

PROSPECTUS FOR BANKRUPTCY REGULATION IN THE EU

A. Preliminary note

The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding an insolvent debtor's assets¹.

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 in its original version was functioning well in general. But in order to enhance the effective administration of cross-border insolvency proceedings the report suggested to improve the application of certain of its provisions². As result the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) was issued.

B. Focal Points

My presentation will focus on the following points:

Which collective proceedings are covered by this Regulation?

The international jurisdiction for the opening of the main proceedings, automatic recognition and enforcement of decisions and which measures does the Regulation take to prevent forum shopping?

Which claims are annex decisions in accordance with Art 6?

¹ REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 4th recital.

² REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 1st recital.

C. Cross-border relation

The EuInsVO only applies between the Member States. Just between Member States the principles of automatic recognition and extension of effects apply. However, the case law of the European Court of Justice leads to an extension of the effects on third states (non-member states) or concentration of competence in the state of the main proceedings.

So the European Court of Justice (ECJ) considered in the case H./H.K., that Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that the courts of the Member State in the territory of which insolvency proceedings regarding a company's assets have been opened have jurisdiction to hear and determine an action, such as that at issue in the main proceedings, brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of payments made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets, where the managing director is domiciled not in another Member State but, as is the situation in the main proceedings, in a contracting party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008³.

With this decision, the ECJ confirmed its judgment *Schmid/Hertel*, in which it adjudicated that Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State⁴.

These two judgments show that the ECJ is satisfied with the applicability of the EuInsVO simple foreign reference. The applicability of the EuInsVO therefore does

³ European Court of Justice (ECJ) 4. December 2014, Case C-295/13 – H./H.K.

⁴ ECJ 16 January 2014, Case C-328/12 – *Schmid Hertel*.

not require that two Member States be affected by the bankruptcy.

However, many Member States have closely aligned their national international insolvency law with the provisions of the EuInsVO. The provisions of the EuInsVO indirectly have an influence on third countries. Furthermore, accession talks will be held with several countries. It can therefore be assumed that the territorial scope of application of the EuInsVO will increase in the coming years.

Non-member states can adopt especially the provisions on the international jurisdiction, the recognition of insolvency proceedings opened in Member States under the regime of the regulation, the cooperation between courts and administrators as well as the establishment of insolvency registers. That would lead to a desirable approximation of national insolvency laws of third countries. This would provide a great deal of practical relief for bankruptcies affecting third countries.

D. The Scope of Application

According to recital 25 this Regulation applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union.

The scope of application is defined in Article 1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in

situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

This Regulation applies to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation applies without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A are not covered by this Regulation⁵.

The scope of this Regulation extends to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. In particular it extends to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It also extends to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they are covered by this Regulation if they take place under the control or supervision of a court. In this context, the term 'control' includes situations where the court only intervenes on appeal by a creditor or other interested parties⁶.

The collective proceedings which are covered by this Regulation include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected. Proceedings

5 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 9th recital.

6 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 10th recital.

which involve only the financial creditors of a debtor are also covered⁷.

In the judgement *Eurofood* the ECJ decided, that the Regulation is also applicable on pre-insolvency proceedings, if the debtor is totally or partially divested of its assets and an insolvency practitioner is appointed. If such proceedings are opened, this is considered as opening of insolvency proceedings according to Art 1. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, a decision to open insolvency proceedings is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to that regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to that regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. It is therefore necessary, in order to ensure the effectiveness of the system established by the regulation, that the recognition principle laid down in that provision be capable of being applied as soon as possible in the course of the proceedings⁸.

The new version of the EulnsVO has thus made a clear specification of its scope. It is also evident that there is a clear desire to broaden the material scope of application of the Regulation. Excluded from the regulation are only confidentially conducted insolvency proceedings, pre-litigation, which does not lead to the loss of power of disposal and asset fitting, as well as insolvency proceedings over the assets of banks and insurance companies.

For the purpose of alignment non-member states could orientate the concept of insolvency proceedings to the definition of Article 1. As national private

7 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 14th recital.

8 European Court of Justice (ECJ) 2. May 2006 – Case C-341/04 – *Eurofood/Parmalat*.

international laws of several Member States adopt the basic values of the EuInsVO, this increased the chance of recognition of insolvency proceedings in Member States opened in a third state.

E. International Jurisdiction and Prevention of Forum Shopping

The rules of jurisdiction set out in this Regulation establish only international jurisdiction. That means, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction remains be established by the national law of the Member State concerned. To regulate the territorial jurisdiction within that Member State remains in the competence of the Member States⁹.

According to 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 the international jurisdiction to open insolvency proceedings (so called 'main insolvency proceedings').

Thus this Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests¹⁰.

According to Art 3 (1) 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. 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. In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. 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.

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

⁹ REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 26th recital.

¹⁰ REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 23th recital.

establishment is actually located within its jurisdiction¹¹. With regard to the principles of mutual trust and the automatic recognition and extension of effects, the court has of its own motion a strict obligation to audit¹².

When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means¹³.

Main insolvency 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 to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may 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 Union¹⁴.

Where main insolvency proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible to open secondary insolvency proceedings in the Member State of the

11 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 27th recital.

12 *Duursma-Kepplinger*, British Courts are satisfied, Continental Europe is not amused – Kritische Anmerkungen zur rigorosen Inanspruchnahme der internationalen Zuständigkeit gem Art 3 Abs 1 EuInsVO durch die Gerichte des Vereinigten Königreichs, ZIK 6/2003/257, 182 ff; *Duursma-Kepplinger* in *Duursma-Kepplinger/Duursma/Chalupsky*, Europäische Insolvenzverordnung (2002) Art 3 recital 25, 41 ff; *Duursma Duursma-Kepplinger*, Gegensteuerungsmaßnahmen bei ungerechtfertigter Inanspruchnahme der internationalen Zuständigkeit gemäß Art. 3 Abs. 1 EuInsVO, DZWIR 2003, 447, 449; *Weller*, Forum Shopping im Internationalen Insolvenzrecht? IPRax 2004, 412, 417; see also *Nunner-Krautgasser*, Rechtsprobleme der Prüfung der Zuständigkeit nach der EuInsVO, Clavara/Garber (Editors), Grenzüberschreitende Insolvenzen im Europäischen Binnenmarkt – die EuInsVO, 2011, 31, 35 ff.

13 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 28th recital.

14 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 23th recital.

registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in accordance with the case-law of the Court of Justice of the European Union¹⁵.

I want to set my focus on the main proceedings and talk about the the measures taken by the recast of the Regulation to prevent a forum shopping.

In accordance with the experience of the original Regulation recital 5 of the recast of the Regulation determines that 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). According to recital 29 this Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.

To prevent forum shopping the presumptions of Art 3 (1) shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. or if the individual's principal 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 or 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.

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 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

15 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 24th recital.

actual centre of management and supervision and 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 dealings with the debtor took place prior to the relocation¹⁶.

With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings¹⁷.

In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction¹⁸.

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

16 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 30th recital.

17 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 31th recital.

18 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 32th recital.

main insolvency proceedings¹⁹.

In addition, any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings. The consequences of any challenge to the decision to open insolvency proceedings should be governed by national law²⁰.

The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings²¹.

These provisions are a response to the intense debate in teaching and jurisprudence about the possibilities of preventing forum shopping. The original regulation, contrary to various preliminary drafts, had waived such periods of protection. In this respect it was obvious that various short-term transfers of seats, as in the case of *Staubitz-Schreiber*, led to heated debates about the effectiveness of the rules on international jurisdiction.

In answer of a preliminary ruling under Article 234 EC the European Court of Justice decided that Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened²².

Discussions and considerations on the refusal of the recognition with reference to the *ordre public* also caused various decisions of British courts, which opened a

19 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 33th recital.

20 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 34th recital.

21 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 35th recital.

22 ECJ 17 January 2006, Case C-1/04 – *Susanne Staubitz-Schreiber*.

main proceedings obviously without further official examination solely on the basis of the information in the insolvency petition²³.

High waves also hit the decision of the ECJ in the case *Eurofood*²⁴. This concerned the determination of the COMI of a group company. The ECJ decided on the interpretation of Art 3 (1) and of the first subparagraph of Article 16 (1) of Regulation No 1346/2000 (automatic recognition):

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Regulation No 1346/2000, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation²⁵.

On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. The rule of priority laid down in that provision, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust, which has enabled a compulsory system of jurisdiction to be established, and, as a corollary, has enabled

23 See *Duursma-Keppinger*, British Courts are satisfied, Continental Europe is not amused, ZIK 6/2003/257, 182 ff.

24 ECJ 2. May 2006, Case C-341/04 – *Eurofood*.

25 ECJ 2. May 2006, Case C-341/04 – *Eurofood*.

the Member States to waive the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision²⁶.

On a proper interpretation of Article 26 of Regulation No 1346/2000, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency. Whilst it is for the court of the State to which application has been made to establish whether a clear breach of the right to be heard has actually taken place in the conduct of the proceedings before the court of the other Member State, that court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the persons concerned by that procedure were given sufficient opportunity to be heard²⁷.

In this decision, the ECJ clarified that the refusal to recognize an opening decision based on *ordre public* could only be considered in absolute exceptional cases. This view was confirmed by the ECJ in the judgement *Probud*²⁸:

26 ECJ 2. May 2006, Case C-341/04 – *Eurofood*.

27 ECJ 2. May 2006, Case C-341/04 – *Eurofood*.

28 ECJ 21. January 2010, Case C-444/07, *Probud*.

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case such as that in the main action, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25 (3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met²⁹.

This restrictive attitude of the case-law on refusal of recognition can only be justified by the principle of mutual trust between the Member States. A transfer of these assessments to the relationship with third countries is therefore in my opinion not considered.

In another important judgement *Rastelli* the ECJ decided that the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State³⁰.

Regulation No 1346/2000 is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of

²⁹ ECJ 21. January 2010, Case C-444/07, *Probud*.

³⁰ ECJ 15. December 2011, Case C-191/10, *Rastelli*.

that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is the place of the registered office, it is necessary that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened³¹.

In conclusion, it should be noted that the recasting of the Regulation and the extensive case law of the ECJ have now produced good indications for the definition of the term COMI.

F. Automatic recognition of opening of insolvency proceedings and annex decisions

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 Union measure which is binding and directly applicable in Member States³².

The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings. In contrast, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings. Where such an action is related to another action based on general civil

³¹ ECJ 15. December 2011, Case C-191/10, *Rastelli*.

³² REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 8th recital.

and commercial law, the insolvency practitioner should be able to bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum. This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law³³.

The original Regulation only provided a rudimentary rule for the jurisdiction and recognition of actions deriving directly from insolvency proceedings and closely linked with them.

According to recital 6 that should be changed. Therefore this Regulation should include provisions governing jurisdiction for opening insolvency proceedings and actions which are directly derived from insolvency proceedings and are closely linked with them. This Regulation should also contain provisions regarding the recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings. The result of these endeavors is Art 6, which is titled „Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them“.

According to Art 6 (1) the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012. The first subparagraph shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring

33 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast), 35th recital.

actions on behalf of the insolvency estate (Art 6 (2)).

According to Art 6 (3) for the purpose of paragraph 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The question of whether or not a procedure should be subsumed under Article 6 concerns the delimitation of the scope of Regulation (EU) 2015/848 (former Regulation (EU) 1346/2000) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12. December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). In its latest judgement *Riel* the ECJ decided, that Article 29 (1) of Regulation No 1215/2012 must be interpreted as not applying, even by analogy, to an action such as that in the main proceedings which is excluded from the scope of that regulation but falls within the scope of Regulation No 1346/2000³⁴.

With regard to third countries, the case law of the European Court of Justice in this context makes it particularly interesting that it regards the jurisdiction of the annex as exclusive competence (jurisdiction)³⁵. While the exclusivity of jurisdiction was limited to the relationship with Member States, the ECJ ruled that the application of the competences of the EuInsVO would be simply foreign³⁶. The affirmation of exclusive competence also in relation to third countries would be problematic. This follows from the fact that only Member States, but not third countries, are legally bound by the principles of automatic recognition and enforcement laid down by the Regulation³⁷. It will thus be necessary to wait and see how the ECJ decides, when it is specifically asked for a preliminary ruling on how jurisdiction should be assessed in relation to third countries.

³⁴ ECJ 18. September 2019, Case C-47/18 – *Riel*.

³⁵ See EJC 14. November 2018, Case C-296/17 – *Wiemer & Trachte*; *Jessica Schmidt*, European Insolvency & Restructuring, TLE-045-2018.

³⁶ See ECJ 16 January 2014, Case C-328/12 – *Schmid Hertel*; EJC 14. November 2018, Case C-296/17 – *Wiemer & Trachte*.

³⁷ *Bork*, European Insolvency & Restructuring, TLE-005-2019.

As to the question of which proceedings are to be subsumed under Art 6, several judgements of the ECJ have meanwhile been issued³⁸. The latest decision in this case-law is ECJ 18. September 2019, Case C-47/18 – *Riel*.

In the judgments below, the ECJ has commented on the complex concept of annexation³⁹. However, where exactly the limits of the scope of application of Annexe jurisdiction are, it is still not fully clarified despite the cited judgments of the Court of Justice on this problem complex⁴⁰.

An annex jurisdiction was affirmed for the following actions:

- avoidance actions against a contestant who has his statutory seat in another Member State, ECJ 12. February 2009, Case C-339/07 – *Christopher Seagon/Deko Marty Belgium NV* (see now Art 6 (1) last sentence)

- claim for recovery of company shares whose sale was ineffective due to non-recognition of the liquidator transaction, ECJ 2. July 2009, Case C-111/08 – *SCT Industri*

- claim by the insolvency administrator against the managing director for repayment of amounts due after insolvency or over-indebtedness, ECJ 4. December 2014, Case C-295/13 – *H./H.K.*

- claim for tortious damages to members of a creditors' committee for their conduct in a vote on the recovery plan, ECJ 20. December 2017, Case C-649/16 – *Valach*

- determination of the existence of a claim for the purpose of filing in bankruptcy proceedings, ECJ 18. September 2019, Case C-47/18 – *Riel*

On the other hand, an annex jurisdiction was denied in the following cases:

- reservation of title based action of the conditional seller against the insolvent conditional buyer, ECJ 10. September 2009, Case C-292/08 – *German Graphics*

- Claim of the assignee arising from a bankruptcy petition assigned by the insolvency administrator, ECJ 19. April 2012, Case C-213/10 – *F-Tex*;

³⁸ See the list below in the text.

³⁹ See also *Jessica Schmidt*, European Insolvency & Restructuring, TLE-045-2018.

⁴⁰ *Jessica Schmidt*, European Insolvency & Restructuring, TLE-045-2018.

- action against a member of the body for damages for the continuation of an undercapitalized company, ECJ 18. July 2013, Case C-147/12 – *OFAB*

- action brought by the liquidator for the provision of transport services, ECJ 4. September 2014, Case C-157/13 – *Nickel & Goeldner*

- an unfair competition claim, alleging that the transferee of a business acquired in insolvency proceedings was wrong to claim to be the exclusive distributor of the goods produced by the debtor, ECJ 9. November 2017, Case C-641/16 – *Tinkers France and Tinkers Maschinenbau*

G. Summary

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) is directly applicable only in the Member States. Only the courts of the Member States are required to apply the Regulation and are bound by its provisions.

Accordingly, only courts of Member States have to automatically recognize insolvency proceedings opened in another Member State using international jurisdiction under the Regulation without review of jurisdiction.

Likewise, only Member States shall automatically recognize decisions in annex proceedings according to Art 6 taken in the Member State of opening main proceedings.

With regard to third countries, the case law of the European Court of Justice in this context makes it particularly interesting that it regards the jurisdiction of the annex as exclusive competence (jurisdiction). While the exclusivity of jurisdiction was limited to the relationship with Member States, the ECJ ruled that the application of the competences of the EuInsVO would be simply foreign. The affirmation of exclusive competence also in relation to third countries would be problematic. This follows from the fact that only Member States, but not third countries, are legally bound by the principles of automatic recognition and enforcement laid down by the Regulation. It will thus be necessary to wait and see how the ECJ decides, when it is specifically asked for a preliminary ruling on how jurisdiction should be assessed in relation to third countries.

However, many Member States have closely aligned their national international insolvency law with the provisions of the EuInsVO. The provisions of the EuInsVO indirectly have an influence on third countries. Furthermore, accession talks will be held with several countries. It can therefore be assumed that the territorial scope of application of the EuInsVO will increase in the coming years.

Non-member states can adopt especially the provisions on the international jurisdiction, the recognition of insolvency proceedings opened in Member States under the regime of the regulation, the cooperation between courts and administrators as well as the establishment of insolvency registers. That would lead to a desirable approximation of national insolvency laws of third countries. This would provide a great deal of practical relief for bankruptcies affecting third countries.