second sentence of Article 3(1) of Regulation 2015/848.[8]

The literature has stated that even though it may appear that the rules regulating international jurisdiction to open insolvency proceedings have introduced far-reaching changes, the Recast, on the concept of COMI, did not deny the previous law and it codified the case law that has gradually developed in respect of Article 3 of the Regulation 1346/2000. The definition of COMI was articulated in the judgement of the Court of Justice in Eurofood, and subsequently confirmed in Interedil.[9] It also corresponds almost exactly to the wording of Recital 13 of the Regulation 1346/2000.[10]

The concept of COMI is said by the doctrine to restrict possibilities of arbitrage and forum shopping, since shifting COMI is not entirely straightforward to achieve. This led to a debate about its mobility and forum shopping, since critics of the concept argue that the COMI, as understood by the Regulation, may open-up possibilities for

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[6] BORK R., MANGANO R, *European Cross-Border Insolvency Law,* Oxford, OUP (2016), 79

[7] LATELLA D., *The "COMI" Concept in the Revision of the European Insolvency Regulation*, in *Eur. Co. Fin. Law Rev.,* Vol.11, n.4 (2015), 488

[8] Regulation 2015/848, Article 3(1): "*The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings"). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*."

[9] WESSELS B., *The European Union Regulation on Insolvency Procedings (Recast): The First Commentaries*, in *Eur. Co. Law*, Vol. 13, no. 4 (2016), 132

[10] Regulation 1346/2000, Recital 13: "*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"*

arbitrage and manipulation. Moreover, the doctrine argued that the definition of COMI is, though, still inherently incapable of eliminating the problems relating to the insufficient definition of this connecting factor, and that the concept COMI as connecting factor is based on two main conceptual features.[11] The first, the internal one, is the administration of the interests on a regular basis. In the literature, the term "administration" is usually correlated to the concept of "management and control", which imply the preparation, making and execution of the decisions regarding management.[12] The remark of the methods of implementation of the administration, "a regular basis", is a reference to the Virgos-Schmit Report and the established interpretation of Article 3 of the Regulation 1346/2000, which provided that the concept of administration was incompatible with a form of temporary management and, in order to prevent forum shopping, a time requirement.[13] Thus, to administer on a regular basis is necessary that the activity is carried out with a degree of regularity.[14] The second one, the external, is the ascertainability by third parties. In the literature, ascertainableness and the knowledge of third parties is considered as a requirement of predictability.[15] This point of view is supported by paragraph 75 of the Virgos-Schmit Report, which provide that insolvency is a foreseeable risk, therefore international jurisdiction must be based on a place known to the debtor's creditors, Recital 28, which establishes that the creditors and their perceptions should be given special consideration, and, is also confirmed by CJEU, specifically the Eurofood case at paragraph 33, where the Court pointed out, among the criteria to identify the COMI, the possibility of ascertainment by third parties.[16] For the COMI to be "ascertainable", the literature argued that is necessary to determine whether the place where the COMI is located is public enough, allowing third parties to recognize the place, relying on

[11] LEANDRO A., *supra*, at 366, 367 (2020)

[12] FILIPIAK P., HRYCAJ A, ZEDLER F, *European Insolvency Proceedings: Commentary on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast),* Kluwer Law International (2021), 94; VIRGÓS M., GARCÌMARTIN F., *The European Insolvency Regulation: Law and Practice,* The Hague, Kluwer Law International (2004), 40

[13] BORK R., MANGANO R.*, supra,* at 82 (2016)

[14]BELOHLAVEK AJ., *supra*, at 163 (2020)

[15] BELOHLAVEK AJ., *supra*, at 165 (2020)

[16]BORK, R., MANGANO R.*, supra,* at 82 (2016); BELOHLAVEK AJ., *supra*, at 165 (2020)

the reasonable and objective indications of the location. The pursuit of these information shall not require special effort on behalf of third parties.[17]

These two objective elements are attached to the functioning of the criteria in order to determine the court with the jurisdiction to open insolvency proceedings in a certain and foreseeable way.[18]

Article 3 of the Regulation provides further guidance in the subsections of the first paragraph in the form of presumptions. These presumptions make a distinction between the different types of debtors: (i) companies and legal persons, (ii) independent professionals, and (iii) all other individuals.

1.1 THE COMI OF A LEGAL PERSON: THE PLACE OF THE REGISTERED OFFICE

Article 3(1), second subparagraph of Regulation 2015/848[19] considers the 'place of the registered office' as a relevant factor in ascertaining the COMI of companies and legal persons.[20]

Even though a more concrete definition is missing, this concept must be given an autonomous meaning that is to be determined without recourse to national law.

Since in the Recast Regulation there is no explicit definition of the term 'company or legal person', the literature observed that, some inspiration may be gained from other sources of European law.[21]

The first source is Article 54(2) TFUE, which establish that the term 'companies or firms' refers to the companies or firms which are constituted under civil or commercial

[17] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra*, at 99 (2021)

[18] LEANDRO A., *supra*, at 366 (2020)

[19] Regulation 2015/848, Article 3(1) second subparagraph: "*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. That presumption shall only apply if the registeres office has not been moved to another Member State within the 3-mont period prior to the request for the opening of insolvency proceedings.*"

[20] BORK R., MANGANO R., *supra,* at 86 (2016)

[21] BORK R., VAN ZWIETEN K., *supra*, at 134-143 (2022); BELOHLAVEK AJ., *supra*, at 167-174 (2020)

law, it also includes cooperative societies, and other legal persons governed by private or public law, with the exception of those which are non-profit making, thus, implying a broad range of business enterprises. Some authors claimed that the notion seems to be addressed to all entities that carry out a business activity, irrespective of whether they have a separate legal personality under national law, and irrespective of whether they are governed by public or private law. Moreover, they argued that the term "company" must encompass any and all civil-law companies, including associations that have legal personality according to the individual legal systems without being classified as legal persons.[22]

The Regulation 2015/848 has its roots in the chapter on 'Judicial Cooperation in Civil Matter', thus, it might also apply to non-profit organizations.

The literature established that the identification of the COMI of the companies is attached to a *iuris tantum* presumption in favour of the registered office. Against this presumption the proof of the contrary is not easily adduced because it must be compatible with the objectivity criteria, the ascertainability by third parties, and the objective of ensuring legal certainty and the possibility to predict the court with international jurisdiction.[23]

It was claimed that the 'registered office' or 'statutory seat' is the official registration address of a company. Every company in the EU needs to have one legal place where it is registered with a public record. Information about the registered office needs to be disclosed to the public, and it needs to be indicated on the company's official correspondence. Depending on the jurisdiction, the registered office may or may not require any physical presence.[24]

The literature argued, the centre of the debtor's main interests (COMI) cannot be deemed identical to the seat in terms of the company seat principle, even though they are *prima facie* similar. The company seat principle stipulates that the decisive legal system for a company is the law of the State in which the legal person has its actual head office. This is usually interpreted as the place of the central administration or management of the company. It may also mean the centre of operations, sometimes the place in which the essential decisions of the company's management are made or

[22] BORK R., VAN ZWIETEN K., *supra*, at 134,135 (2022); BELOHLAVEK AJ., *supra*, at 167 (2020)

[23] LEANDRO A., *supra*, at 369 (2020)

[24] BORK R., VAN ZWIETEN K., *supra*, at 135 (2022)

where the principal place of business is located. The concept of COMI of the Regulation 2015/848 differs from the concept of the "seat", of the company seat principle because the COMI is a specific concept of insolvency law, has a different objective, and is needed to identify where the interests of the debtor are concentrated.[25]

1.2 THE COMI OF AN INDIVIDUAL EXERCISING AN INDEPENDENT BUSINESS OR PROFESSIONAL ACTIVITY: THE INDIVIDUAL'S PRINCIPAL PLACE OF BUSINESS

The Regulation 2015/848 was the first to introduce the concept of 'principal place of business' as a connecting factor applicable to natural persons.

In fact, the Regulation 1346/2000 only specified the location of the COMI of companies and legal persons.

The literature argues that the place of main interest of a debtor is the person's principal place of business, i.e the place from which the person manages his or her gainful activity.[26] Moreover, it is a conflict-of-laws criterion that fulfils the requested criteria by being clear and objectively ascertainable. It also provides a sufficient degree of legal certainty and predictability for third parties as regards the place in which potential insolvency proceedings will be conducted.

Article 3(1), third subparagraph[27], thus, applies to individuals who exercise 'an independent business or professional activity'.

The doctrine believes that individuals exercising an independent business appear to refer to the self-employed or entrepreneurs. Their main criterion is that there is not an element of subordination, in this case, in fact, the individual is free from being under the direction of another person in carrying out their work. On the other hand, they

[25] BELOHLAVEK AJ., *supra*, at 172 (2020)

[26] BELOHLAVEK AJ., *supra*, at 168 (2020),

[27] Regulation 2015/848, Article 3(1) third subparagraph: "*In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that indvidual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings*."

usually bear the commercial risk of the business, balanced with the freedom to choose his own working hours and to engage his own assistants.
The second group of persons mentioned in the Article, are the individuals exercising a 'professional activity'. This is a reference to the 'liberal' or 'free' professions, which are a number of activities that for various reasons are organized by independent professionals.[28]

1.3 THE COMI OF ANY OTHER INDIVIDUAL: THE INDIVIDUAL'S HABITUAL RESIDENCE

The third category of debtors used in Regulation 2015/848, Article 3(1) fourth subparagraph[29], is 'any other individual', implicitly referring to individuals who do not exercise an independent business or a professional activity.
According to the doctrine, the interpretation of "habitual residence" depends on the actual facts of each case and it needs to be distinguished from domicile.
It usually tends to be examined from the perspective of objective ascertainableness, complying with the overall concept of Regulation 2015/848.
The established doctrine[30] states, habitual residence represents a concept that is not precisely defined. It is necessary to consider the fact that individual decisions are always made in the context of a specific law or regulation in which this term is used and in relation to which the decision was rendered.
The term 'habitual residence' is a well-known concept used in private international instruments in various contexts. The Recast has not defined it.
However, the European Court had to define the concept in the context of social security law as the place 'where the habitual centre of their interests is to be found'; giving further indications as to the importance of the individual's family situation, the reasons

[28] BORK R., VAN ZWIETEN K., *supra*, at 165-168 (2022); BELOHLAVEK AJ., *supra*, at 173, 174 (2020)

[29] Regulation 2015/848, Article 3(1) fourth subparagraph: "*In the case of any other individual, the centre of main interest shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings*."

[30] BORK R., VAN ZWIETEN K., *supra*, at 168-174 (2022); BELOHLAVEK AJ., *supra*, at 173, 174 (2020)

that caused them to move, the length and continuity of their residence, the fact that they are in stable employment, and their intention as it appears from all the circumstances. Thus, social security law, along with the EU Succession Regulation, which also relies heavily on the concept of habitual residence', give further guidance for the interpretation of the concept of habitual residence.[31]

Further guidance on the concept of the COMI of a debtor who does not exercise an independent business or a professional activity has been given by the Court of Justice. As observed by a prestigious author, the Court, in fact, in the Novo Banco case ruled that, in order to safeguard the expectations of the creditors and the requirement of legal certainty, the COMI has to be determined after a global evaluation of the objective criteria, ascertainable by third parties, which are related to the financial and economical situation of the debtor.[32]

2. ANOTHER BENCHMARK FOR THE ALLOCATION OF JURISDICTION: THE CONCEPT OF ESTABLISHMENT

Article 3(2) of the Regulation 2015/848 stipulates that secondary proceedings may be opened in Member States where the debtor has an 'establishment'.[33] The definition of the concept of the establishment is given by Article 2(10) of Regulation 2015/848[34], and according to the literature it has to be assessed exclusively in the context of the Regulation, not allowing any sort of interpretation according to national law.[35]

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[31] BORK R., VAN ZWIETEN K., *supra*, at 168,169 (2022)

[32] DE CESARI P., *Osservatorio internazionale sull'insolvenza – La Corte di Giustizia si pronuncia sul centro degli interessi principali della persona fisica*, in *Fall*. n.1 (2021), 142

[33] Regulation 2015/848, Article 3(2): "*Where the centre of the 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 it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State*."

[34] Regulation 2015/848, Article 2(10): "*'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*."

[35] BELOHLAVEK AJ., *supra*, at 191 (2020)

The existence of the establishment plays an important role for the purposes of opening secondary proceedings. International jurisdiction, in fact, is established by the presence of the establishment in a Member State, which allows to open secondary insolvency proceedings.[36]

The literature argued that before the adoption of the Regulation 1346/2000, courts were easily convinced to open local proceedings and thereby created opportunities for the opening of a larger number of insolvency proceedings in different States against one debtor. This often caused a detrimental effect to the coordination between Member States for the liquidation of the assets or any recovery efforts, additionally duplicating direct costs.[37]

Article 3(2) of Regulation 2015/848 is the root of authority for the opening of territorial proceedings. The provision is similar but not identical to the Regulation 1346/2000. In fact, the definition of 'establishment', contained in Article 2(10), embodies a crucial amendment as compared to the definition given by the previous Regulation.

Some authors analyzed that in the first part of the provision, the legislator introduced additional words, to remove any doubt about the possibility for opening territorial proceedings provided that the establishment was in active operation in the period immediately preceding the request to open main proceedings. However, it still remains unclear whether it is necessary that the establishment must have been fully operational throughout the three-month period before the request to open main proceedings, or whether it is sufficient to be able to demonstrate that the establishment was in active operation at some time within that period. The Recast also made a substitution of the final word of the provision, substituting the word 'goods' with the word 'assets', in the official English language version. Where territorial proceedings are opened after main proceedings have already opened in the debtor's centre of main interests, they are known as 'secondary insolvency proceedings'. Whereas, where territorial proceedings are opened before main proceedings have opened in the debtor's centre of main interests, they are known as 'independent territorial proceedings'.[38]

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[36] BORK R., VAN ZWIETEN K., *supra*, at 134-142 (2022); BELOHLAVEK AJ., *supra*, at 191, 193 (2020)

[37] BORK R., VAN ZWIETEN K, *supra*, at 181 (2022)

[38] MOSS G., FLETCHER I., ISAACS S, *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (2016), 65, 66, 440; WESSELS B., *The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries*, in *Eur. Co. Law*, Vol. 13, no. 4 (2016), 132

Mover it was claimed that the existence of assets or affairs of the debtor that result from the debtor's activity in a Member State with international jurisdiction and the need to realize and settle such assets and affair within the framework of the debtor's insolvency are objective in nature. The form of the debtor's activity in the respective state is not to be considered relevant for the possibility of opening territorially limited insolvency proceedings unless the activity is completely random.[39]

An 'establishment' must constitute a collection of assets, which may have its relative autonomy and primarily exhibits specific characteristic features. The debtor must carry out an economic activity.

The intention of the Regulation is to protect legal certainty within the market economy, hence, an establishment is to be assumed whenever the debtor operates in the market through an economic activity.

The activity necessarily must be ascertainable by third parties.

Moreover, it must be a non-transitory activity. This requirement excludes from the concept of 'establishment' purely occasional activity from the scope of the Article.

Establishment relies on a certain stability, permanence, and continuity of the activity of the debtor. Nevertheless, the Regulation does not impose any minimum duration requirements, implying that each situation must be evaluated individually with respect to the nature of the activity in question.

Article 2(10) defines establishment as a place of operations. This requirement implies that the economic activity of the debtor must be carried out at a localized site, meaning it must be linked to some physical location. A certain degree of stability, organization, and permanence is required.

The doctrine stated that the establishment must also feature a material basis, constituted by the debtor's assets, and a personnel basis. It seems likely that wherever there is a place of operation at which the debtor uses human means to carry out an economic activity, assets will also be associated with that kind of activity. Assets are to be understood as any item that will form part of the insolvency estate in the event of insolvency proceedings being opened. The requirement of the personnel basis, demonstrate the need for a minimum degree of organization. If the activities are carried out on the behalf of the debtor, he can be said to make use of human means, which is the case when the activity is conducted by employees of the debtor. 'Human means'

[39] BELOHLAVEK AJ., *supra*, at 191 (2020)

does not include whenever third parties act independently, yet potentially in the interest of the debtor.[40]

3. THE ACTUALISATION OF MODIFIED UNIVERSALISM IN THE EUROPEAN UNION

As stated in the previous paragraphs, the Regulation 2015/848 is guided by the principles of universality and unity. However, the European legislator opted for a modified universalist approach to address cross-border insolvencies, to guarantee the efficiency of the European Union insolvency proceedings, and thus, the equal and fair distribution of available assets to creditors. Moreover, the principle of modified universality functions as a frame for the discussion on the function of main and secondary insolvency proceedings [41]

It was also stated by the doctrine that modified universalism may be enhanced through some degree of delegation of certain functions to internal body, which underlines the importance of the existing domestic system within which the proceedings will take place.[42]

The doctrinal analysis states that the first paragraph of Article 3 enables main insolvency proceedings to be opened in the Member State where the debtor's centre of main interests is located. These types of proceedings are identified as 'main' proceedings featuring a universal scope.

They aim at encompassing all the debtor's assets on a worldwide basis and at affecting all creditors, wherever located. Only one set of main insolvency proceedings may be opened in the territory covered by the Regulation.[43]

Moreover, Article 3 provides for the category of territorially limited proceedings, characterized by secondary proceedings, which to a substantial effect are dependent

[40] BORK R., MANGANO R, *supra,* at 240 (2016)

[41] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 369 (2021); PANZANI L., *L'apertura della procedura secondaria in Italia secondo il Regolamento 2015/848: un diritto o un'opportunità*, in *Fall,* n.6 (2022), 836, 369

[42] MEVORACH I., *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps,* in *Tex. L. Rev.,* Vol. 96 (2018), 15

[43] BORK R., VAN ZWIETEN K, *supra*, at 130 (2022); VANZETTI, *L'insolvenza transnazionale nell'Unione Europea: una panoramica della disciplina in vigore*, *in Rev. Fac. Dir*, n.78 (2021), 310

on main proceedings, albeit subject to their own regime within the framework of separately applicable governing law, and independent territorial proceedings, which may be opened in any of the states before the opening of the main proceedings, but the debtor does not have its COMI in that state.

The most important feature of the main proceedings, according to the literature, is their universal impact and the fact that they cover any and all assets of the debtor. The existence of secondary proceedings restricts the universal nature of the main proceedings, thus, the European Insolvency Regulation 20157848 falls within the modified universalism theory.[44] Hence, the concept of universality can only be perceived as universal effects of any particular (national) proceedings opened in a Member State.[45]

The doctrine also stated that the EU legislation has created the possibility of secondary proceedings to ameliorate the (perceived) disadvantages of adopting a purely universalist approach.[46]

Further guidance in the matter of the main and secondary proceedings is given by Recital 23[47], which clarifies the universal scope of the main proceedings and the effects of the secondary proceedings, and by Recital 22[48], which gives more details on the choice made by the EU legislator regarding the approach adopted by Regulation 2015/848.

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[44] BELOHLAVEK AJ., *supra*, at 153 (2020)

[45] BELOHLAVE AJ., *supra*, at 153,154 (2020)

[46] BORK R., MANGANO K., *supra,* at 231 (2016)

[47] Regulation 2015/848, Recital 23: "*This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union*."

[48] Regulation 2015/848, Recital 22: "*This Regulation acknowledges the fact that as a result of widely differing substantive law it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening would, against this background, frequently leas to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. At the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level. This Regulation should take account of such differing national laws in two different ways. On the other hand, national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope*."

3.1 MAIN AND SECONDARY PROCEEDINGS

Constitutes a consolidated doctrinal orientation the interpretation of the first paragraph of Article 3 Regulation 2015/848 regulates international jurisdiction to open main insolvency proceedings, meaning that main proceedings can be opened by the courts of the Member States where the COMI of the debtor is located. They have a universal scope, encompassing all the assets of the debtor. Its universality cover also the effects of the judgement, which will be recognized across the European Union. [49]

The Regulation 2015/848 provides for the possibility to open secondary insolvency proceedings, which allow the decentralization of all insolvency proceedings in courts of different Member States.

Albeit it does not define secondary proceedings, Article 3(2)[50] and (3)[51] provide that secondary proceedings are territorial proceedings opened in a Member State in which the debtor has an establishment, which are conducted parallel to main proceedings opened in another Member State.

Secondary proceedings are opened in a Member State different from that where the debtor's COMI is located and they are territorial in their effects.

A novelty, often highlighted in the literature, is the removal, in the current Regulation on insolvency proceedings[52] of the last sentence of Article 3 (3) of the Regulation 1346/2000, which established that secondary proceedings had to be winding-up proceedings.[53]

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[49]BORK R., VAN ZWIETEN K., *supra*, at 130 (2022); MOSS G., FLETCHER I., ISAACS S., *supra*, at 58 (2016); CRESPI REGHIZZI Z., *La disciplina della giurisdizione in materia di insolvenza: il Reg. Ue n.2015/848*, in *Giur. it*., 2018, 257; JOKUBAUSKAS R., ŚWIERCZYNSKI M., *The Coordination of Main and Secondary Proceedings in European Union Insolvency Law*, in *Int. Comp. Jurisprud.,* Vol. 8, n.1 (2022), 1

[50]Regulation 2015/848, Article 3(2): "*Where the centre of the 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 it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.*"

[51] Regulation 2015/848, Article 3(3): "*Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.*"

[52] Regulation 2015/848 of 20 May 2015

[53] CRESPI REGHIZZI Z., *supra*, at 257 (2018)

3.2 THE RELATIONSHIP BETWEEN MAIN AND SECONDARY PROCEEDINGS

The coexistence between main and secondary proceedings raises questions as to how they should be coordinated and their general relationship.

It is a prevailing opinion that even though the main and secondary proceedings refer to the same debtor, they are separate proceedings, which relate to different assets, are conducted by different insolvency practitioners, and feature different law as their *lex fori concursus*. These two proceedings may be considered to be independent, yet they run parallel to one another; due to the dependency of secondary proceedings to main proceedings, both proceedings are, in fact, intertwined.[54]

According to the literature, the system of allocation and coordination of international jurisdiction of either main and secondary proceedings is the concept of "centre of interests", wherever the "main interests" are located main insolvency proceedings can be opened, otherwise, wherever other interests are located secondary proceedings and independent territorial proceedings can be opened.[55]

The main proceedings inhabit a dominant role in the hierarchy between main and secondary proceedings, nevertheless, secondary proceedings maintain a certain level of autonomy, being able to follow their own objectives and ambitions, regardless of those followed by the main proceedings.[56]

According to Article 19 of the Regulation 2015/848, any judgement concerning the opening of insolvency proceedings shall be recognized by all other Member States from the moment in which the judgement becomes effective in the Member State where the insolvency proceedings have been opened.

The Regulation does provide for the necessary coordination and cooperation between participants of the proceedings and provides optional means of influence to the main proceedings.[57]

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[54] BORK R., MANGANO R., *supra,* at 261-270 (2016)

[55] BOGGIO L., *Centre Of Main Interests, dipendenze e trasferimento della sede: cercando di sfuggire al giudicato sulla giurisdizione costituzionale…*, in *Giur. it.,* n. 2(2017), 380

[56] BORK R., MANGANO R., *supra,* at 261-270 (2016)

[57] BORK R., MANGANO R., *supra,* at 261-270 (2016)

The Regulation 2015/848 has expanded the rules on cooperation and communication[58], addressing them between insolvency practitioners, between different courts, and between courts and insolvency practitioners, providing for basic underlying principles. The duty to communicate information is imposed to both the participants of the main and secondary proceedings, who are obliged to cooperate.

The dominance of the main proceedings, and consequently of the insolvency practitioner of the main proceeding, is shown also by the possibility for the insolvency practitioner of the main proceedings to make a request for the court that opened the secondary proceedings to stay the realization of the assets in the secondary proceedings, according to Article 46.

The main insolvency practitioner, as stated in Article 38, may also request the stay of the opening of the secondary proceedings, to be issued before the opening of the proceedings.

Moreover, pursuant to Article 48, the insolvency practitioner may, under certain conditions, propose rescue plans, compositions, or comparable measures to end the secondary provisions.

Article 51(1) of the Regulation provides that the main insolvency practitioner can alter the type of secondary proceedings. The secondary proceedings may only be converted to another type of proceedings if the requirements to hold the desired type of the proceedings are met.

Concerning the position of the creditors, they may lodge their claims in both types of proceedings. Article 45(2) allows the main insolvency practitioner to lodge all of the claims which have already been lodged in the main proceedings in the secondary proceedings.

The insolvency practitioners of both main and secondary proceedings are empowered to participate in other insolvency proceedings as if they were creditors in those proceedings.

According to the doctrine, the coordination of the two proceeding, main and secondary, is based on the assumption that the COMI of the debtor is located in a Member State, with the exception of Denmark.[59]

[58] These rules on cooperation and communications are featured in Articles 41-44 of the Regulation 2015/848

[59] CRESPI REGHIZZI Z., *supra*, at 263 (2018)

3.3 THE RESTRICTED EFFECTS OF TERRITORIAL PROCEEDINGS

The limits of the effects of territorial proceedings are provided by Article 3(2) which requires, in order to open this type of proceedings the existence of an establishment in the Member State where the request has been lodged, and, furthermore, establish that the effects of the territorial proceedings are restricted to the assets located in the territory of the Member State where the establishment is located.

According to the doctrine, secondary proceedings result in the formation of a separate insolvency estate (the 'secondary estate') under the supervision of an additional insolvency practitioner (the 'secondary IP') with the application of the insolvency law of that Member State (the *lex fori concursus secundarii*), meaning that any effects of the main proceedings will not relate to the assets encompassed by the secondary proceedings. Moreover, it was stated that there may be more than one set of secondary proceedings opened alongside main proceedings, this is attributable to the link between the secondary proceedings and the presence of an establishment in a certain Member State. It was also claimed that Member States, in fact, are unlikely to accept unrestricted applications of foreign insolvency law without any means to protect assets located in their territory. Hence, the possibility to open of secondary proceedings, which imply the application of the national insolvency law, may be an incentive for the Member State to surrender somewhat to the universality of the Regulation, whose impact is lessened by this possibility.[60]

The prevalent literature believe that econdary insolvency proceedings perform two functions: (a) a protective function whereas the object of protection is local interests situated in the state where the establishment is located, in particular, the interests of local creditors; (b) an auxiliary function addressed to main insolvency proceedings whereas the importance of this function has been reinforced in the Recast Regulation to the extent that the opening of secondary insolvency proceedings is avoided if this would threaten the performance of the effective administration principle regarding the debtor's insolvency proceedings. Accordingly, the principle of limiting the universal effects of the opening of main insolvency proceedings interacts with the protective function of local interests. Frequently, small creditors who are employees of the debtor or smaller contractors of the debtor, may not have the organizational and financial

[60] BORK R., MANGANO R., *supra,* at 230-232 (2016)

capacity to conduct proceedings outside of their operational activity. For this reason, Recital 40[61] sentence 1, indicates explicitly that the function of secondary proceedings is to protect local interests, which is possible through the opening of secondary proceedings that results in the application of the law of the Member State of the opening of secondary insolvency proceedings. Hence, the protection of local interest also implies the protection of assets situated in the state where an establishment is situated against being used to finance main insolvency proceedings. The aim is therefore to put local creditors on an equal footing with large foreign creditors operating internationally. Furthermore, Recital 40 provides that secondary insolvency proceedings may serve to support the administration of an insolvency estate situated in different states. [62]

It was also supported by the doctrine that the debtor's assets, in fact, may be too complex to administer as a whole or the differences in the relevant legal systems are so significant that extending the effects of the *legis fori concursus* to other states where the assets are situated may be hampered.[63].

The literature claimed that the opening of secondary proceedings may optimize some of the processes related to the coordination of different transactions and activities concerning the assets situated in a particular state.[64] The supportive role of secondary proceedings is supported by the new cooperation requirements and the general duty of sincere cooperation between the courts, recognized by the CJEU.[65]

The requirements for jurisdiction for secondary insolvency proceedings follow from Article 3(2) and in the doctrine it has been affirmed that they are satisfied where (i) the debtor's COMI is located in the EU, but (ii) in a different State than that where the

[61] Regulation 2015/848, Recital 40: "*Secondary proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires.*"

[62] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 370-372 (2021)

[63] PANZANI L., *supra*, at 836 (2022)

[64] FILIPIAK P., HRYCAJ A, ZEDLER F, *supra,* at 375 (2021)

[65] BORK R., VAN ZWIETEN K., *supra*, at 176 (2022)

secondary proceedings are to be opened, and (iii) the debtor has an establishment in the Member State in which the secondary proceedings are to be opened.[66]

The scope of secondary proceedings is restricted to the debtor's assets that are located in the Member State that asserts jurisdiction. Hence, the literature stated that the proceedings defined in Article 3(2) are territorial with respect to assets and universal with respect to creditors.[67]

Secondary proceedings are subject to automatic recognition throughout the European Union[68], but their effects are, in principle, confined to the assets located within the state of opening the proceedings.

However, the territoriality principle generally applies only to the debtor's assets and not to its liabilities. All creditors can lodge claims and will be satisfied in secondary insolvency proceedings.[69]

The secondary insolvency estate is treated separately from the main insolvency estate, and there will be as many secondary insolvency estates as there are sets of secondary insolvency proceedings.[70]

4. INDEPENDENT TERRITORIAL PROCEEDINGS

Independent territorial insolvency proceedings distinguish themselves from territorially limited proceedings because they are opened exclusively in relation to assets located in the territory of a particular state but before the opening of the main insolvency proceedings. These types of proceedings are independent of the debtor's COMI, which is located outside the state of the territorial proceedings.

The requirements for the opening of secondary proceedings in terms of Article 3(2) of Regulation 2015/848 also apply to the requirements for the opening of territorial

[66] BORK R., VAN ZWIETEN K., *supra*, at,180 (2022)

[67] BORK R., VAN ZWIETEN K., *supra*, at 186, 187 (2022)

[68] With the exception of Denmark

[69] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 394 (2021)

[70] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 395 (2021)

proceedings, thus, the presence of an establishment is still necessary in order to open independent territorial proceedings.[71]

Interpreting the provision of Article 3(4), part of the doctrine presumes that the court or the petitioner(s) are aware that the debtor's COMI is not located in the respective place (the state of its international jurisdiction) but there are assets in that country the structure and status of which allow the opening of territorially limited insolvency proceedings. Hence, Article 3(4) functions as an exception to the rule that provides that main insolvency proceedings should always be opened first. As the Virgós-Schmit Report explains, in in paragraph 84, independent territorial proceedings constitute an exception because they are inconsistent with the general framework of the Regulation, which is focused on and built around the primacy of main insolvency proceedings and their universal scope.[72] Moreover, Recital 37[73] provides that these proceedings are intended to be limited to what is absolutely necessary and may be opened in three circumstances.

The prevalent doctrine claimed that territorial insolvency proceedings follow the spirit and the requirements of 'genuine' secondary proceedings. They will only be 'independent' in the absence of main proceedings. Hence, they can be opened only when no main proceedings have been opened with respect to the same debtor, meaning they can be opened prior to those main proceedings. If independent territorial proceedings are opened and then main proceedings are opened, the territorial proceedings will become secondary proceedings by virtue of Article 50[74]. The provisions on the conduct of secondary proceedings will then apply. In the case of independent territorial insolvency proceedings, contrary to secondary insolvency

[71] STONE P., *Stone on Private International Law in the European Union,* Cheltenham, Edward Elgar Publishing (2018), 816; BELOHLAVEK AJ., *supra*, at 217 (2020)

[72] BORK R., VAN ZWIETEN K., *supra*, at 188 (2022); BELOHLAVEK AJ., *supra*, at 217 (2020)

[73] Regulation 2015/848, Recital 37: "*Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and public authorities, or to cases in which main insolvency proceedings cannot be opened under the law of the Member State where the debtor has the centre of its main interests. The reason for this restriction is that cases in which territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary*."

[74] Regulation 2015/848, Article 50: "*Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 41, 45, 46, 47 and 49 shall apply to those opened first, in so far as the progress of those proceedings so permit.*"

proceedings regulated by Article 3(2), the court examines the existence of the debtor's state of insolvency without restrictions referred to in the second sentence of Article 34[75]. The insolvency of the debtor is not examined prior to the examination of the request for the opening of independent territorial insolvency proceedings. The last sentence of Article 3(4) provides that the territorial insolvency proceedings, when main insolvency proceedings are opened, shall become secondary insolvency proceedings. Thus, according to the doctrine the conversion occurs by operation of law and does not require any jurisdictional act either constitutive or declaratory in nature, meaning that, as soon as the decision of the main insolvency proceedings becomes effective and is subject to recognition, all the provisions of the Regulation 2015/848 on secondary insolvency proceedings apply to independent territorial insolvency proceedings.

Moreover, the same doctrine, the opening of independent territorial insolvency proceedings results in the creation of an insolvency estate that includes the debtor's assets situated in the state of the opening of those proceedings. The fact that territorial proceedings pursuant to Article 3(4) are opened and conducted does not mean that main insolvency proceedings would have to be opened too. Whenever main insolvency proceedings are opened subsequently, the insolvency estate of the independent territorial insolvency proceedings will transform into the estate of the secondary insolvency proceedings. The composition or administration and liquidation rules of the secondary insolvency estate is not changed by the conversion.

Article 3(4)(b) provides for one of the two situations where the prior opening of main insolvency proceedings is not required. The provision entails the special relationship of the creditor and his or her claim to the establishment.[76]

The Article distinguishes two group of creditors, specific local creditors, and public authorities. According to Article 3(4)(b)(i)[77], a request for the opening of the independent territorial insolvency proceedings may be made by a creditor whose

[75] Regulation 2015/848, Article 34, second sentence: "*Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened*."

[76] BELOHLAVEK AJ., *supra*, at 219 (2020); FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 184 (2021); BORK R., MANGANO R., *supra,* at 271 (2016)

[77] Regulation 2015/848, Article 3(4)(b)(i): "*a creditor whose claim arises from or is in connection with the establishment situated within the territory of the Member State where the opening of territorial proceedings is requested*;"

claims arise from or are in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial insolvency proceedings is requested.[78]

The wording of the article is almost identical to the definition of a 'local creditor', provided by Article 2(11)[79].

The Virgós-Schmit Report lists some examples of local creditor, including creditors whose habitual residence, domicile and registered office is in the State where the establishment is located; or whose claim arises from the operation of that establishment.[80] According to the doctrine, the claims of the creditors may not only be contractual in nature but also tortious in nature, as well as arise from unjust enrichment. Those creditors may, however, be domiciled, habitually resident or have a registered office outside the state of the establishment. This means that it is theoretically possible for a creditor with a domicile in the debtor's state of COMI to have its bankruptcy petition approved.[81]

The second category of persons empowered to request the opening of territorial proceedings is a public authority which has the right to request the opening of insolvency proceeding, as stated in Article 3(4)(b)(ii)[82].

The literature claims that "public authority" is any entity authorized to enforce individual or general acts using its enforcement powers. The individual language versions use various terms, but the interpretation of the material essence of these terms leaves no room for imagination, in fact, their meaning corresponds to the long-settled concept.[83] Moreover, it was also stated, the public authority's power to request territorial insolvency proceedings only applies if it is entitled to request regular insolvency proceedings in the Member State of the debtor's establishment.[84]

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[78] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 182 (2021)

[79] Regulation 2015/848, Article 2(11): "*'local creditor' means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located*"

[80] Virgós-Schmit Report, paragraph 85

[81] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 183 (2021)

[82] Regulation 2015/848, Article 3(4)(b)(ii): "*a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings*."

[83] AJ. BELOHLAVEK AJ., *supra*, at 221 (2020)

[84] BORK R., VAN ZWIETEN K., *supra*, at 192 (2022)

4.1 IMPOSSIBILITY TO OPEN MAIN INSOLVENCY PROCEEDINGS IN THE STATE OF THE DEBTOR'S COMI

The first possibility for the opening of independent territorial proceedings, provided by Article 3(4)(a)[85], concerns the situation in which main insolvency proceedings cannot be opened in the Member State of the debtor's COMI. The Virgós-Schmit Report, in paragraph 85, gives an example to clarify the situation at hand, describing a situation in which the debtor cannot be subject to insolvency proceedings due to the applicable law of the Member State where the insolvency proceedings should be opened.

According to the literature, this type of situation may be created by the existence of any legal obstacles to the opening of insolvency proceedings in the Member State within the territory of which the debtor has its COMI. It may be the lack of the debtor's capacity to be declared, the lack of fulfilment of the objective prerequisites for declaring bankruptcy, the lack of sufficient assets to cover the costs of the insolvency proceedings in a situation when the law of the state does not allow to declare bankruptcy of the debtor not having sufficient assets.[86]

In these circumstances, the independent territorial proceedings have a subsidiary function, replacing the main insolvency proceedings, since it the only means to ensure the protection of the collective interests of all creditors. However, in the territorial insolvency proceedings, the only assets in question will be those situated in the state of the establishment, inhibiting the insolvency practitioner to dispose of assets situated in other Member States.

[85] Regulation 2015/848, Article 3(4)(a): "*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*;"

[86] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 181 (2021); BORK R., VAN ZWIETEN K., *supra*, at 189 (2022)

5. AN INEDIBLE PROBLEM: THE FORUM SHOPPING

One of the main issues that may occur in the insolvency framework is forum shopping. Forum shopping and the attempts to combat it became a central issue, not only in the European Union.

At the European level, the legislator tried to manage the problem since the first drafts attempting to regulate the insolvency in the EU, even the first case of the Court of Justice involving the Regulation 1346/2000 concerned a forum shopping practice.

Recital 4 of Regulation 1346/2000[87] aimed to restrain the possible transfer of assets and judicial proceedings from one Member State to another.

Forum shopping was also identified as one of the reasons why the Regulation of insolvency proceedings needed to be reformed.

There has been some controversy concerning this delicate topic. Most scholars were convinced that the European Union should enlarge the scope of the Regulation 1346/2000 and shape its architecture in such a way as to avoid forum shopping, other academics supported the opposite opinion. Sometimes, this debate has been nourished by the interpretation of Articles 49[88] and 54[89] of the Treaty of the Functioning of the European Union, which expressly recognize the right of individuals and companies to establish their activities across Europe.[90]

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[87] Regulation 1346/2000, Recital 4: "*It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).*"

[88] Article 49 TFUE: "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agency, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

[89]Article 54 TFUE: "*Companies or firms formed in accordance with the law of a Member State and having their office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as a natural persons who are national of Member States.*
'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making"

[90] BORK R., MANGANO R., *supra,* at 92 (2016)

The Regulation's jurisdiction rules have been criticized for allowing forum shopping by companies and natural persons through abusive COMI-relocation.[91]

The differences in national insolvency and company laws enhance the problem of forum shopping.

Moreover, the problems of the procedural framework made it difficult for a judge seized with a request to open proceedings to determine whether proceedings have already been opened in another Member State and, if so, which type of proceeding is still "available" to be opened by him. The detected issues facilitated forum-shopping by debtors applying for the opening of proceedings in a Member State with a more favourable insolvency regime.[92]

To this day, forum shopping remains one of the critical issues of Regulation 2015/848.

[91]*Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings /*COM/2012/0744 final – 2012/0360 (COD) */*, 3

[92]*COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings /*SWD/2012/0416 final*/*, 20

CHAPTER THREE - THE ISSUES OF MODIFIED UNIVERSALISM. PERSPECTIVES AND SOLUTIONS

1. WHAT ARE THE CHOICES CONCEALED BEHING FORUM SHOPPING?

1.1 THE DEFINITION OF FORUM SHOPPING

The European Insolvency Regulation has always been an instrument which deals with COMI-migration.

Forum shopping, in general, has been defined by the doctrine, as the identification of the optimum jurisdiction for a certain transaction, followed by measures taken so that the law of that jurisdiction is applied. However, the Regulation adopted a specific notion of forum shopping which involves the transfer of the assets of the debtors or judicial proceedings, from one Member State to another, in order to obtain a more favorable legal position to the detriment of the general body of creditors.[1]

The European legislator made a distinction between beneficial and abusive forum shopping and, as a key element, introduced the suspension period before the insolvency application to identify the court with international jurisdiction.[2]

Recital 5[3] lays down the need to avoid incentives for parties to transfer assets or judicial proceedings between Member States, in order to ascertain the proper function of the internal market. Moreover, the Recitals from 29 to 34 give an insight to some measures to prevent abusive forum shopping.

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[1] SPARK LEGAL NETWORK, *Study on the issue of abusive forum shopping in insolvency proceedings. Final Report* (2022), 24; RINGE WG., *Forum Shopping under the EU Insolvency Regulation,* in *Legal Research Paper Series,* Paper, n.33 (2008), 2; Mucciarelli FM., *The unavoidable persistence of forum shopping in European Insolvency Law*, in *CEFIN Working Papers*, n. 36 (2013), 40; BORK R., MANGANO R., *European Cross-Border Insolvency Law*, Oxford, OUP (2016), 91

[2] RINGE WG., *Insolvency Forum Shopping, Revised,* in *Hamburg L. Rev.* (2017), 40

[3] Regulation 2015/848, Recital 5: "*It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).*"

1.2 THE REASONS BEHIND FORUM SHOPPING AND THE POTENTIAL STRATEGIES

In the European Union there are still considerable difference between the domestic insolvency laws of the Member State, due to the lack of harmonization on the matter. This may cause an incentive for debtors to shift their COMI to a different Member State where they might benefit from a more attractive insolvency law regime, which may be considered to be more useful for the attainment of their objective.[4]

The prevalent doctrine[5] has identified the 'forum shopping factors' which may encourage COMI shifts fall within the categories of 'factors mainly related to jurisdiction/procedural aspects across the Member States', and 'factors related to aspects of national (substantive) insolvency laws'.

Among the factors related to jurisdiction and procedural aspects, the first one is the speed of the procedure, which has always been considered one of the most important things in cross-border insolvency.[6]

A related factor is the complexity of a Member State's insolvency which may also be connected to the role that the language plays in making a jurisdiction more attractive.

The cost of the procedure and experts also plays a role in the decision of the parties involved in an insolvency proceeding.

A lack of clarity about the applicable insolvency rules could undermine the investments of the creditors involved. The foreseeability of the insolvency forum and the applicable insolvency law is of crucial importance.[7] If the insolvency rules are unclear efficient credit contracts will not be concluded.[8]

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[4] RINGE WG., *supra*, at 14 (2008)

[5] SPARK LEGAL NETWORK, *supra*, at 44 (2022)

[6] BERENDS A., '*The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, in *Tul. J. Int'l & Comp*., Vol. 6 (1998), 321

[7] EIDENMÜLLER H., *Abuse of Law in the Context of European Insolvency Law,* in *Eur. Co. Fin. Law Rev.,* Vol. 6 (2009), 6-5

[8] EIDENMÜLLER H., *Free Choice in International Company Insolvency Law in Europe*, in *EBOR,* Vol. 6, n.3 (2005), 429

It was also stated that a further source of disharmony among the Member States is the presence or absence of a specialized insolvency court or judges, thus the experience and commercial awareness of the court.

Among the factors, suggested by the doctrine, related to aspects of national insolvency laws include the conditions for insolvency proceedings, which relate to the purpose of the proceedings. Thus, whether the court of the Member State usually tend to liquidate a company in order to satisfy the claims of the shareholders, or to rescue or restructure the company.

Another factor is the ranking of the creditors, the Member States differ in the orders of priority for the satisfaction of the creditors. Moreover, a Member State national insolvency framework may contain rules on avoidance actions, meaning rules according to which, on the opening formal insolvency proceedings previously valid legal acts may be or are declared void.

Additionally Directors' duties fall within the category of the factors related to aspect of national insolvency law, which are intrinsically associated with the directors' liability if they are not respected, may also differ across Member States, when insolvency is imminent and when the insolvency proceedings have commenced.

Some Member States may set different rules and conditions for debt discharge, i.e. the cancellation of the outstanding debts following the closure of insolvency proceedings which entails that the debtor is no longer liable for the debt and the lender is no longer allowed to make attempts to collect the debt.

In the context of restructuring proceedings, the literature has underlined, there may be some national rules which determine the level of influence that certain creditors or groups of creditors have on the approval of a restructuring plain. In certain Member States it is required that the plan for the restructuring provides the satisfaction of certain percentages of creditors to be approved by a court, as well as the approval of particular majorities for the adoption of a plan. Ultimately, Member Stated differ on the extent of the powers, tools and means available in each Member State in order to trace and prevent the assets during the insolvency proceedings.[9]

The studies on the subject have identified two main forum shopping strategies of the debtors. The first strategy involves the movement of the register office of the debtor to another country, or the principal place of business or habitual residence, in case of

[9] SPARK LEGAL NETWORK, *supra*, at 44-71 (2022)

individuals. The second strategy implies that the debtor moves the 'head office functions' of a company in another Member State, without moving its registered office, for example, the board of directors moves to a new Member State while the company remains incorporated where it was.[10]

1.3 THE REGULATION 2015/848 SAFEGUARDS AGAINST FORUM SHOPPING

The Regulation 2015/848, in Recital 29[11], establishes the need for safeguards in order to prevent abusive or fraudulent forum shopping.

The safeguards involve the concept of 'centre of main interests' (COMI).

Article 3 of the Regulation provides for different types of presumptions for the COMI, which vary according to the type of the debtor, which are valid until the COMI is not moved within a specified time frame.[12] The doctrine claimed that the safeguards move from the assumption that the movement of the COMI during a specific time frame is to be considered abusive or fraudulent due to the motives of the debtor which include the detriment of his creditors for his own benefit. If the movement of the COMI is not within the time frame specified by Article 3 shall be permitted.[13]

The first paragraph, second sentence, lays down the presumption in the case of a company or a legal person; the third sentence concerns the case of an individual exercising an independent business or professional activity; the fourth sentence applies to any other individual, i.e, individuals not exercising an independent business or professional activity. The presumptions allow to better identify where the COMI is

[10] SPARK LEGAL NETWORK, *supra*, at 28 (2022); R. BORK, K. VANZWIETEN, Commmentary on the European Insolvency Regulation (2022), 145

[11] Regulation 2015/848, Recital 29: "*This regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping*"

[12] LEANDRO A., *Il centro degli interessi principali del debitore tra regolamento (UE) 2015/848 e codice della crisi d'impresa e dell'insolvenza*, in *Riv. dir. int*., Vol. 103, n. 2 (2020), 382, 383; SPARK LEGAL NETWORK, *supra*, at 26, 27 (2022)

[13] LEANDRO A., *supra,* at 383 (*2020)*

located. Moreover, the Article provides for the possibility to rebut the presumption under some circumstances, which are laid down in Recital 30[14] of the Regulation.[15]

The second safeguard is that national courts must verify the location of the COMI. Article 4 provides that national courts must examine *ex officio* their jurisdiction to open insolvency proceedings whether or not the COMI is located in their Member State. This safeguard also applies to insolvency practitioners.

The third safeguards, identified by the doctrine is the one concerning "suspect periods" when the COMI may have been moved. In the case of a company or legal persons, as well as for the individuals exercising an independent business or professional activity the Regulation takes into consideration the three months prior to the opening of insolvency proceedings, in order for the presumption to be rebutted. In the case of any other individuals the suspect period is six months. [16]

The doctrine argues that the applicability of the presumptions, provided by Article 3(1), is not excluded if the COMI is transferred, if the shift is carried out before the suspects periods. The intention of the European legislator is to prevent the "last minute moves", that may be considered a forum shopping practice.[17] Moreover, it was argued that the national court of the Member State where the COMI is located will maintain its international jurisdiction, even if the COMI was transferred within the suspect period, under the condition that the COMI actually remained in said Member State.[18]

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[14]Regulation 2015/848, Recital 30: "*Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut tis 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 centre of management and supervision and of the management and is interests is located in that other Member State. In the case of an individual non exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation*".

[15] MOSS G., *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (2016), 445

[16] WESSELS B., *The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries*, in *Eur. Co. Law*, Vol. 13, no. 4 (2016), 132

[17] BOGGIO L., *Centre Of Main Interests, dipendenze e trasferimento della sede: cercando di sfuggire al giudicato sulla giurisdizione concorsuale…*, in *Giur. it.*, n. 8-9 (2017), 381, 382

[18] GRIFFINI D., *Trasferimento della sede e giurisdizione italiana alla vigilia del Reg. UE n. 848/2015*, in *Giur. it*., n. 10 (2015), 2120

Moreover, it has been assessed by the doctrine that the Regulation 2015/848 provided for another safeguard which allows any creditor to challenge the decision of the court on its jurisdiction on the insolvency proceedings, stated in Article 5.[19]

The possibility to open secondary insolvency proceedings can also help reduce forum shopping. Furthermore, it was also stated by the doctrine that whenever a debtor moves its COMI to benefit from the insolvency laws of another Member States, usually lodges a request for the opening of insolvency proceedings, precluding himself/herself the chances to question its insolvency before the court.[20]

2. A CRUCIAL FACTOR IN INSOLVENCY PROCEEDINGS: THE IMPORTANCE OF TIME

2.1 THE CONCEPT OF TIME IN FORUM SHOPPING

Time can be considered as a key factor in insolvency proceedings.

The Regulation does not precisely specify the relevant point in time for the determination of the COMI. Nevertheless, according to the doctrine, jurisdiction must be determined as early as possible in the proceedings in order to prevent COMI shifts and abusive forum shopping.[21] The Court of Justice usually takes into consideration the moment where the request for opening insolvency proceedings is lodged with the relevant court.[22]

However, the Regulation establishes some safeguards related to the concept of time. Recital 27[23] underlines the relevant period of time for the determination of the COMI,

[19] SPARK LEGAL NETWORK, *supra*, at 26-27 (2022)

[20] G. MONTELLA, *La procedura secondaria: un rimedio contro il forum shopping del debitore nel Regolamento CE n.1346/2000* (2009), 1302

[21] P. FILIPIAK, A. HRYCAJ, F. ZEDLER *European Insolvency Proceedings: Commentary on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast*) (2021), 157

[22] R. BORK, K. VANZWIETEN, *supra* (2022), 143

[23] Regulation 2015/848, Recital 27: "*Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction*."

it also provides that the courts before the opening of the proceedings have to examine *ex officio* the actual location of the COMI.

The literature claimed that it may happen that a debtor has moved its COMI during the time between the date of the request to open proceedings and the date of its opening, thus changing its jurisdiction. This problem was already addressed in the Staubitz-Schreiber Case[24], the Court of Justice, in order to solve the case, adopted the *perpetuatio fori doctrine,* ruling that the interpretation of Article 3 entails that the court of the Member State has international jurisdiction whenever the COMI located in the Member State at the time when the debtor lodges the request to open insolvency proceedings even if the debtor moved his COMI to another Member State after the request has been lodged. This ruling, and the principle, was confirmed in the Interedil case, and most recently in the Galapagos case.

The last safeguard time-related, established by the Regulation, are the presumptions. The presumptions establish some time limits for the identification of the Member State where the COMI is located, and thus which court has the international jurisdiction to open insolvency proceedings.[25] The suspension period is activated whenever the registered office has been moved across borders within a period of three months before the debtor company files for insolvency, and whenever the debtor moves his habitual residence within six month before lodging a request to open insolvency proceedings. It was established in the doctrine that this rule only disapplies the COMI presumption, it does not cover any potential COMI shift.[26]

[24]Discussed in Chapter One

[25] BORK R., MANGANO R., *European Cross-Border Insolvency Law* (2016), 95-98

[26] RINGE WG., *supra*, at 47 (2017)

2.2 THE CONCEPT OF TIME IN THE DETERMINATION OF THE GROUNDS OF INTERNATIONAL JURISDICTION

It has been authoritatively supported[27] that Article 3(1) of the Regulation does not determine clearly the time when the grounds for international jurisdiction must exist; there may be cases when these grounds subsequently cease to exist or subsequently arise in the course of insolvency proceedings. Two situations may occur.

In the first situation, the grounds of jurisdiction existed at the time when the request to open insolvency proceeding was lodged, but they subsequently disappeared during the proceedings and did not exist at the time the bankruptcy petition was examined. This problem can be solved referring to general rules on procedural prerequisites, this way the subsequent disappearance of the grounds has to be treated as a subsequent lack of procedural prerequisite precluding the continuation of the proceeding, or, as an alternative, the single point in time has to be regarded as decisive for the assessment of the existence of the grounds for international jurisdiction. Another solution would be to refer to the principle of stabilization of international jurisdiction, which should be regarded as a rule inherent in uniform law.

In the second situation, the grounds of jurisdiction did not existed at the time when the request to open insolvency proceedings was lodged, which implies the subsequent emergence of grounds of international jurisdiction. The first solution to this problem is to consider the subsequent appearance of grounds of international jurisdiction has no relevance for the course of the proceedings and cannot be taken into account by the court, or, as an alternative, consider that the subsequent emergence of the grounds has to be taken into account.

The aforementioned authors claimed that the objectives of the Regulation 2015/848, such as the effort to ensure the effective and efficient functioning of cross-border insolvency proceedings, imply that the solution, which involve not taking into account the subsequent appearance of grounds for jurisdiction, cannot be adopted.

The subsequent emergence of grounds for international jurisdiction must be acknowledged by the insolvency court, which cannot conclude that it has no jurisdiction in a situation where, during the insolvency proceedings, the COMI of the debtor has been transferred to the territory of the Member State where the proceedings

[27] FILIPIAK P., HRYCAJ A., ZEDLER F., *European Insolvency Proceedings: Commentary on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast*), Kluwer Law International (2021), 157-167

take place. The court can accept its jurisdiction if it finds that, at a given moment of the proceedings for insolvency declaration, the COMI of the debtor is situated in the State where the request has been lodged.

On the matter of secondary proceedings, the aforementioned authors[28]

Article 3(2) establishes that the courts of the Member State where the debtor has its establishment have jurisdiction to open insolvency proceedings. The second paragraph does not make an explicit reference to a particular moment in time for the determination of international jurisdiction. However, unlike the first paragraph of Article 3, the norm use the term 'possesses', making it impossible to refer to moments in the past when determining the grounds of international jurisdiction.

In territorial insolvency proceedings is confirmed the assumption that the moment of lodging the request to open insolvency proceedings is the moment establishing international jurisdiction. In this moment in time the debtor must have an establishment in the territory of the forum state and its COMI in any Member State of the European Union. After the request is lodged, any developments that may occur have no relevance for the examination of the existence of grounds for jurisdiction. The interpretation of the possession of an establishment is different whether the request is lodged for the opening of secondary insolvency proceedings or independent insolvency proceedings. Whenever the request concerns the opening of independent territorial proceedings, the debtor must carry out, with human means and assets, a non-transitory economic activity at the moment of the filing of the request. The subsequent developments have no relevance in assessing the existence of ground of jurisdiction. On the other hand, when the request is for the opening of secondary insolvency proceedings is important whether at the time of lodging the request for the opening the debtor carries out or has carried out a non-transitory economic activity with human means and assets in the last three months prior to the request to open main insolvency proceedings. In this case, a request to open main insolvency proceedings should be understood as a request that causes the opened territorial insolvency proceedings to become secondary insolvency proceedings.

[28]FILIPIAK P., HRYCAJ A., ZEDLER F., *supra*, at 157-167 (2021)

3. CONFLICT OF JURISDICTION

The literature argued that, since the Regulation 2015/848 is based on the principle of modified universalism, only one set of main insolvency proceedings may be opened. The concept of COMI allows to identify the Member State with international jurisdiction to open main insolvency proceedings. Each debtor can only have one COMI.[29]

However, it may happen that if a court have no knowledge that other request to open main insolvency proceedings have been lodged before other courts, it may conclude that the COMI of the debtor is located in their Member State and consequently open main insolvency proceedings. Otherwise, a court may conclude that the COMI of the debtor is situated in another Member State, and consequently refuse to open main insolvency proceedings.

The only provision, which deals with the competition of opened insolvency proceedings is Article 3(3), however, the doctrine has found an explicit mechanism to deal with positive and negative conflicts of jurisdiction is not contained in the Regulation 2015/848.[30]

The effects of a lack of international jurisdiction are not regulated by the Regulation, albeit Recital 33[31] provides that whenever a court, seized with a request to open insolvency proceedings, considers that the COMI of the debtor is located in another Member States, thus is not within its jurisdiction, it should not open main insolvency proceedings. The Regulation, on the matter of the conflict of jurisdiction, also refers to national law in this respect, as established by Article 7(1) and (2). The court lacking jurisdiction should hand down a decision, according tonational law for situations where there is no international jurisdiction.

A national court cannot make a binding transfer of a bankruptcy case to the court of another Member State. In the case of declaring the lack of jurisdiction, the only

[29] BORK R., VANZWIETEN K., *supra* (2022), 192

[30] BELOHLAVEK AJ., *EU and International Insolvency Proceedings: Regulation (EU) 2015/848 in insolvency proceedings. Commentary* (2020), 207

[31] Regulation 2015/848, Recital 33: "*In the event that the court seised of the request to open insolvency proceedings finds that the centre of main interests is not located on its territory, it should not open main insolvency proceedings*."

decision that a court of a Member State may issue is provided for in the national law of a particular state.[32]

The Virgós-Schmit Report, at paragraph 79, clarifies the choice made by the Regulation. Conflicts of jurisdiction, due to the uniform nature of the criteria of jurisdiction, must be considered as an exception. Furthermore, the Report lays down certain solution when, eventually, disputes do arise.[33]

3.1 POSITIVE CONFLICT OF JURISDICTION

The orientation of the juridical literature defines a positive conflict of jurisdiction occurs whenever two or more Member States assert their jurisdiction over the same matter, claiming their international jurisdiction to open main insolvency proceedings[34].

There are two elements which characterize the positive conflict of jurisdiction. The first element is the cause of that conflict, which is to be interpreted as the simultaneous existence of the international jurisdiction of the courts of different Member States. The second element is the contemporaneous presence of two set of proceedings, which involve the same debtor and the same issues.[35]

Another example of a positive conflict of jurisdiction may be whenever a court of a Member State mistakenly asserts its jurisdiction to hear the case, due to the nature of the concept of the centre of the debtor's main interests, which is very broad and general.

The Regulation 201/848 establish a single jurisdictional link *ex* Article 3(1), which is where the COMI of the debtor is situated. This jurisdictional link, which implies that each debtor only has one COMI, is also required for legal certainty.[36]

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[32] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 167-168 (2021)

[33] BORK R., MANGANO R., *supra*, 101-102 (2016)

[34] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 167-168 (2021); BORK R., VANZWIETEN K., *supra* (2022), 192; BORK R., MANGANO R., *European Cross-Border Insolvency Law* (2016), 95-98; BELOHLAVEK AJ., *supra*, at 207 (2020)

[35] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 170-171 (2021)

[36] BELOHLAVEK AJ., *supra*, at 208 (2020)

However, the concept of COMI and its location are dynamic, the debtor may choose to move its COMI from one Member State to another, both before lodging a request to open main insolvency proceedings and during the insolvency proceeding.[37]

In this scenario, previous CJEU case law[38] suggest the importance of the time of opening of the proceedings, provided for by Article 2(8)[39].

This Article which establishes the time of the opening of the provides that when the judgement opening insolvency proceedings becomes effective, without taking into consideration whether said judgement is final or not, the insolvency proceeding is to be considered opened. This provision has proved to be crucial, as stated by the doctrine, whenever a debtor finds himself in an economic distress and tries to move his COMI, possibly causing an abusive or fraudulent forum shopping practice and a positive conflict of jurisdiction, due to the impossibility to determine definitively where the COMI is located and thus which court has international jurisdiction.[40] Since the majority of the doctrine concluded that the relevant time for the determination of the location of the COMI corresponds to the moment when the request to open insolvency proceedings is filed. If the COMI is transferred after the request has been lodged the shift must not be recognized. In this situation, the court in the state where the COMI was situated keeps the competence to open main insolvency proceedings.[41]

The majority of the doctrine claimed that it is not possible to find only one solution to a positive conflict of jurisdiction. Some authors attempted to give a series of option to overcome the problem[42].

One option is to make an association of the moment in which the international jurisdiction is stabilized, and when the request to open insolvency proceedings has

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[37] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 171-172 (2021)

[38] Case C-1/04, Susanne Staubitz-Schreiber, ECLI:EU:C:2006:39

[39] Regulation 2015/848, Article 2(8): "*'the time of the opening of proceedings' means the time at which the judgement opening insolvency proceedings becomes effective, regardless of whether the judgement is final or not;*"

[40] CRESPI REGHIZZI Z., *La disciplina della giurisdizione in materia di insolvenza: il Reg. Ue n.2015/848*, in *Giur. it*,. n.1, 2018, 260

[41] The International Insolvency Institute. International Insolvency Studies, 2010, 23

[42] P. FILIPIAK, A. HRYCAJ, F. ZEDLER *supra,* at 173-178 (2021); R. BORK, K. VANZWIETEN, *supra* (2022), at 193-197; R. BORK, R. MANGANO, *European Cross-Border Insolvency Law* (2016), 95-98; AJ. BELOHLAVEK, *EU and International Insolvency Proceedings: Regulation (EU) 2015/848 in insolvency proceedings. Commentary* (2020), 207

been lodged. Another solution could be to include in Article 3 a provision equivalent to Article 29 (1) of Regulation No. 1215/2012[43]. Thus, whenever the requests to open main insolvency proceedings have been lodged for the same debtor, in different Member States, the court which received the request later should ex officio stay the proceedings until the first court seized has established its international jurisdiction on the matter. This solution, as suggested by the doctrine, can be seen as the implementation of the priority principle, which, in fact, provides that the first proceedings opened prevail over those opened later, that shall be stayed by the court.[44] This principle relies on the mutual trust between the Member States, as established by Recital 65, which also provides for the immediate recognition of the judgements on insolvency proceedings. The need for mutual trust is also confirmed by the Eurofood IFSC in paragraph 44, which established the recognition of the main insolvency proceedings opened by a court of the Member States, without the possibility for the other courts of different Member States to review the jurisdiction of the court of the Member State first seized. The recognition starts from the time that the judgement becomes effective in the Member State of the main proceedings. The rule of priority, which is based on a chronological criterion, in addition, is established in the first subparagraph of Article 19 of the Regulation[45], which also provides for the moment when the decision becomes effective.

A possible consequence of the application of the priority principle, pointed out by some authors, is that the subsequent proceeding, opened by a court on a later date, becomes a secondary proceedings if the court wants to maintain jurisdiction, as stated by Article 3(3).[46] This solution would become more effective with the aid of a European register of insolvency proceedings, as stated also by Recital 75, which, in

[43] Regulation No. 1215/2012, Article 29(1): "*Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established*."

[44] BORK R., MANGANO R., *supra*, at 102 (2016); K. PANNEN, *European Insolvency Regulation: Commentary*, Boston, De Gruyter (2011), 118

[45] Regulation 2015/848, Article 19(1): "*Any judgement opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States from the moment that it becomes effective in the State of the opening of proceedings*"

[46] BORK R., MANGANO R., *supra*, at 104 (2016)

addition, requires the Member States to publish relevant information of the insolvency cases.

Another option, proposed as a solution by the doctrine, is to amend the definition of the concept of COMI underlying the perceptions of third parties.

Other authors suggested the option to challenge the opening decision ex Article 5, which provides for the possibility to challenge the decision on grounds of international jurisdiction.[47]

An additional solution, suggested by the doctrine, is to refer the issue to the Court of Justice for a preliminary ruling ex Article 267 TFUE.[48]

However, the solution considered "most pragmatic" is for the courts to seek mutual dialogue, which is encouraged by Article 24 and Recital 76.[49]

3.2 NEGATIVE CONFLICT OF JURISDICTION

The negative conflict of jurisdiction is the opposite problem to the positive conflict of jurisdiction. The literature has found that this type of conflict, in a narrow sense, arises when the courts two or more Member States state that they do not have the international jurisdiction to open a main insolvency proceeding, leaving a judicial vacuum.[50]

In the Regulation 2015/848 there are neither provisions nor Recitals which could help outline the problem[51]. Moreover, the method to solve this type of conflict is also not defined. However, the scope of the regulation does not make any referral to national

[47] BORK R, VANZWIETEN K, *supra* (2022), at 195; VANZETTI, *L'insolvenza transnazionale nell'Unione Europea: una panoramica della disciplina in vigore*, *in Rev. Fac. Dir*, n.78 (2021), 316-318

[48] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 173-178 (2021); AJ. BELOHLAVEK, *supra,* at 209 (2020)

[49] BORK R., K. VANZWIETEN K, *supra* (2022), at 197

[50] BORK R., K. VANZWIETEN K, *supra*, at 197 (2022); R. BORK, R. MANGANO, *supra*, at 105 (2016); BELOHLAVEK AJ., *supra,* at 209 (2020); FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 173-178 (2021) make also a thorough description of negative conflicts of jurisdiction in a more general sense.

[51] BORK R., VANZWIETEN K., *supra*, at 197 (2022)

law for the interpretation of the jurisdictional links, which implies that the interpretation of the provisions needs to be based on the European rules of jurisdiction. Some authors pointed out two circumstances that may influence the rise of negative conflicts of jurisdiction. The first group of circumstances are internal. They are related to the diversity and multiplicity of permissible interpretation of the norms in the Regulation. The courts of the Member States may also apply different procedural rules in insolvency proceedings, as provided for by Article 7. Thus, the recognition of the courts may be based on the erroneous finding of the factual state or an inaccurate interpretation of the norms of jurisdiction. The second group are the external circumstances, which are those concerning the general possibility of access to the justice system of a particular State. These may be cause interference with the rights of the creditors and the debtors, and are contrary to the aim of the Regulation to protect the internal market.[52]

The literature has proposed some solutions to overcome negative conflict of jurisdiction. The court of the Member States may refer to the CJEU for a preliminary ruling ex art 297 TFUE.[53] Another option is, instead of opening main insolvency proceedings, to open independent territorial proceedings, which could be supported by the broad delimitation of the communication and cooperation between the courts and insolvency practitioners, as established by Article 42 and 43 of the Regulation.[54]

Moreover, the literature has suggested the possibility for the courts of the Member State to solve adverse jurisdictional conflict through international referral, arguing that the COMI of the debtor is not located in their territory but, at the same time, suggesting that the COMI is situated in another Member State, and thus the international jurisdiction of that court. [55]

[52] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 179 (2021)

[53] BORK R., MANGANO R., *supra*, at 105 (2016)

[54] BELOHLAVEK AJ., *supra,* at 210 (2020)

[55] FILIPIAK P., HRYCAJ A., ZEDLER F., *supra,* at 180 (2021); BORK R., VANZWIETEN K, *supra*, at 197 (2022); BORK R., MANGANO R., *supra*, at 105 (2016); PANNEN K., *supra*, at 115 (2011)

4. ARE WE SURE FORUM SHOPPING CAN ONLY HAVE ONE CONNOTATION?

In order to make a thorough analysis of the connotation of the forum shopping practice, is important to dwell on the concept of abuse of law.

In the Italian literature, Rodolfo Sacco noted that some actions, in exercise of rights provided by the law, may constitute an abuse of law, due to the way they have been implemented. Furthermore, he observed that, usually, to rely on the category of the abuse of law, there must be a gap in the law, which does not regulate a specific situation.[56]

According to the Court of Justice, an abuse of law consists in the recourse to a right provides by the law for a different purpose other than the one desired by the legislator with the intention of taking advantage from the situation.[57]

The literature argued that, in order for an abuse of law to occur, two elements are required: an objective element, and a subjective element. The objective element involves the formal compliance to the wording of the norm without reaching is scope. The subjective element is the intention to benefit from this practice.[58]

There is a lack of CJEU case law relating to insolvency, however, the concept of abuse of law is starting to be used in order to restrain forum shopping.[59]

The doctrine believes the existence of the principle of the abuse of law and the possibility to apply it in the discipline of insolvency. Thus, the debate concerns whether the principle may be applied, specifically, in order to restrain abusive COMI-migration. Part of the doctrine argues that the application of the principle to insolvency proceedings may be a "first line of defence".[60]

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[56] L. PANZANI, *Abuso del diritto. Profili di diritto comparato con particolare riferimento alla disciplina dell'insolvenza transfrontaliera*, in *Giur. civ*., n.3 (2014), 695

[57] L. PANZANI, *Forum shopping e abuso del diritto, in Nuovo dir. soc.,* Fasc. 10 (2017), 1

[58] H. EIDENMÜLLER H., *Abuse of Law in the Context of European Insolvency Law* (2009), 8-11; DE WEIJS RJ., BREEMAN MS., *Comi-migration: Use or Abuse of European Insolvency Law?,* in *Amsterdam Law School Research Paper,* n. 38 (2014), 506; PANZANI L., *supra*, at 1 (2017)

[59] PANZANI L., *supra*, at 2 (2017)

[60] RJ DE WEIJS, MS. BREEMAN, *supra* (2014), at 508,509 (2014)

Eidenmüller[61], to support the application of the abuse of law to curb COMI-migration, argued that since the main goals of the European Insolvency Regulation were the "efficient and effective administration of cross-border insolvency" and the prevention of forum shopping. Moreover, he claimed that what is important is if the goal of the shift is to enrich the person initiating it, is to be considered abusive. It falls into the same category when the COMI migration aim is to create a different distribution of the assets of the debtor. A COMI migration should not interfere with the pre-insolvency entitlements.[62]

The discussion started due to the wording of Recital 29, which establishes that the safeguards provided by the Regulation 2015/848 shall prevent fraudulent or abusive forum shopping. The doctrinal debate regarded the possibility of a "good" forum shopping, even though the Regulation never mention it.

The literature argued that the concept of COMI is, by its nature, "movable".[63]

Moreover, it was claimed that the mobility of the COMI and its possibility to shift from one Member State to another is generally protected by the freedom of establishment provided by the TFUE. Thus, to consider that forum shopping may only have a negative connotation and preventing a free choice of the applicable law may be regarded as an obstacle, which restricts the freedom of establishment. However, fundamental freedoms can be subject to restrictions.[64]

Ringe[65] claimed that a part of the doctrine suggested that the scope of the freedom of establishment is "limited to provisions of company law only". However, he believes that the freedom of establishment is not confined by formal rules of 'company law', and since company law is supported by insolvency law, the latter can be considered within the functional scope of company law.[66] Moreover, he stated that, in the moment when, for example, a company wishes to establish itself in another Member State

[61] Statutory Professor for Commercial Law

[62] H. EIDENMÜLLER, *supra*, at 16 (2009); RJ. DE WEIJS, MS. BREEMAN, *supra*, at 509-510 (2014)

[63] LEANDRO A., supra, at 375 (2020); MOSS G., supra, at 64, 65 (2016)

[64] The International Insolvency Institute. International Insolvency Studies, Forum Shopping under the Regime of the European Insolvency Regulation, 2010, 32

[65]Professor of Law and Finance at the University of Hamburg and Director of the Institute of Law & Economics

[66]RINGE WG., *supra*, at 23 (2008)

different from the one in which it has its COMI, insolvency law does not have an "equal influence" on the choice of establishment, it rather plays an important lore once the debtor becomes insolvent or in the verge of insolvency.[67]

The doctrine, when the freedom of the establishment is taken into account, believes that the choice of the forum and the subsequent movement of the COMI is allowed, provided that these practices do not affect the rights protected by Regulation 2015/848, undermining the creditors and the other parties of the insolvency proceeding. If the latter situation occurs, the forum shopping practice is to be considered abusive or fraudulent.[68]

Focusing on the role of the creditors, part of the doctrine argued that, even though forum shopping may cause a detriment of their rights or of other parties due to the uncertainties and the costs of a COMI migration, creditors, as a matter of facts, are never able to predict the lex fori of the insolvency proceedings if the internal market maintains different substantive insolvency regimes. Taking protection against a potential COMI migration should be a creditor's responsibility.[69]

The literature suggested that, in order to determine the connotation of the forum shopping practice, the importance of the role of the creditors and whether the COMI migration entails an efficiency gain by changing the forum and, consequently, the applicable law to the insolvency proceeding.[70] Usually it was argued that the shift is either approved by the creditors or, otherwise, some adequate legislative guarantees are provided by the legislator. The creditors' consent can thus be used as an "indicator for efficiency gains" and allows to investigate whether the motives behind the forum shopping practice may be considered abusive, within the meaning of benefitting from the shift regardless of the creditors and the efficient administration of the insolvency. Whenever the shift is contrary to the scope of the Regulation is to be considered abusive, in accordance with the Recitals, and shall be prevented. On the contrary,

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[67] WG. RINGE, L. GULLIFER; P. THÉRY, *Strategic Insolvency Migration and Community Law* (2009), 101

[68] LEANDRO A., supra, at 376 (2020)Leandro 2020, 376

[69] WG. RINGE, L. GULLIFER; P. THÉRY, *Strategic Insolvency Migration and Community Law*, Oxford, Hart Publishing (2009), 92

[70] DE WEIJS RJ., BREEMAN MS., *supra*, at 496-530 (2013); RINGE WG., *supra*, at 17-22 (2008); ARNOLD M., *Truth or Illusion? COMI Migration and Forum Shopping under the EU Insolvency Regulation*, in *Bus. Law Int.*, Vol. 14, Issue (2013), 252-256

whenever creditors consent to the transfer of the COMI and safeguards are in place in order to deal with the situations where there is no consent of the creditors, the literature argued that the forum shopping practice should be permitted.[71]

[71]RINGE WG., *supra,* at 22 (2008)

CONCLUSIONS

Cross-border insolvencies and their regulation among the Member States has always been a sensitive subject, which keeps its relevance also nowadays.

The subject has been addressed several times by the European Commission, however, there is still no joint solution, and the Member States are reluctant to adopt a uniform regulation on insolvency.

The adoption of the Regulation (EC) 1346/2000 and the subsequent Regulation (EU) 2015/848 is certainly a first step towards the proper harmonization of the phenomenon and an organic regulation of the matter, in so far as it lays down the criteria for the identification of the Member State with the international jurisdiction for the opening of insolvency proceedings, in which territory the debtor has his main interests.

The solution of the matter maintains its relevance in this time in history, characterized by the globalization, which encourage the debtor to carry out his activities in different Member States, for the best pursuit of corporate purposes.

Article 3 allows to limit possible frauds to the detriment of creditors, caused by the lack of harmonization of the Regulation. This situation, hence, encourage the debtor to move its COMI in a different Member State where insolvency proceedings are regulated in a more favourable way, also in terms of the promptness of the opening of the procedure and liquidation of the assets.

The provisions should be more detailed , especially concerning the possibility to move the COMI in a "lawful" way, in order to better distinguish it from an abusive or fraudulent movement of the COMI, which is covered by the Regulation (EU) 2015/848.

Greater importance should be given to the matter of the conflict of jurisdiction, either positive or negative, which at the moment not regulated and, in order to overcome it, there are only doctrinal opinions.

To nominatively regulate this issues would lead to the solution of the problems, resulting in a lower expenditure of procedural energies of the Court of Justice and an increased promptness in the adoption of the judgements.

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