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THE COORDINATION OF MAIN AND SECONDARY INSOLVENCY PROCEEDINGS IN EUROPEAN UNION INSOLVENCY LAW

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Abstract. This article focuses on the coordination of main and secondary insolvency proceedings in cross-border insolvency cases. The authors analyse how main and secondary insolvency proceedings should be coordinated in different aspects of these proceedings, namely: the opening of insolvency proceedings, the exercise of creditors' rights, and the treatment of the debtor's assets. The procedural peculiarities of the opening of secondary insolvency proceedings are also discussed. The article also examines how insolvency practitioners and courts in parallel cross-border insolvency proceedings should coordinate their actions to ensure proper response to the debtor's insolvency problems. Moreover, the authors assess the relevant case law of the Court of Justice of the European Union and whether is compatible with the goal of effective cross-border insolvency proceedings.

Keywords: cross-border insolvency, European Union law, main insolvency proceedings, secondary insolvency proceedings

Introduction

The cross-border insolvency proceedings established in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter – EIR) are based on the modified universalism approach, which includes main insolvency proceedings having a universal scope (Recital 22 of the EIR) and secondary insolvency proceedings which have a territorial scope (Recital 23 of the EIR). In private international law, modified universalism is regarded as the dominant approach to cross-border insolvency proceedings and is based on the centralisation of all insolvency procedures in one insolvency court (Mevorach, 2021, p. 286). However, there is the possibility for opening secondary insolvency proceedings which allow the decentralisation of insolvency proceedings in courts of different states. Though this decentralisation of insolvency procedures may impede the effectiveness of the administration of insolvency, there are various legal and economic factors which support the opening of secondary insolvency proceedings.

The differences in legal regulation, peculiarities of the domestic market, and business cultures lead to a significant diversity of approaches to insolvency proceedings in the member states of the European Union. These differences become sheer in cross-border insolvency proceedings in which the debtor may have assets and creditors in different jurisdictions. Thus, it is important to assess how main and secondary insolvency proceedings should be coordinated to provide the most effective solution to the debtor's insolvency problems despite defragmentation of regulation of insolvency proceedings in the member states.

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The aim of this article is to analyse coordination between main and secondary insolvency proceedings through the means of cooperation and how it should ensure effective solutions to debtors' insolvency problems. The article focuses on the hypothesis that secondary insolvency proceedings serve not only to protect the interests of local creditors where secondary insolvency proceedings should be established, but also may contribute to the effective administration of the debtor's assets and the rescue of business in case of the opening of restructuring proceedings. However, the opening of secondary insolvency proceedings and complex coordination between the main and secondary insolvency proceedings raise a number of questions. Unsurprisingly, some authors argue that secondary proceedings may unnecessarily complicate the administration, because they cause coordination and boundary problems, and also increase costs (INSOL Europe, 2012, p. 78).

This article deals mostly with the procedural aspects of cross-border insolvency proceedings and does not examine other questions related to them, such as undertaking to avoid the opening of secondary proceedings as established in Article 36 of the EIR, since this would require a separate study and thus would fall out of the scope of the chosen methodology of this article. The article consists of four parts: first, it deals with requirements for the coordinated approach towards debtors' insolvency problems; second, it analyses the process of opening secondary insolvency proceedings; third, it assesses some specific problems related to cooperation between main and secondary insolvency proceedings (exercise of creditors' rights and treatment of the debtor's assets); and, fourth, it deals with the problems related to the treatment of the debtor's assets.

1. A coordinated approach to the debtor's insolvency problems

The system of cross-border insolvency in the EU is based on the premise of effective main insolvency proceedings. The idea of one set of international insolvency proceedings of the debtor would correspond to the needs of the functioning of the domestic market and allow the defragmentation of insolvency proceedings to be avoided. However, the EIR also allows opening secondary insolvency proceedings in the member state of the establishment of the debtor. Thus, the EU insolvency regime "combines a universalist starting point with important territorial carve-outs and a possibility of opening secondary territorial proceedings" (Franken, 2014). Namely, the coordination of parallel main and secondary insolvency proceedings in different members states requires the search for the effective tools of coordination of different insolvency proceedings. However, the word "cooperation" is mentioned only four times in the EIR (Recital 3, 12, 20, 21), and the definition of this concept in cross-border insolvency proceedings remains unclear (Santen, 2015).

The first question related to coordination is the legal and economic needs of opening secondary insolvency proceedings. Recital 23 of the EIR establishes that the regulation permits the opening of secondary insolvency proceedings to *protect the diversity of interests*. The myriad of interests which can be protected by opening secondary insolvency proceedings is also reflected in Recital 40 of the EIR, pursuant to which secondary insolvency proceedings can serve different purposes, besides the protection of local interests. Thus, secondary insolvency proceedings relate not only to the protection of the local creditors of the member state in which they should be opened, but also other interests which are not specified in the EIR. The regulation does not specify which interests of the local creditors may be protected. This protection may be coupled with the need to ensure legal certainty and lawful expectations, which the local creditors are provided by the national law of the member state of establishment. The CJEU also rightly noted that the interests of the local creditors are "<…> the legitimate expectation of a creditor to be able to request the enforcement of a right in rem in respect of the assets of a debtor who is part of the establishment concerned, or to be granted other preferential rights, in accordance with the rules applicable in the Member State where that establishment is situated, since those rules were foreseeable for the creditor when the business relationship was established with the debtor" (*Burgo Group SpA v. Illochroma SA and Jérôme Theetten*, 2014, para. 37).

Protection of these creditors' interests aims to provide the necessary protection of specific rights which the creditors enjoy under the national law of the member state in which secondary insolvency proceedings should be opened and which would not be provided by the law of the member state in which main insolvency proceedings are opened. The interests of creditors in secondary insolvency proceedings relate to protection of the rights *in rem* to the assets which are located in the member state of establishment. This means that the insolvency law of such a member state is applicable to the debtor's assets located in this member state, and local creditors may maintain

all their rights and satisfy their claims. These creditors' interests in the proper exercise of the rights *in rem* are also reflected in the rules of the applicable law in cross-border cases, which establish the exception to the general rule of *lex concursus* since the opening of main insolvency proceedings shall not affect the exercise of rights *in rem* under *lex causae* (Article 8(1) of the EIR).

The CJEU also emphasized the protection of the preferential rights of the creditors. This is another reason for opening secondary insolvency proceedings, since the creditors which enjoy preferential treatment under the national law of the member state of establishment may lose their preferential rights under the law of the main insolvency proceedings. This preferential treatment is first important for the ranking of the creditors' claims and the order of their satisfaction. For instance, the creditor may enjoy preferential treatment by the law of the member state in which secondary insolvency proceedings should be opened and the claim would be satisfied in the first group of the creditors' ranking, but the law of the member state of the main insolvency proceedings may not recognize such creditors as preferential. In such a case, preferential creditors would seek the opening of secondary insolvency proceedings and satisfaction of the claims in the member state of establishment.

Furthermore, besides the protection of local creditors, secondary insolvency proceedings may serve other purposes. Some of the main justifications for opening secondary insolvency proceedings may be economic reasons, such as the need for the effective realization of the debtor's assets through administration. Though the EIR does not harmonize the material aspects of insolvency law, such as how the assets of the debtor should be treated, the treatment of the assets of the debtor is fundamental to effective insolvency proceedings. One the one hand, the EIR envisages the right to avoid the opening of secondary insolvency proceedings by giving the right to insolvency practitioners to provide a unilateral undertaking. According to Article 36(1) of the EIR, in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the member state in which secondary insolvency proceedings could be opened, such that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that member state. On the other hand, the opening of secondary insolvency proceedings also serves towards the effective protection of the assets of the debtor, especially considering the applicable national law and the nature of the assets.

Another question which arises when analysing the need for coordinated solutions to the debtor's insolvency problems is: Which national insolvency proceedings of the member states may fall under the scope of them? It is established that only the national insolvency proceedings which are listed in Annex A of the EIR fall under the scope of the EIR (Article 1(1) of the EIR). In contrast to the previous EU insolvency regulation, the EIR establishes that secondary proceedings can be any national insolvency proceeding; they are not limited to winding-up proceedings. This is a significant change regarding not only the goals of secondary insolvency proceedings, but also has implications on the domestic market, contributes to the rescue of business approach, and increases the chances of successful restructuring proceedings of viable businesses across the EU.

The problems of defragmentation of various types of main and secondary insolvency proceedings of the same debtor were analysed by the CJEU in the *Bank Handlowy* (2012) case, which revealed the shortcomings of the previous EU insolvency regulation proceedings and lack of coordinated solutions to the debtor's insolvency problems. The main question in this case was whether the opening of restructuring insolvency proceedings (*sauvegarde* proceedings in France, which aim to rescue a company) restricts the opening of liquidation (bankruptcy) proceedings of the establishment or of that company in another member state. In this case, the French court opened *sauvegarde* proceedings against the debtor on 1 October 2008. On 20 July 2009, the French court approved a rescue plan for the same debtor, under which debts would be paid off in instalments spread over 10 years and prohibiting the transfer of the undertaking situated in Poland and of certain defined assets belonging to the debtor. After opening insolvency proceedings in France, the Bank Handlowy (a creditor of the debtor) requested the court in Poland to open secondary insolvency proceedings against the debtor. The debtor contested that the opening of secondary proceedings in Poland should be dismissed, since such proceedings were contrary to the objectives and nature of the *sauvegarde* proceedings.

In this case, the CJEU found that "<…> the court having jurisdiction to open secondary proceedings, should consider the objectives of the main proceedings and to take account of the scheme of the Regulation, which, <…> aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings" (*Bank Handlowy*, 2012, para. 62). It also established that "it is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation" (*Bank Handlowy*, 2012, para. 63). Thus, the CJEU relied heavily on the principle of cooperation between the courts dealing with the insolvency problems of the same debtor and did not in principle oppose the opening of secondary insolvency proceedings (liquidation proceedings), though the main insolvency proceedings aimed towards the opposite goals (restructuring proceedings).

The *Bank Handlowy* case reveals the problems of different approaches to insolvency problems and the effectiveness of these proceedings, which, to some extent, are addressed in the EIR. In a case such as *Bank Handlowy*, when the main insolvency proceedings are restructuring and the courts in the member state of establishment opens liquidation proceedings, this creates vivid divergences and a lack of coordinated solutions to the insolvency problems of the debtor. Particularly problematic in such cases is the proper implementation of a restructuring plan (a rescue plan) when it involves the realisation of the assets of the establishment and (or) changes in the business activities of the establishment. Such situations could significantly undermine the effectiveness of restructuring proceedings and should be avoided. However, in the absence of legal tools to deal with such situations under the previous version of the EIR, the CJEU emphasized the importance of sincere cooperation between the courts of the member states, which shall be based on the implementation of the insolvency regulation and sincere cooperation. The EIR indeed addresses some of the issues which were raised in the *Bank Handlowy* case. Since the EIR no longer couples secondary insolvency proceedings with winding-up, this means that main and secondary insolvency proceedings can in essence have the same character. This is particularly important in rescue (restructuring) proceedings aiming primarily to rescue viable business. Thus, part of the problem raised in the *Bank Handlowy* case has been partly solved in the EIR.

Furthermore, it may happen that the insolvency proceedings start at liquidation proceedings, but during the course of the proceedings, the assets appear, additional financing is provided, and other measures are taken to restore the viability of the debtor. There can also be the opposite situation when, during restructuring proceedings, the debtor becomes even more indebted (illiquid) and the rescue plan fails. In such cases, insolvency law should provide effective mechanisms to convert insolvency proceedings into other types of insolvency proceedings to ensure protection of the interests of the company, creditors and other interested parties.[3] The need for effective tools for conversion of insolvency proceedings is also recognized in the international insolvency standards (UNCITRAL, 2005). Flexible conversion of insolvency proceedings is also needed in cross-border cases when, for instance, the debtor restores viability in the member state in which the main insolvency proceedings are opened, and the liquidation proceedings are opened as secondary insolvency proceedings. In such cases, restored viability of the debtor in the state in which the main insolvency proceedings are opened may be hampered by liquidation proceedings. Thus, a flexible approach towards the conversion of insolvency proceedings in cross-border matters is relevant. The need for effective tools to address insolvency problems is also reflected in the possibility of the conversion of secondary insolvency proceedings into national insolvency proceedings which are different than the original.

The EIR proposes solutions to the conversion problem. Article 51(1) of the EIR establishes that, at the request of the insolvency practitioner in the main insolvency proceedings, the court of the member state in which secondary insolvency proceedings have been opened may order the conversion of the secondary insolvency proceedings into another type of insolvency proceedings listed in Annex A, provided that the conditions for opening that type of proceeding under national law are fulfilled, that that type of proceeding is the most appropriate as regards the interests of the local creditors, and that it maintains coherence between the main and secondary insolvency proceedings. Article 51(2) of the EIR establishes that when considering the request referred to in paragraph 1, the court may seek information from the insolvency practitioners involved in both proceedings.

[3] For instance, Article 81 of the Republic of Lithuania Law on Insolvency of Legal Persons allows termination of liquidation proceedings if the restructuring plan is confirmed, and the restructuring case is commenced.

The rationale of the rule laid down in Article 51(1) of the EIR is that when, for instance, liquidation proceedings are opened as secondary insolvency proceedings, they can be converted into rescue (restructuring) proceedings. There are cumulative conditions for such a conversion: i) the type of such proceedings should be listed in Annex A of the EIR; ii) the conditions for opening that type of proceedings under national law are fulfilled; and iii) that type of proceeding is the most appropriate as regards the interests of the local creditors and coherence between the main and secondary insolvency proceedings is maintained. The possibility to convert secondary insolvency proceedings is relevant and addresses the need for a flexible approach to deal with solvency problems in cross-border cases. However, such a conversion should not be automatic, and requires the coordination of main and secondary insolvency proceedings, which also requires cooperation between the courts and insolvency practitioners in both proceedings.

2. The procedure of opening secondary insolvency proceedings

Opening insolvency proceedings is a complex question which requires not only legal, but also economic analysis of the debtor and the assessment of which type of insolvency proceedings (liquidation or restructuring) would be the most suitable in each situation. Opening secondary insolvency proceedings shall be effective, meaning that the decision to open them should be prompt, considering the different interests of the relevant interested persons.

The first question related to the opening of secondary insolvency proceedings is the right to request opening them and how it should be exercised. The persons having the right to request the opening of main insolvency proceedings are established only in the national law (the EIR does not regulate this question). However, the right to request the opening of secondary insolvency proceedings is regulated primarily by EU law. The persons empowered to request the opening of secondary insolvency proceedings are listed in Article 37(1) of the EIR, according to which, the opening of secondary insolvency proceedings may be requested by: (a) the insolvency practitioner in the main insolvency proceedings; or (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested. This provision reveals that *locus standi* to request opening secondary insolvency proceedings is established by EU law (insolvency practitioner in the main insolvency proceedings) and the national law of the member state in which the secondary insolvency proceedings are sought to be opened (other persons). The question arises as to who should have *locus standi* to request the opening of secondary insolvency proceedings, since Article 37(1) of the EIR does not establish an exhaustive list of such persons.

The question of *locus standi* to request opening secondary insolvency proceedings was addressed by the CJEU in the *Burgo Group SpA* case. The court confirmed that the person who is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the member state within the territory of which the opening of such proceedings is sought. However, since the national law should ensure effective application of EU insolvency law, the court emphasized that *locus standi* to request the opening of secondary proceedings cannot be restricted to creditors who have their domicile or registered office within the member state in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment (*Burgo Group SpA v. Illochroma SA and Jérôme Theetten*, 2014, para. 51). Therefore, the national law regulating insolvency proceedings should not bar other interested persons from opening secondary insolvency proceedings. The broad scope of Article 37(1)(b) of the EIR suggests that not only creditors, but also other interested third parties, such as directors, shareholders of the company and other parties, may have the right to request the opening of secondary insolvency proceedings. This rationale is supported since, particularly in rescue (restructuring) proceedings, the directors and shareholders of the company may have significant incentives for opening secondary insolvency proceedings. Thus, the national laws on insolvency proceedings should not limit the right to request the opening of insolvency proceedings only to the creditors.

Another question related to opening of secondary insolvency proceedings is: Under which conditions should they be opened? Generally, opening insolvency proceedings requires a demonstration that the debtor is insolvent (or is encountering insolvency problems in case of imminent insolvency), but this is different when considering the opening of main insolvency proceedings. Pursuant to Article 34 of the EIR, debtors' insolvency shall not be re-

examined in the Member State in which secondary insolvency proceedings may be opened. This rule codifies the previous case law of the CJEU, in which it was stated that the examination of the debtor's insolvency by the court having jurisdiction to open main proceedings is binding on any other courts before which an application to open secondary proceedings is submitted (*Bank Handlowy*, 2012, paras. 70, 74). This is an important procedural aspect of opening secondary insolvency proceedings since it does not require the establishment of the insolvency of the debtor because the debtor was already found insolvent in the member state where main insolvency proceedings were commenced.

The ground for opening secondary insolvency proceedings is establishment (Article 3(2) of the EIR), which is the economic and legal opposition of the centre of main interests, which in itself is the ground for opening main insolvency proceedings (Article 3(1) of the EIR). Pursuant to Article 2(1) of the EIR, 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. The notion of establishment and the requirements for establishment are well defined in the case law of the CJEU (*Interedil*, 2011) and national case law (*Olympic Airlines SA*, 2015; Court of Appeal of Lithuania, 2021).

However, the question arises as to when the existence of establishment should be established. It may happen that after submission of a claim for opening secondary insolvency proceedings the establishment may be transferred to another member state, or may lose the necessary elements of being an establishment. Following the rationale of the *Staubitz* case, in which the CJEU found that the move of the debtor's centre of main interests after the lodgement of the request to open insolvency proceedings does not negate jurisdiction to open those proceedings (*Staubitz*, 2006, para. 29), one may argue that the later movement of establishment (loss of the elements of establishment) may not be relevant since the relevant date in such a case is the date of the filing for secondary insolvency proceedings.

To sum up, the opening of secondary insolvency proceedings may contribute to the effectiveness of insolvency proceedings since they may be not only liquidation, but also restructuring proceedings. The opening of secondary insolvency proceedings may also allow for the protection of the economic and legal interests of the local creditors, but may also contribute to the effective realization of the debtor's assets. This also means that the persons who have the right to apply for opening of secondary insolvency proceedings should not be limited to the insolvency administrator in the main insolvency proceedings and the local creditors, but should also include other persons who may have interests in such proceedings.

3. Coordination as the main element for effective insolvency proceedings

Coordination between main and secondary insolvency proceedings is achieved by cooperation between courts and insolvency practitioners in both proceedings. Article 41(1) of the EIR establishes the general duty of cooperation of insolvency practitioners in cross-border insolvency cases. It states that the insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent that such cooperation is not incompatible with the rules applicable to the respective proceedings. The wording of this provision ("shall cooperate") indicates that insolvency practitioners have a duty to cooperate which may be limited to the national regulation of insolvency proceedings. Thus, this duty requires maximum cooperation between insolvency practitioners.

Article 41(2) of the EIR provides more specific duties of cooperation between insolvency practitioners. First, insolvency practitioners shall as soon as possible communicate to each other any relevant insolvency of the proceedings (Article 41(2)(a) of the EIR). Second, insolvency practitioners shall consider the possibility of restructuring of the debtor and in case of such possibility, elaborate and implement a restructuring plan (Article 41(2)(b) of the EIR). Third, insolvency practitioners shall coordinate the administration of the realisation or use of the debtor's assets and affairs (Article 41(2)(c) of the EIR). The nature of these duties indicates that they have a continuous character and shall be exercised throughout the insolvency proceedings. Particularly important duties of cooperation which relate to the effectiveness of cross-border insolvency proceedings include analysis of the possibility of restructuring of the debtor, which allows a viable company to be rescued, and coordination of the realization of the debtor's assets.

The EIR also requires the courts hearing insolvency proceedings of the same debtor to cooperate. Article 42(1) of the EIR establishes the general duty of cooperation of courts in such cases. Similarly to the duty of cooperation of insolvency practitioners, this article also employs the imperative wording for cooperation ("shall cooperate"), and can also be limited only by national law. The duty of cooperation between courts has already been recognized in EU private international law and derives from primary EU law, namely Article 81 of the Treaty on the Functioning of the European Union. The rationale behind this rule is that the court which opened insolvency proceedings or before which the request to open insolvency proceedings is pending should cooperate with the courts from other member states which are in such a situation. Interestingly, in contrast to Article 41(1) of the EIR, Article 42(1) of the EIR establishes the purpose of such cooperation: facilitation of the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor. However, the key word of this provision (cooperation) remains undefined. On the one hand, national courts always work as independent decision-making bodies; on the other, the EIR requires the courts to cooperate when making decisions in insolvency proceedings on the same debtor. Considering the importance of the independence of the courts, it seems that courts should not coordinate decisions. Instead, this requirement means that courts shall exchange information which may be relevant for other courts when making certain decisions.

The requirement to ensure efficient and effective cross-border insolvency proceedings is a clear indication that the national courts should cooperate in such cases and such cooperation aims to increase the overall efficiency of these proceedings. Some guidance as to how cooperation should take place was provided by the advocate general in the *Bank Handlowy* case, Kokkot, who noted that "<…> whether secondary proceedings are opened at all continues to be a matter for the decision of the court having jurisdiction. In making that decision too, it must take account of the objectives of the Regulation and the effects of the main proceedings, in particular whether the creditors who were involved in the main proceedings and who consented to a rescue plan would be able to evade their obligations under that plan by instituting secondary proceedings" (Opinion of Advocate General Kokkot, 2012, para. 68).

The answer to the question of the ways in which the courts should communicate is established in Article 42(3) of the EIR, which provides a non-exhaustive list of the possible ways of cooperation between the courts. Such ways could be: (a) coordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) coordination of the conduct of hearings; and (e) coordination in the approval of protocols, where necessary. These examples of courts' cooperation indicate that the courts should coordinate resolution of one of the main actions in insolvency proceedings, such as the appointment of the insolvency practitioner and realization of the debtor's assets. All these actions may contribute to the search for the best solutions to tackle a debtor's insolvency problems.

Another novelty regarding the duty of cooperation in cross-border insolvency proceedings is the regulation of "protocols". Pursuant to Recital 49 of the EIR, such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions. Nevertheless, the legal nature of such agreements and protocols, the order of their conclusion and the consequences of not following them has already raised serious scepticism (CERIL Report, 2018). Though the courts have a duty to cooperate, it is doubtful that such agreements and protocols have a legal binding power or that sanctions may be applied for their violation. This is because, first, the EIR establishes that such cooperation may be carried out without the conclusion of agreements and conclusions. Second, such documents may reflect a common approach between the relevant stakeholders and may serve as a more concrete guidance as to how insolvency proceedings should be carried out, but it is unclear what actions can be taken if the courts fail to cooperate as established in the EIR. Should interested parties demand the courts to cooperate in insolvency proceedings? How should the independence of the court be guaranteed?

Since of one of the aims of secondary insolvency proceedings is the protection of the interests of local creditors, opening these proceedings provides the right to the local creditors to lodge their claims and participate in the insolvency proceedings. This issue is also addressed in the EIR. Lodgement of creditors' claims in secondary insolvency proceedings is regulated in Article 45 of the EIR, which, to some extent, amended Article 32 of the previous EIR. Pursuant to Article 45 (1) of the EIR, any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings. This article establishes the general right of the creditors in main and secondary insolvency proceedings to lodge claims in secondary insolvency proceedings. Article 45(2) of the EIR deals with the right of insolvency practitioners to lodge creditors' claims. The insolvency practitioners in the main and any secondary insolvency proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served by doing so, subject to the right of creditors to oppose such lodgement or to withdraw the lodgement of their claims where the law applicable so provides. Article 45(3) of the EIR provides the right to insolvency practitioners to participate in insolvency proceedings as a creditor, in particular to attend creditors' meetings.

The problems of submission of creditors' claims in secondary insolvency proceedings and the applicable law were analysed in the recent *Alpine BAU* (2021) case. In this case, the court in Austria opened the main insolvency proceedings of Alpine BAU and appointed NK as a liquidator in 2013. In the same year, the court in Slovenia opened the secondary insolvency proceedings of Alpine BAU and, in their notice, noted that the submission of creditors' claims to the court was limited. On 30 January 2018, NK applied to the court in Slovenia to lodge claims from the main proceedings in the secondary insolvency proceedings. The court rejected that lodging of claims as being out of time pursuant to the national law.

The main question in the *Alpine BAU* case was around when the lodging of claims in secondary insolvency proceedings – which were already submitted in the main insolvency proceedings by the liquidator in the secondary insolvency proceedings – is subject to the provisions relating to the time limits for lodging claims and to the consequences of lodging claims out of time, established by the law of the member state of the opening of the secondary proceedings. Thus, the problem arose as to which law should be applicable to deal with the procedural questions of lodgement of the creditors' claims submitted in secondary insolvency proceedings when they are already submitted in the main insolvency proceedings.

The previous EU insolvency regulation did not establish time limits governing the lodging of claims in insolvency proceedings or the consequences of any lodging of such claims out of time. Article 55(6) of the EIR establishes that claims shall be lodged within the period stipulated by the law of the State on the opening of proceedings. In the case of a foreign creditor, that period shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State on the opening of proceedings. However, said provision is intended to apply to the claims lodged by foreign creditors, not insolvency practitioners.

The CJEU found that the consequences of a failure to respect the law of the member state on the opening of proceedings concerning the lodging of claims and, in particular, the time limits laid down in that regard must also be assessed on the basis of that law (*Alpine Bau*, 2021, para. 31). Though the answers to this part of the question are based on the principle of *lex concursus*, the Court also had to address the more complex questions raised by the insolvency practitioners in this case, namely: Should the insolvency practitioner in the main proceedings enjoy a special right to lodge, in the secondary insolvency proceedings, claims already lodged in the main proceedings for which they were appointed, without being subject to the time limits prescribed by the law of the member state in which the secondary proceedings were opened? The insolvency practitioner argued that such special treatment should be provided since the insolvency practitioner first has to await the verification and admission of claims in the main insolvency proceedings before lodging them in secondary proceedings.

The CJEU found that the time limits for the lodging of claims laid down by the law of the member state on the opening of the secondary proceedings in which they lodge the claims already lodged in the main proceedings for which they have been appointed cannot be ignored (*Alpine Bau*, 2021, para. 37). The findings of the CJEU were based on the principle of equal treatment (*pari passu*) of creditors and the role of insolvency administrator. First, the Court affirmed the importance of the principle of equal treatment of creditors in EU insolvency law (*Alpine*

Bau, 2021, para. 38). It established that if, in contrast to the creditors, an insolvency practitioner acting in the name and on behalf of the creditors disregarded the law of the member state of the opening of proceedings governing the time limits for the lodging of those claims, the creditors would be placed at a disadvantage compared with those whose claims were lodged by the liquidator in other related proceedings (*Alpine Bau*, 2021, para. 39). It also found that, in such a case, the creditors "<…> would benefit from a total absence of limitation period and would avoid any consequence of lodging claims out of time, it would result in unequal treatment which could lead to an unjustified infringement of the rights of a category of creditors" (*Alpine Bau*, 2021, para. 40). Furthermore, the CJEU did not accept the argument that the insolvency practitioner in the main insolvency proceedings should enjoy a more favourable legal status in the secondary insolvency proceedings, and that the court which opened main insolvency proceedings should verify and admit the claims. The fact that the liquidator in the main proceedings verified the claims in the light of the law applicable to the main proceedings is not *a priori* relevant for the verification of the same claims lodged in the secondary proceedings (*Alpine Bau*, 2021, para. 41). Therefore, the CJEU in *Alpine BAU* affirmed the importance of cooperation in cross-border insolvency cases and how the proper exercise of this principle contributes to the effective exercise of the creditors' rights.

4. The need for effective of treatment of the debtor's assets

One of the aspects of the coordination of main and secondary insolvency proceedings is related to effective administration and realisation of the debtor's assets. Since insolvency proceedings deal with administration and the realisation of the debtor's assets, it is important to ensure that the maximum value of the debtor's assets is attained.

Since main and secondary insolvency proceedings can take place simultaneously, the question arises as to how the treatment of assets should be coordinated to achieve the most efficient treatment of them. Opening secondary insolvency proceedings triggers certain legal effects regarding the treatment of debtor's assets and applicable law (Article 35 of the EIR, Article 7 of the EIR). Pursuant to Article 20(1) of the EIR, the regulation isolates the assets which fall under the scope of secondary insolvency proceedings from the legal effect of the main proceedings (Bork, 2017, p. 223). Thus, the law of the main insolvency proceedings (*lex concursus*) is not applicable in secondary insolvency proceedings, and the treatment of the assets of the debtor located in that member state are regulated by the law of that member state. As was rightly pointed out in the Virgós & Schmit Report, "<…> once territorial proceedings have been opened, the direct powers of the liquidator in the main proceedings no longer apply to assets situated in the state of the opening of the territorial proceedings. The liquidator in the territorial proceedings has exclusive powers over those assets" (Virgós & Schmit, 1996, para. 163). Though the insolvency practitioner in main insolvency proceedings does not enjoy exclusive power over the treatment of assets in the member state in which secondary insolvency proceedings are opened, this still requires proper cooperation between insolvency practitioners appointed in both proceedings (Article 41 of the EIR).

Recital 23 of the EIR establishes that the effects of secondary insolvency proceedings are limited to the assets located in that member state. The same rule is reiterated in Article 2(2) and Article 34 of the EIR. This rule of effects of secondary insolvency proceedings is well recognized in cross-border insolvency law. For instance, the restriction of the effects of secondary insolvency proceedings only to assets of the state in which these proceedings are opened is also recognized in Article 28 of the UNCITRAL Model Law on Cross-Border Insolvency (1997).

Nevertheless, the EIR establishes a few peculiarities to this rule. First, upon request from the insolvency practitioner in the main insolvency proceedings, the court which opened the secondary insolvency proceedings shall stay the process of realisation of assets in whole or in part. In addition, the court of secondary insolvency proceedings may require the insolvency practitioner to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a stay of the process of realisation of assets may be ordered for up to 3 months, and may be continued or renewed for similar periods (Article 46(1) of the EIR). Thus, the temporal stay of realisation of the debtor's assets located in the territory of the member state in which secondary insolvency proceedings are opened may be applied. Second, in case secondary proceedings involve liquidation, the insolvency practitioner shall immediately transfer any assets remaining to the insolvency practitioner in the main insolvency proceedings (Article 49 of the EIR). This rule means that in case all local creditors' claims are satisfied, the debtor's assets should be used in main insolvency

proceedings to satisfy the claims of other creditors, and the insolvency practitioner does not have the right to use the remaining assets for other purposes, such as to give them to the shareholders of the company. The exercise of this duty also requires effective cooperation between the insolvency practitioners and both insolvency proceedings.

Another problematic question exists regarding the treatment of assets and the allocation of international jurisdiction between the court hearing main and secondary insolvency proceedings when the actions to determine the legal status and (or) ownership of the assets are submitted to the courts in different member states. In the *Nortel Networks SA* (2015) case, an action seeking a declaration that specified assets fall within secondary insolvency proceedings was submitted. The question arose as to whether such an action is a related action, and whether it falls under the jurisdiction of the court of the member state in which secondary insolvency proceedings have been opened.

First, the CJEU found that the courts of the member state in which the secondary insolvency proceedings were opened also have the right to hear actions related to insolvency proceedings. Considering the peculiarities of secondary insolvency proceedings, the court found that the courts of the member state within the territory of which secondary insolvency proceedings have been opened enjoy the jurisdiction to hear related actions *in so far as those actions relate to the debtor's assets that are situated within the territory of that State* (*Nortel Networks SA*, 2015, paras. 32–33). Thus, the court confirmed the territorial limits of the secondary insolvency proceedings over the assets.

Second, the Court supported the view that such an action to determine whether the specific assets fall within the scope of secondary insolvency proceedings relates to protection of the interests which are protected in secondary insolvency proceedings (*Nortel Networks SA*, 2015, paras. 32–37). Therefore, the CJEU found that "<…> the courts of the member state in which secondary insolvency proceedings have been opened have jurisdiction to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings" (*Nortel Networks SA*, 2015, para. 38).

Third, the question of exclusive or concurrent jurisdiction to hear such an action should have been answered. On the one hand, the court of the member state in which the main insolvency proceedings have been opened has jurisdiction to hear all claims (related actions) related to the treatment of the assets of the debtor. On the other, this is also logically the case for the courts of the member state in which secondary insolvency proceedings have been opened since they directly deal with the questions which relate to the assets in the territory of that member state. The CJEU found that the courts which opened main and secondary insolvency proceedings share jurisdiction to determine the assets of the debtor by stating that "<…> the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction, **concurrently** with the courts of the Member State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings" (*Nortel Networks SA*, 2015, para. 46, emphasis added).

Thus, the rationale of the Court is that such related action can be submitted to the courts of the member state in which the main insolvency proceedings have been opened or the court of the member state in which secondary insolvency proceedings have been opened. Such a conclusion leads to further procedural ambiguities and problems of coordination. Though the CJEU was right to conclude that, as in the *Nortel Networks SA* case, courts of the member states in which main and secondary insolvency proceedings have been opened may have jurisdiction to hear such actions according to the goals of both proceedings, this triggers problems in determining how to deal with the hearing of the same claim before the courts of these member states and enforcement of judgments. This may happen, for instance, when the insolvency practitioners of both proceedings institute such hearings in different member states. Since the EIR lacks any rules on *lis pendens* of similar claims, such concurrent litigation may result in different judgments on the same subject matter and the problems of irreconcilability of judgments. Such a situation may jeopardize the effectiveness of cross-border insolvency proceedings.

The CJEU, though acknowledging these problems, failed to provide a more concrete solution to avoid concurrent litigation and instead opened the doors for procedural ineffectiveness and the defragmentation of disputes. One solution to such a problem could be the application of the *lis pendens* rule (first-in-time approach), which is firmly

established in EU private international law (Articles 29–34 of the Brussels lbis Regulation) and allows only the court first seized to rule on the action to avoid concurrent jurisdiction.

Conclusions

1. Coordination in opening main and secondary insolvency proceedings may contribute to the effective solution of a debtor's insolvency problems. The courts in both proceedings should cooperate and coordinate to decide what type of insolvency proceedings (liquidation or restructuring) should be commenced. The opening of secondary insolvency proceedings primarily serves to protect the interests of local creditors. However, when considering opening these proceedings, other economic arguments, such as administration and the nature of the debtor's assets, should be assessed. The EIR also allows secondary insolvency proceedings to be converted, considering the nature of main insolvency proceedings. In case of opening liquidation or restructuring insolvency proceedings in the main insolvency proceedings, secondary insolvency proceedings should serve the same goals as the main proceedings.
2. The broad scope of Article 37(1)(b) of the EIR suggests that not only creditors, but also other interested third parties, such as directors, shareholders of the company and other interested parties, may have the right to request the opening of secondary insolvency proceedings, and that national laws on insolvency proceedings should not limit the right to request the opening of insolvency proceedings only to creditors.
3. Though the EIR allows creditors to lodge claims in main and secondary insolvency proceedings, it may create problems regarding how creditors should exercise this right and what law is applicable to the procedural aspects of the claim. The rationale in the *Alpine BAU* case suggests that exercising the right to lodge a claim (Article 45(1) of the EIR) in secondary insolvency proceedings follows the procedural aspects and time limits for the lodgement of such claims as established under the national law of the member state in which secondary insolvency proceedings are opened.
4. Shortcomings in the lack of coordination regarding related actions concerning the treatment of the debtor's assets are also found in the case law of the CJEU. The solution proposed in the *Nortel Networks SA* case for the concurrent jurisdiction may lead to irreconcilability of judgments and a lack of legal certainty. The solution to this problem could be the application of the general *lis pendens* rule.

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