

# EU INSOLVENCY LAW : NEW RECAST REGULATION ON INSOLVENCY PROCEEDINGS

---

**Akšamović, Dubravka**

*Source / Izvornik:* **Procedural Aspects of EU Law, 2017, 69 - 94**

**Conference paper / Rad u zborniku**

*Publication status / Verzija rada:* **Published version / Objavljena verzija rada (izdavačev PDF)**

*Permanent link / Trajna poveznica:* <https://um.nsk.hr/um:nbn:hr:132:322729>

*Rights / Prava:* [Attribution-NonCommercial 4.0 International/Imenovanje-Nekomercijalno 4.0 međunarodna](#)

*Download date / Datum preuzimanja:* **2025-03-12**



**Repozitorij Pravnog  
fakulteta u Osijeku**

*Repository / Repozitorij:*

[Repository of Faculty of Law in Osijek](#)



**Dubravka Akšamović, PhD, Associate Professor**

Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Croatia  
Stjepana Radića 13, Osijek  
daksamov@pravos.hr

## **EU INSOLVENCY LAW- NEW RECAST REGULATION ON INSOLVENCY PROCEEDINGS**

### **ABSTRACT**

*Intensive process of Europeanization and the creation of internal market significantly changed European business landscape. More and more European companies are spreading their businesses across Europe what consequently raised considerable number of issues to address, such as, law applicable to corporate activities, creditor's rights, etc. The problem is particularly complex and complicated in case of companies' bankruptcy. In „massive“ bankruptcy cases with cross border elements, involving large number of creditors, companies assets in several member states, large number of employees etc., it is hard or impossible to coordinate all activities, to ensure equal treatment and equal rights to all creditors, prevent forum shopping or/and to trace, collect and sell debtor's assets.*

*Having in mind all that and the fact that conflicting Member States insolvency rules create uncertainty among investors, discourages cross-border investments and cause delay in restructuring, EU is taking steps in harmonizing insolvency law since early 1980's. However, the first EU Insolvency Regulation was not enacted until year 2002. The 2002 EU Insolvency Regulation sets forth a framework for cross border insolvency within the EU, especially providing rules for the international jurisdiction of a court in a Member State for opening of insolvency proceedings, the automatic recognition of these proceedings and the power of „liquidator“ in the other Member State, and important choice of law provisions. After 10 years of application of 2002 Insolvency Regulation, in year 2012, the EU Commission decided that it is time to modernize EU insolvency law. As a result it came out with the proposal of the Recast Insolvency Regulation. Recast Insolvency Regulation was finally adopted by the EU Parliament and Council in June 2015 but it will enter into force in year 2017.*

*The new Recast Insolvency Regulation does not adopt radically different approach compared to previous Regulation not it offers revolutionary different solutions. The fundamental premise that insolvency law is a matter for each EU member state has remained. However the Recast regulation strengthens and broadens the framework of recognition and co-operation which the 2002 Insolvency regulation set up over a decade ago. In that context, paper will address processes of harmonization of EU insolvency law. It will emphasize the most important aspects of EU insolvency regime. Special attention will be given to substantive and procedural issues as regulated in the Recast Insolvency Regulation.*

**Keywords:** Recast Insolvency Regulation, EU insolvency law

## 1. INTRODUCTION

On May 20th 2015 European Parliament and Council after lengthy and complex analysis of the strengths and weaknesses of European Insolvency law, adopted new Insolvency Regulation<sup>1</sup>. New Insolvency regulation will enter into force on June 26th 2017. Since that is the first comprehensive reform of EU insolvency law since the first EU Insolvency regulation entered into force in year 2002, it seems that it is an appropriate occasion to explore and reflect on achievements and weaknesses of EU insolvency law and to define the course or direction of “new” EU insolvency law.

The paper will generally focus on the legal measures and efforts undertaken on EU level to provide legal framework for dealing with cross-border bankruptcies. However, paper will also shortly reflect on international treaties and process of harmonization of insolvency law on international level particularly explaining reasons and importance of harmonization of cross border insolvency proceedings.

Furthermore, paper will provide a comprehensive overview of the rules adopted by new Recast Insolvency Regulation. Special attention will be given to the issues which are considered to be a cornerstone of reform such as (re)definition of COMI and to the other most important aspect of last EU insolvency reform.

## 2. GOALS, POLICY REASONS AND HARMONIZATION OF CROSS-BORDER INSOLVENCY PROCEEDINGS

With the development of international trade and economic integration, cross-border insolvency become increasingly important<sup>2</sup>. In present time it is quite often to have a situation where a company is registered in one country, managed from another country and having subsidiaries, employees and assets spread in several other countries.

When such company becomes insolvent, that affects a great variety of stakeholder's employees, shareholders, suppliers, customer's financial lenders, pensioners and tax man<sup>3</sup>.

---

<sup>1</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 [2015] OJ L 141/19 (Further in the text: Recast Insolvency Regulation)

<sup>2</sup> Mucciarelli, Federico, *Not Just Efficiency: Insolvency in the EU and Its Political Dimension*, European Business Law Organization Review, No. 14, 2013, p. 176.

<sup>3</sup> Hey, Jon, *Harmonising Insolvency Law- Nice but Not Necessary*, Global Capital, May 2015., available at: URL=<http://www.globalcapital.com/article/rmwjf2st641x/harmonising-insolvency-law-nice-but-not-necessary>, Accessed 3 February 2017.

It is possible that each country in which insolvent company has business premises or assets will have aspiration to conduct an insolvency proceedings. It may happen that under the national insolvency law, insolvency proceedings can be opened at the same time in several countries. It is also possible that a company will move assets or/and registered office from one jurisdiction to another because of more favourable insolvency regime. And finally, the problem can also arise in connection to creditor's rights, creditor's protection etc.

Therefore, in order to maximize and protect value of assets of insolvent company, prevent forum shopping, protect creditors from fraudulent insolvency practice, avoid simultaneous insolvency proceedings against same debtor in several states etc., number of states as well as leading international institutions begun to explore the possibility of harmonization of insolvency proceeding having cross-border dimension long time ago<sup>4</sup>. For example, already in 1933. Bankruptcy convention was applicable in five Scandinavian states<sup>5</sup>. But such and similar documents enacted worldwide and in Europe did not have significant local or international impact<sup>6</sup>.

The first international piece of legislation that had major influence on harmonization of cross-border insolvency proceeding on global level was the Model Law on Cross-Border Insolvency<sup>7</sup>. It was accepted by the United Nations Commission on International Trade Law (UNCITRAL) in Vienna on 30 May 1997. Number of countries around the world adopted legislation based on the Model Law<sup>8</sup> what led to soft harmonization of cross border insolvency proceedings worldwide.

---

<sup>4</sup> Burman, Harold, *Harmonization of International Bankruptcy Law: A United States Perspective*, Fordham Law Review, vol. 64, Issue 4, 1996, p. 2544; See more: Paulus, Christoph, *Global Insolvency Law and the Role of Multinational Institutions*, Brook.J.Int'lL, Vol. 32, No.3, 2007.

<sup>5</sup> *Ibid.*, p. 2544.

<sup>6</sup> First attempts to harmonize cross border insolvency rules we can trace back in 1889 when several Latin American states entered into the Treaty called Montevideo Treaty on Commercial International Law. This Treaty was updated in 1940's but was than ratified by Uruguay, Paraguay and Argentina. Another such document was Bustamante Code from 1928, based on the Havana Convention on Private International Law. See: Paulus, Christoph, *A Vision of the European Insolvency Law*, Norton Journal of Bankruptcy Law and Practice, Vol. 17, No. 5, 2008, p .608

<sup>7</sup> UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL, 1997.

<sup>a</sup>valiable at: URL= [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html).

<sup>8</sup> Legislation based on the Model Law has been adopted in 41 States in a total of 43 jurisdictions. Among those countries are also several European countries, Greece, Poland, Romania,UK, Slovenia, but also U.S., Australia, Canada and Japan.

Seemore: URL=[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html), Accessed 14 February 2017.

However, with no intention to minimize importance or significance of UNCITRAL Model Law on Cross-Border Insolvency, Model Law focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law. As stated in its preamble „it focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border insolvency cases, with a view to promoting the general objectives of insolvency law such as:

- (a) Cooperation between the courts and other competent authorities of the enacting State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvency proceedings that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment<sup>9</sup>.

Another piece of legislation that also had worldwide impact on insolvency proceedings with cross-border dimension originates from the EU. It is the Council Regulation on Insolvency Proceedings enacted in year 2000<sup>10</sup> (2002 Insolvency Regulations), only three years after UNCITRAL Model Law was enacted.

But, unlike the process of harmonization of insolvency law on global level, harmonization of cross border insolvency law within the European Union took place indifferent political context and with different political background and goals.

### 3. EU INSOLVENCY LAW HARMONIZATION: FROM INSOLVENCY CONVENTION TO THE RECAST INSOLVENCY REGULATION

Harmonization of insolvency law on EU level has a long history. The dream of a European-wide insolvency regime goes back to the 1960's<sup>11</sup> when European coun-

<sup>9</sup> UNCITRAL, Practical Guide on Cross-Border Insolvency Cooperation, United Nations, New York, 2010, p.12

<sup>10</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, pp. 1–18.

<sup>11</sup> Caneco, A., Joseph, *Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU*, 2016, Setton Hall University, Scholarship Paper 90, p. 5.

tries recognized the need and importance of harmonization of insolvency law for creation of the internal market<sup>12</sup>.

It was generally accepted that orderly and effective insolvency procedure plays a critical role in fostering growth and competitiveness of European economies. Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, different creditors may not be treated adequately, and level of domestic and foreign investments on internal market will decrease<sup>13</sup>. Also, it was obvious that disparities between national laws create obstacles to cross border activities within the European Union.

Nevertheless, a process of harmonization of EU insolvency law went slowly and not too smoothly. In 1970s and subsequently in 1980s European Communities Commission proposed a draft for an Insolvency Convention<sup>14</sup>. But the draft was rejected as irrational and too complex in certain areas. Finally, after the years of various negotiations, in November 1995. Convention on Insolvency Proceedings<sup>15</sup> was published. Although the Convention never came into force, because it was not ratified by all EU countries<sup>16</sup>, the Convention strongly influence future of EU insolvency law, notably the first 2002 EU Insolvency Regulation.

---

<sup>12</sup> Effective and efficient functioning of cross-border insolvency proceedings is recognized as an important factor for the smooth functioning of internal market.

<sup>13</sup> International Monetary Fund, *Orderly and Effective Insolvency Procedures*, Legal Department, 1999, pp 1-7.

<sup>14</sup> Draft Convention on bankruptcy, winding –up arrangements, composition and similar proceedings, Bulletin of the European Communities, Supplement 82, 1982 ( available at: URL= <http://aei.pitt.edu/5480/1/5480.pdf>),

See more: Rudbordeh, Amir, Adl, *An analysis and hypothesis on forum shopping in insolvency law: From the European Insolvency regulation to its Recast*, < [https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH,%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20\(EU\).pdf](https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH,%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20(EU).pdf) > p. 6.; Muir, Hunter, *The Draft Bankruptcy Convention of the EEC*, *International and Comparative Law Quarterly*, vol. 5, No. 2, 1976, pp. 310-328.

available: URL=[https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH,%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20\(EU\).pdf](https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH,%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20(EU).pdf). Accessed 11 February 2017.

<sup>15</sup> Text of the Convention is available at: URL= <http://aei.pitt.edu/2840/1/2840.pdf>, Accessed 3 February 2017; See also Report on the Convention on Insolvency Proceedings, EU The Council, 6500/96, 3.May1996, (so called: Virgos Report); (available at: URL=[http://globalinsolvency.com/sites/all/files/insolvency\\_report.pdf](http://globalinsolvency.com/sites/all/files/insolvency_report.pdf). Accessed 6 February 2017.)

<sup>16</sup> The text of the EU Convention on Insolvency Proceedings was open for a signature between 23 November 1995 and 23rd May 1995. By May 23rd 1996., 14 out of 15 Member States signed the Convention. Only UK due to political controversies didn't sign Convention

Most of the content of the Insolvency Convention was taken over in the text of the 2002 Insolvency Regulation<sup>17</sup>. So the question is, why something that was rejected just few years ago was accepted now? The answer lays in fact that Convention, as a legal instrument, in order to be applicable on national level had to be ratified by Member States. Contrary to that, regulation is a Community law instrument which is binding and directly applicable in all Member States<sup>18</sup>.

So, contrary to the Convention whose application was postponed until it is ratified by all Member States, 2002 Insolvency Regulation entered into force in all Member States on May 31st, 2002, with the exception of Denmark<sup>19</sup>.

2002 Insolvency Regulation had crucial impact on development of EU Insolvency Law in Europe. It sets forth a framework for cross border insolvency within EU, especially providing:

- 1/ rules for the international jurisdiction of a Court in a Member State for the opening of insolvency proceedings,
- 2/ the automatic recognition of these proceedings,
- 3/ the powers of liquidator in the other Member States, and
- 4/ important choice of law provisions<sup>20</sup>.

Concerning the scope of application, the 2002 Insolvency Regulation primarily aimed at regulating cross-border insolvency proceedings of “European” companies. However, it has broader territorial scope. It also applies on foreign (non EU) companies, notably the US corporations having registered office out of EU, if they operate in the EU and have the economic activities in the European Union.

2002 Insolvency Regulation was in force for more than a decade. It is generally regarded as a successful legal instrument for the recognition and for the coordination of cross-border insolvency proceedings in the EU<sup>21</sup>. But just as UNCITRAL Model Law on Cross- Border Insolvency, 2002 Insolvency Regulation was not enacted with intention to harmonize substantive insolvency law of EU Member

---

<sup>17</sup> Wessels, Bob, *EU Regulation on Insolvency Proceedings*, INSOL, 2006 p.6., Available at: URL=<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis,%20Bob%20Wessels.pdf>. Accessed 16 February 2017.

<sup>18</sup> *Ibid.*, p. 6

<sup>19</sup> *Ibid.*, p. 6

<sup>20</sup> *Ibid.*, p. 1.

<sup>21</sup> Report from the Commission On the Application of Council Regulation No 1346/2000 On Insolvency Proceedings, COM (2012) 743, 12 December 2012.

States. The fundamental premise, adopted by 2002 Insolvency Regulation was that the insolvency law is the matter for each Member State. As a result, 2000 Insolvency Regulation did not have significant effect on harmonization of national substantive laws in this field, what proved to be one of its major weaknesses<sup>22</sup>.

Also, the economic crisis which affected European countries in period between 2009 and 2011 and which has led to increase in number of failing businesses, indicated that current insolvency regulation on EU level may not be adequate instrument for dealing with increased number of insolvency proceedings in enlarged EU. According to the data published by the European Commission, in period between 2009- 2011, an average of 200 000 firms went bankrupt per year in EU. About one-quarter of these bankruptcies have a cross –border element. 1.7 million jobs are estimated to be lost due to insolvencies every day<sup>23</sup>.

Faced with this economic realities European Commission opened broader public consultation about possible reform of EU insolvency law. In time frame between 2011 and 2014 it presented a package of measures<sup>24</sup> to modernize insolvency rules<sup>25</sup>. Final outcome of all those efforts is the enactment of new insolvency regulation, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015, commonly referred as the Recast Insolvency Regulation.

As mentioned in the introduction, Recast Insolvency Regulation will enter into force in June 2017, two years after it was adopted by the European Parliament and the Council. It will replace former 2002 Insolvency Regulation.

The Commission has high expectations from this legislative reform. One of the objectives of Recast Insolvency Regulation is to shift the focus away from liquidation towards encouraging viable business to restructure at the early stage to prevent insolvency<sup>26</sup>.

---

<sup>22</sup> See more: Wessels, Bob, *Twenty Suggestions for a Makeover of the EU Insolvency Regulation*, International Caselaw Alert, No. 12, 2006, pp. 68-73

<sup>23</sup> Communication from the Commission to the European Parliament, the Council and The European Economic and Social Committee, A new approach to business failure and insolvency, COM ( 2012) 742 final, Strasbourg, 12 December 2012, p. 2.

<sup>24</sup> In 2011 the European Parliament published the Report with Recommendations to the Commission on the Insolvency Proceedings (A7-0355/2011). In 2012 Commission published Communication on a New Approach to Business Failure and insolvency ( COM(2012) 742 Final). In 2014 Commission published Recommendation on a New Approach to Business Failure and Insolvency ( COM 2014).

<sup>25</sup> See: European Commission, Press release, Insolvency: Commission recommends new approach to rescue businesses and give honest entrepreneurs a second chance, Brussels, 12 March 2014.

<sup>26</sup> Stones, Kathy, *What harmonisation provisions have the EU Commission recommended and what is their legal status?*, LexisNexis, 19 March 2014; Available at: URL=<http://blogs.lexisnexis.co.uk/randi/the-challenges-of-harmonising-insolvencies-and-restructurings/>). Accessed 15 February 2017.



Furthermore, it is also expected that the new Recast regulation will significantly improve efficiency and effectiveness of cross border insolvency proceedings and thus contribute to “*building solid foundations for boosting growth and jobs in Europe*”<sup>27</sup>.

As stated in European Commission press release, “*the modernized regulation will bring:*

- ***A broadened scope:*** *The rules will cover a broader range of commercial and personal insolvency proceedings, such as the so-called Spanish scheme of arrangement, the Italian reorganisation plan procedure and the Finnish consumer insolvency procedures. Overall, the reform will allow 19 new national insolvency procedures to benefit from the Regulation.*
- ***Legal certainty and safeguards against bankruptcy tourism:*** *If a debtor relocates shortly before filing for insolvency, the court will have to carefully look into all circumstances of the case to see that the relocation is genuine and not abusive.*
- ***Interconnected insolvency registers:*** *Businesses, creditors and investors will have easy access to any national insolvency register European e-Justice Portal*
- ***Increased chances to rescue companies:*** *The new rules avoid secondary proceedings in other Member States being opened, while at the same time guaranteeing the interests of local creditors. It will be easier to restructure companies in a cross-border context.*
- ***A framework for group insolvency proceedings:*** *With increased efficiency for insolvency proceedings concerning different members of a group of companies, there will be greater chances of rescuing the group as a whole*<sup>28</sup>.

#### 4. STRUCTURE AND THE MAIN FEATURES OF THE RECAST INSOLVENCY REGULATION

Recast Insolvency Regulation addresses different aspects of cross border insolvency proceedings<sup>29</sup> among which some of the most important are: criteria for opening

<sup>27</sup> European Commission, Press release, Justice Ministers agree on modern insolvency rules, Brussels, 4 December 2014., available at: URL=[http://europa.eu/rapid/press-release\\_IP-14-2322\\_hr.htm](http://europa.eu/rapid/press-release_IP-14-2322_hr.htm). Accessed 15 February 2017.

<sup>28</sup> *Ibid.*

<sup>29</sup> Regulation is organized in seven chapters as follows: Chapter I (1-18), General provisions, Chapter II, Recognition of Insolvency Proceedings (19- 33), Chapter III ( 34-52), Secondary Insolvency Proceedings, Chapter IV ( 53-55) Provisions of Information for Creditors and Lodgment of Their Claims,

of an insolvency proceedings, management of insolvency proceedings, creditor's rights, main and secondary insolvency proceedings, rules on recognition of insolvency proceedings, insolvency proceedings of a group of companies etc. Recast Insolvency Regulation brings number of improvements and clarifications of legal concepts previously insufficiently regulated by 2002 Insolvency Regulation. In many aspects, the reform simply codifies EU Courts case law with the aim of increasing legal certainty<sup>30</sup>. However it is important to emphasize that the Recast Insolvency Regulation doesn't attempt to harmonize insolvency rules of EU level. In the preamble of Recast Insolvency Regulation it is stated that "*as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union*"<sup>31</sup>.

In that sense, substantive insolvency rules of Member States still remain main source of law even in cross border insolvency proceedings. Recast Insolvency Regulation applies only to proceedings which fall within its scope as defined in the Recast Insolvency Regulation.

#### **4.1. Proceedings within the scope of the Recast Insolvency Regulation**

According to the wording of Article 1 of the Recast Insolvency Regulation it applies to all collective insolvency<sup>32</sup> proceedings which entail the partial or total divestiture of a debtor as well as to pre-insolvency, rescue or/ and to other similar reorganization proceedings where a debtor remains in possession.

Closer examination of above rule reveals three conditions that must be fulfilled in order to apply the Recast Insolvency Regulation:

a) Firstly, proceeding must be collective. That means that all creditors may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded<sup>33</sup>.

---

Chapter V (56-77), Insolvency Proceedings of Members of a Group of Companies, Chapter VI (78-83), Data Protection, Chapter VII (84-92), Transitional and Final Provisions.

<sup>30</sup> Mucciarelli, Federico, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or Re-statement of the Status Quo?* ECFR1, 2016, p.1. (available at: URL=https://ssrn.com/abstract=2650414 or URL=http://dx.doi.org/10.2139/ssrn.2650414. Accessed 17 January 2017)

<sup>31</sup> Recast Insolvency Regulation, *op. cit.* note 1, Preamble (22).

<sup>32</sup> Collective insolvency proceedings means proceedings which include all or a significant part of a debtor's creditors, provided that, in the later case, the proceedings do not affect the claims of creditors which are not involved in them. (Article 2. of the Recast Insolvency Regulation)

<sup>33</sup> Wessels, Bob, *op. cit.* note 17, p. 11

b) Secondly, proceedings can be opened only in connection to the debtor's insolvency and not on other grounds<sup>34</sup>. This doesn't mean that the debtor must be insolvent. Recast Insolvency Regulation may be applied in case when there is only likelihood of insolvency but only if the purpose of such pre-insolvency proceeding is to avoid the debtor's insolvency or the cessation of the debtor's business activities<sup>35</sup>. Therefore, insolvency, pre-insolvency and reorganization proceedings should fit within scope of Article 1 of the Recast Insolvency Regulation.

c) Thirdly, the proceeding should entail the appointment of insolvency practitioner<sup>36</sup> such as for example "liquidator" and must be subject to control or supervision by the court.

All three conditions must be fulfilled cumulatively.

Concerning the scope of application of the Recast Insolvency Regulation *ratione personae*, it applies both to corporates and individuals<sup>37</sup>. In practice this encompasses various corporate entities as well as individual entrepreneurs.

And finally, Recast Insolvency Regulation applies on all insolvency proceedings having impact on internal market and that is presumed to be when parties have their centre of main interest within a Member State of the EU. This means that the Recast Insolvency Regulation also applies to corporate entities whose place of incorporation is outside EU, but whose centre of main interests is within EU.

#### **4.2. Lex forum concurs or the law applicable to cross border insolvency proceedings: "COMI" solution**

The topic that has probably gained the greatest attention in connection to cross-border insolvency proceedings is related to law applicable to cross border insolvency proceedings<sup>38</sup>. When a company is doing business in several Member States and has business premises, assets and employees in every of several Member States

<sup>34</sup> *Ibid.*, p. 11

<sup>35</sup> Article 1 (1) par.2 of the Recast Insolvency Regulation, See also, Mucciarelli, F, *op.cit.* note 33, p. 10.

<sup>36</sup> Notion „insolvency practitioner“ cover wide range of persons differently defined in European jurisdictions. In order to be qualified as an „insolvency practitioner“ one must: person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs. The persons and bodies referred to in the first subparagraph.

<sup>37</sup> Article 3. of the Recast Insolvency Regulation.

<sup>38</sup> See: Latella, Dario, *The COMI Concept in the Revision of the European Insolvency Regulation*, ECFR, No. 4, 2014, pp. 1-16.

it may be difficult to determine or identify which court is competent to open insolvency proceeding.

Since this creates number of problems in practice in connection to rules on publicity, forum shopping, creditors' claims etc., the issue was already dealt in 2002 Insolvency Regulation. According to the 2002 Insolvency regulation, jurisdiction of the competent court in cross –border insolvency proceedings has been determined based on so called COMI or centre of the debtor's main interest.

Recast Insolvency Regulation follows the same approach.

According to the Article 3 of the Recast Insolvency Regulation, the courts of the Member State within the territory of which the centre of the debtor's main interest (COMI) is situated shall have jurisdiction to open (so called) “main insolvency proceeding”.

So in order to determine which court is competent for opening an insolvency proceedings one must first determine where the debtor's COMI or main centre of interest is.

Proper determination of COMI is extremely important. Under the principle of unity, generally adopted by EU insolvency law, it is not allowed to open or conduct multiple or parallel main proceedings over the same debtor. So when insolvency proceedings is once opened in one Member State, this proceeding will be considered the “main insolvency proceeding”, and no other main insolvency proceedings can be opened in other Member State.

Although determining COMI at first glance may seem simple, determining COMI in practice is not always an easy task. In many situations it may be unclear where the COMI is. For example, if company is incorporated in UK, company's management is located in Germany and business activity (business premises) is dominantly located in Croatia, we may not be certain in which country is the centre of the debtor's main interest (COMI). Also, it may be problematic to determine COMI in situation when company transfer corporate seat from one jurisdiction to another. So the question is, where is COMI now?

From above it is clear that defining COMI is more factual than legal issue. In each and every case it should be determined which among several place of debtor's business is “central” place of business.

Recast Insolvency Regulation provides general guidelines for determining COMI. Basic presumption is that COMI is “*in the place where debtor conducts the adminis-*

tration of its interests on a regular basis and which is ascertainable by third parties”<sup>39</sup>. The definition evidently gives primacy to the place from which debtor in reality manages its business over the place of incorporation. The idea is to look for the “brain” of the company, not for the “mussels”: the actual centre of management and supervision of the interest of the debtor (head office functions) which may not necessarily coincide with the location of the debtor’s principal place of business or operations<sup>40</sup>.

However, if debtor has several places of administration, so it is unclear which of several places is debtors main centre of interest, than for legal persons COMI is presumed to be in the place of the registered office, unless otherwise is proved<sup>41</sup>. For individuals, an independent business or professional activity, COMI is presumed to be in individual’s principal place of business, unless otherwise proved<sup>42</sup>.

In both mentioned cases, the presumption of COMI 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<sup>43</sup>. This rule has been introduced in EU insolvency law by the Recast Insolvency Regulation, and it is aimed at preventing abusive *forum shopping*.

EU rules of free movement allow individuals as well as to companies to move their central administration from one country to another. Companies in financial troubles or faced with the imminent probability of opening insolvency proceedings tend to move corporate seat to another more favourable jurisdictions in order to prevent opening insolvency proceedings or in order to have more “friendly” insolvency regime.

The above rule does not affect the companies’ right to transfer corporate seat (registered office). Any kind of such restriction would be contrary to the right on free movement. However, it is expected that introducing a minimum period of the location of the COMI will discourage abusive COMI relocation.

Recast Insolvency Regulation introduces another important rule concerning the COMI concept. According to the new rule it is a duty of the court seized with a

<sup>39</sup> Article 3 (1) of the Recast Insolvency Regulation.

<sup>40</sup> Garcimartin, Francisco, *The EU Insolvency Regulation: Rules on Jurisdiction*, Available at: URL=[http://www.ejtn.eu/PageFiles/6333/Rules\\_on\\_jurisdiction.pdf](http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf). Accessed 16 February 2017.

<sup>41</sup> Article 3 (1) par. 1. of the Recast Insolvency Regulation.

<sup>42</sup> Article 3 (1) par. 2. of the Recast Insolvency Regulation; See more: Wessels, Bob, *The Changing Landscape of Cross-border Insolvency Law in Europe*, *Juridica International*, Vol. 12, 2007, p.120; Mucciarelli, *op.cit.* note 32., pp. 15- 17.

<sup>43</sup> Article 3 (1) par. 2. and par. 3. of the Recast Insolvency Regulation

request for open insolvency proceeding to examine, *ex officio* and prior to opening insolvency proceeding, whether it has jurisdiction to open insolvency proceeding<sup>44</sup>. It is also in obligation to specify the grounds on which the jurisdiction is based, meaning to support the presumption that the COMI is within the territory of this particular Member State.

Such decision may be challenged by debtor or any creditor before a court on grounds of international jurisdiction<sup>45</sup>.

However, once when COMI is properly determined and when insolvency proceeding is opened in one country it is not possible to open another “main” insolvency proceeding over the same debtor in another country, nor can court of a certain Member State re-examine debtor’s insolvency when a main insolvency proceeding is opened in another Member State<sup>46</sup>. The Recast Insolvency Regulation is based upon the principle that only single “main insolvency proceedings” may be opened with regard to the same debtor<sup>47</sup>.

Notwithstanding to this general rule, it is however possible to open so called secondary or territorial proceeding. There is general consensus that secondary proceedings serve mainly two purposes: 1) they protect creditors, usually local creditors, from the main proceedings, and 2) at the same time they assist and support the operation of the main insolvency proceedings<sup>48</sup>.

### 4.3. Secondary insolvency proceedings versus main insolvency proceedings

Secondary proceeding is proceedings which can be opened in country in which debtor has an „establishment,“ within the territory of that particular State. This would for example be the case when debtor’s COMI is in Germany and its establishment is in Italy. In this case, despite the fact that debtor’s COMI is in Germany, according to the Recast Regulation it is possible to open so called secondary or territorial insolvency proceeding in country of establishment. In this case, country of establishment is in Italy, thus secondary proceedings can be opened in Italy.

The general rule is that, if such proceeding is opened, the effects of the secondary proceedings shall be restricted to the debtor’s assets in that territory.

---

<sup>44</sup> Article 4 (1) of the Recast Insolvency Regulation

<sup>45</sup> Article 5 (1) of the Recast Insolvency Regulation

<sup>46</sup> See: Mucciarelli, F., *op.cit.* note 32, p. 8

<sup>47</sup> Garcimartin, F., *op.cit.* note 40, p.8

<sup>48</sup> Wessels, B., *op.cit.* note 18, p. 13

Recast Insolvency Regulation distinguishes between two kinds of secondary proceedings: 1) independent territorial proceeding<sup>49</sup> and 2) secondary territorial proceeding.<sup>50</sup>

1) Independent territorial proceedings is independent of „the main proceeding“. It can be opened prior the main insolvency proceedings and if no main proceeding is opened.

It must be opened prior to opening of main insolvency proceeding where:

- a) Main insolvency proceeding cannot be opened because of the conditions laid down by the law of Member States or
- b) the opening of territorial insolvency proceeding is requested by a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of a Member State where the opening of territorial proceeding is requested, or
- c) A public authority under which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings<sup>51</sup>.

If, and when, main proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

2) Secondary territorial proceeding can be opened only after the main proceedings have been opened by the competent court<sup>52</sup>.

The opening of secondary proceedings may be requested by the insolvency practitioner in the main insolvency proceedings and 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<sup>53</sup>.

The law applicable to secondary insolvency proceedings shall be the law of the Member State within the territory of which the secondary insolvency proceedings are opened<sup>54</sup>.

---

<sup>49</sup> Article 3(2) of the Recast Insolvency Regulation

<sup>50</sup> Article 3(3) and (4) of the Recast Insolvency Regulation

<sup>51</sup> Article 4(4) of the Recast Insolvency Regulation

<sup>52</sup> Article 3(3) and article 34 of the the Recast Insolvency Regulation

<sup>53</sup> Article 37 (1)of the Recast Insolvency Regulation

<sup>54</sup> Article 35 of the Recast Insolvency Regulation

Before opening secondary insolvency proceeding, a court seized of a request to open secondary proceedings must immediately notify insolvency practitioner in the main proceeding that it has seized a request and must give an opportunity to the practitioner to be heard on the request.

Practitioner (liquidator) of the “main proceedings” are granted certain rights to prevent and avoid opening of secondary proceedings, because it is generally considered that opening of secondary proceedings can “*hamper the efficient administration of the debtor’s estate*”<sup>55</sup>.

So, in order to avoid the opening of secondary proceedings, the insolvency practitioner in the main insolvency proceeding may commit to undertaking, that when distributing assets in main proceedings, he will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceeding were opened in that Member State<sup>56</sup>.

If the insolvency practitioner does not comply with the obligations and requirements he or she shall be liable for damage to local creditors<sup>57</sup>.

#### **4.4. Creditor’s rights and obligations as regulated by the Recast Insolvency Regulation**

Although protection of creditors is just one among several insolvency proceedings objectives, protection of creditors is fairly important insolvency law issue. Problem of creditor’s rights and their equal treatment, as one of basic insolvency law principle,<sup>58</sup> arises particularly in connection to opening a secondary insolvency proceeding. Indeed, historically, the opening of secondary proceedings was often viewed as having a destabilizing effect on main proceedings or other rescue plans, at times hindering the administration of the main proceedings and leading to increased costs with unnecessary duplicative work across borders<sup>59</sup>.

Thus, question is, whether in such a case the interests of the creditors are secured in proper manner?

---

<sup>55</sup> Proposal for a Regulation of the European parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM/2012/0744 final, p.2.

<sup>56</sup> Article 36 and article 34 of the the Recast Insolvency Regulation

<sup>57</sup> Article 36 (10) of the Recast Insolvency Regulation

<sup>58</sup> Equal treatment of creditors with similar rights is one of the main principles of modern insolvency laws.

<sup>59</sup> Hastings, Paul, *The New EU Regulation on Insolvency Proceedings*, June 2015, available at: URL=<https://www.paulhastings.com/publications-items/details/?id=2011e669-2334-6428-811c-ff00004cbded>. Accessed: 12 February 2017.



The Recast Insolvency Regulation contains large number of norms which deal with the creditor's rights in connection to secondary proceedings. Nevertheless, it also regulates other issues of direct interest to creditors such as rules on publicity, lodgement of creditors' claims, implications of opening of the proceedings to *in rem* creditors, etc.

In following sections attention will be directed towards the most relevant issues relating to creditor's as regulated by the Recast Insolvency Regulation. A special focus will be on: 1/Creditors rights in connection to secondary territorial proceedings, 2/ Right *in rem* creditors, 3/Provisions of information's for creditors and lodgement of their claims.

### **1/ Creditors rights in connection to secondary territorial proceedings**

Right to request opening of insolvency proceedings falls in category of substantive issues regulated by the laws of Member States. When, debtor's COMI is defined and jurisdiction is determined, insolvency proceedings will continue according to the law of that particular Member State. For example, if debtor's COMI is in Italy, Italian law will be applicable law. In that sense, Recast Insolvency Regulation regularly does not decide on the issues such as who has *iusstandi in iudicio* for opening insolvency proceeding or do creditors have right to appoint insolvency practitioner, when and how distributions of assets will take place, etc. Those issues are resolved by Member State insolvency law.

However, Recast Insolvency Regulation makes an exception in connection to secondary territorial proceedings. Right to request opening of the secondary territorial proceedings is directly granted to creditors. According to the Article 3 (4) of the Recast Insolvency Regulation territorial secondary proceedings may only be opened when cumulatively two conditions are fulfilled: 1/ that secondary territorial proceedings is opened prior to the opening of main insolvency proceedings and 2 /that the opening of such proceedings is requested by a creditor whose claim arises from or in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested.

In that sense, it is important to emphasize that the secondary insolvency proceedings will not be opened *ex officio* or as a result of direct application of Member States Law.

Creditors of secondary proceedings are those who must take action in order to initiate opening of secondary territorial proceeding. The intention to this rule is to empower creditors to demand opening of the insolvency proceeding in country

of debtor's establishment because they expect that their chances to participate in distribution of debtors assets are much better within this proceedings, than within the main insolvency proceeding.

## 2/ Right in rem creditors

Recast Insolvency Regulation dedicates whole article to the "third parties' rights *in rem*. However, it fails to define what is a right *in rem* what may cause legal uncertainty in connection to defining *in rem* creditors and their rights. Typically right *in rem* includes, but is not limited to pledge or mortgage. Broader guidance in relation to what will constitute a right *in rem* is given in Virgos-Schmit Report<sup>60</sup>. From this report it appears that:

*"a) a right in rem is not to be given an unreasonably wide interpretation. It should not include, for instance, rights simply reinforced by a right to claim preferential payment;*

*(b) in particular, a right in rem may not only be established with respect to floating charge assets but also rights which are characterized under national law as rights in rem over intangible assets or over other rights; and*

*(c) a right in rem basically has two characteristics: its direct and immediate relationship with the asset to which it relates, which remains linked until the debt has been satisfied (without depending upon the asset belonging to a person's estate, or on the relationship between the holder of the right in rem and another person); and the absolute nature of the location of the right to the holder".*<sup>61</sup>

The fundamental policy concerning right *in rem*, and *in rem* creditors adopted by the Recast insolvency regulation is that the third parties' right *in rem* should be respected. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, movable or immoveable assets<sup>62</sup>. Rights *in rem* have a very important function with regard to the

<sup>60</sup> Report on the Convention on Insolvency Proceedings, prepared by Virgos. M., Schmit, E., European Union Council, Brussels, 3 May 1996, 6500/96, p. 70.

<sup>61</sup> Marshall, J., *The Future of the European Insolvency regulation, Article 5 (rights in rem)*, available at: URL=[http://www.eir-reform.eu/uploads/PDF/Jennifer\\_Marshall.pdf](http://www.eir-reform.eu/uploads/PDF/Jennifer_Marshall.pdf). Accessed 28 February 2017.; See also: Wessels, Bob, *Rights in rem of third parties under the EU Insolvency Regulation*, Fordham University School of Law, New York, June 2006., Available at: URL=[https://www.iiiglobal.org/sites/default/files/media/1\\_Wessels\\_Rightsinrem.PDF](https://www.iiiglobal.org/sites/default/files/media/1_Wessels_Rightsinrem.PDF). Accessed 9 January 2017.

<sup>62</sup> Article 8 (1) of the Recast Insolvency Regulation.

granting of credit and obtaining capital investment<sup>63</sup>. They protect their holders against the risk of insolvency and the interference of third parties<sup>64</sup>.

In line with this philosophy, Recast Insolvency Regulation grants number of rights to *in rem* creditors, in particular, *in rem* creditors are entitled a) to dispose of assets or income from those assets, in particularly by virtue of a lien or mortgage, b) to demand assets or restitution from anyone having possession or use of them contrary to the wishes of the *in rem* creditors, and c) to use assets<sup>65</sup>.

The protection given by Article 8 of the Recast Insolvency regulation applies where the secured assets is situated within the territory of a Member State other than the one in which insolvency proceedings are commenced.

### **3/ Provisions of information for creditors and lodgement of their claims**

The Recast Insolvency Regulation introduces several practical novelties aimed at increasing clarity and simplifying procedure concerning lodgement of claims. Two major innovations refer to: a) the standardized procedure to file and lodge claims, and b) the reinforcement of the publicity of information relating to insolvency proceedings.

These novelties are the most welcomed since in cross border insolvency proceedings creditors come from different Member States, so the problem may arise in connection to language of the claim, timely distribution of information, unequal treatment of same type of creditors etc. In complex insolvency cases it may not be clear where to file a claim, how to file a claim, who is entitled to file a claim etc.

Concerning a right to lodge a claim, the Recast Insolvency Regulation prescribes that any foreign creditor may lodge claims in insolvency proceedings by any means of communication, which are prescribed by the law of the State of the opening of proceedings<sup>66</sup>. A foreign creditor may lodge its claim using the standard claim forms<sup>67</sup>, and the claim can be lodged in any EU official language. This means that

<sup>63</sup> Wessels, Bob, *op.cit.* note 18, p. 19.

<sup>64</sup> *Ibid.*

<sup>65</sup> Article 8 (2) of the Recast Insolvency Regulation.

<sup>66</sup> Article 53. of the Recast Insolvency Regulation

<sup>67</sup> This standard claim form is created by the Commission, and it includes, certain specific information (including, *inter alia*, the debtor's name, contact details, bank details, the amount of the claim, and possible interest claimed) and will specify the interest rate the period of calculation and the capitalized amount of interest. When a cross-border insolvency procedure is opened under the Regulation, all the creditors have to provide the same essential information to the insolvency practitioner in order to get a clear view of the liabilities of the debtor. It also enables creditors to provide all the information necessary to protect their rights.

the claim can be written in mother tongue of creditor. Claim must be accompanied by copies of any supporting documents. Where the court, the insolvency practitioner or the debtor in possession has doubts in relations to a claim, it shall give the creditor opportunity to provide additional evidence on the existence and the amount of claim<sup>68</sup>.

Concerning the deadline for lodging the claim, Recast Insolvency Regulation prescribes that it should be lodged within the period stipulated by the law of the State of the opening of proceedings<sup>69</sup>. In case of foreign creditor, the Recast Insolvency regulation prescribes that for a foreign creditors, 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 of the opening of proceedings.

Publication of opening of insolvency proceedings is standard practice in all Member States. But the question is how this information shall reach foreign creditors. For example, if insolvency proceedings is opened in Germany, how will foreign creditors find out about that?

The issue is dealt in the Recast Insolvency Regulation if following way. It is stated that: *“As soon as insolvency proceedings are opened in a Member State, the court of that State or insolvency practitioner appointed by the court shall immediately inform the known creditors”*.<sup>70</sup> They shall do so by using “standard notice form”.<sup>71</sup>

Two thing seems problematic in connection to above rule. First, what happens with other, “unknown” creditors? How will they learn about opening of insolvency proceedings? Second, it is hard to imagine that insolvency practitioner or the court will have any idea at all who may be a foreign creditor. The only creditor that they can be aware of is creditor who initiated opening of insolvency proceedings.

The Recast Insolvency Regulation contains another, more general rule that deals with this particular issue. Article 28 of the Recast Insolvency Regulation empowers the insolvency practitioner or the debtor in possession to request that the notice of the judgement opening insolvency proceedings is published in any other Member State where an establishment of the debtor is located. This seems as quite reasonable solution for the above problem.

---

Standard form is available at: [URL=ec.europa.eu/civiljustice1.../bankruptcy\\_ec\\_en\\_form2.doc](http://URL=ec.europa.eu/civiljustice1.../bankruptcy_ec_en_form2.doc)

<sup>68</sup> Article 55 (7) of the Recast Insolvency Regulation

<sup>69</sup> Article 55 (6) of the Recast Insolvency Regulation

<sup>70</sup> Article 54 (1) of the Recast Insolvency Regulation.

<sup>71</sup> Article 54 (3) of the Recast Insolvency Regulation.

For the conclusion, it should be noted that in a case where one main proceedings is opened and one or several secondary territorial proceedings are opened, creditors can file their claims to any of those proceedings. Potential risk in connection to that lays in fact that they may simultaneously file claim in several states. To prevent fraudulent behaviour of such creditors, the Recast Insolvency Regulation in its text included set of norms dealing with cooperation between insolvency practitioners, communication between courts.

#### **4.5. Other points to note: cooperation between insolvency practitioners, communication between courts**

Where several insolvency proceedings concerning the same debtor are running (on main insolvency proceedings and one or more secondary proceedings), the Recast Insolvency Regulation provides for duties for different insolvency practitioners and courts involved to cooperate and communicate in various ways.

In particular, Recast Insolvency Regulation imposes obligation to cooperate to insolvency practitioners of main and secondary proceedings, unless such cooperation is not incompatible with the rules applicable to the respective proceedings.<sup>72</sup> Such cooperation may take any form, including to conclusion of agreements or protocols.<sup>73</sup>

Recast Insolvency Regulation provides details concerning forms of cooperation. It says that insolvency practitioners should communicate to each other any information which may be relevant to the proceedings, in particular any progress made in lodging and verifying claims, information aimed at rescuing or restructuring the debtor, information regarding terminating proceedings etc.<sup>74</sup> Furthermore, they should also communicate in order to coordinate the administration of the realization or use of debtor's assets and affairs etc.<sup>75</sup>

Recast Insolvency Regulation imposes cooperation to the courts too. Judges of the main and secondary proceedings should coordinate in the appointment of the insolvency practitioners, they should coordinate administration and supervision of the debtor's assets and affairs, coordinate on hearings etc.<sup>76</sup>

---

<sup>72</sup> Article 41(1) of the Recast Insolvency Regulation.

<sup>73</sup> *Ibid.*

<sup>74</sup> Article 41(2) (a) of the Recast Insolvency Regulation.

<sup>75</sup> Article 41(2) (b) of the Recast Insolvency Regulation.

<sup>76</sup> Article 42 of the Recast Insolvency Regulation.

Such communication could be useful, for example, in order to ensure that the judge in the main proceedings is informed of relevant developments in the secondary proceedings before deciding on further actions.

And finally, Recast Insolvency Regulation also prescribes compulsory cooperation and communication between insolvency practitioners of main and secondary proceedings with the courts of main and secondary insolvency proceedings.<sup>77</sup>

In order to increase transparency of cross-border insolvency proceedings, improve access to information for the relevant creditors, courts and practitioners and to prevent the opening of parallel insolvency proceedings the Recast Insolvency Regulation introduces a two new instruments- Interconnected Insolvency Registers systems and a central European database.

Interconnected Insolvency register systems shall be composed of the insolvency registers of the Member States and the EU e-justice Portal. The system shall provide a search in all the official languages of the Member States. Introduction of those registers will simplify research on cross-border insolvency proceedings and will ensure that certain standard set of essential information are published in all Member States. All Member States are in obligation to establish those registers latest by 26 June 2019<sup>78</sup>.

#### **4.6. Recognition of Insolvency Proceedings**

Last issue that is going to be addressed in the paper is the issue of recognition of foreign insolvency proceedings and effects of such recognition. The general principle adopted by the Recast Insolvency Regulation is that any judgement opening insolvency proceedings handed down by a court of a Member State shall be recognized in all other Member States from the time it becomes effective in the state where proceedings are opened (so called automatic recognition)<sup>79</sup>. Automatic recognition should therefore mean that the effects attributed to the insolvency proceedings by the law of the State in which the proceedings were opened extend to all other Member States<sup>80</sup>. Recognition requires no preliminary decision or other

---

<sup>77</sup> Article 43 of the Recast Insolvency Regulation.

<sup>78</sup> Rules on establishing „Insolvency Registrar“ (Art. 24 of the Recast Insolvency Regulation) become effective as of 26 June 2018, and rules on creation of Interconnection of Insolvency Registers (Art. 25 of the Recast Insolvency Regulation) become effective as of June 26 2019.

<sup>79</sup> Article 19 of the Recast Insolvency Regulation.

<sup>80</sup> Wessels, Bob, *op.cit.* note 18, p. 25.

formality by a court to all Member States<sup>81</sup>. The effects of the proceedings may not be challenged in other Member State<sup>82</sup>.

However, a Member State may refuse to recognize foreign judgement on the opening of insolvency proceedings where the effects of such recognition would be manifestly contrary to public policy, fundamental constitutional principles or rights and liberties of individuals<sup>83</sup>.

Once main insolvency proceedings have been opened in one Member State and automatically recognized in other Member States, the question arises in connection to the effects of such recognition. The general principle is that the judgement opening proceedings produces its effects with equal force in all Member States. This means that in any Member State the same effect are produced as under the law of the State of the opening of proceedings.<sup>84</sup>

The main effect of the recognition of insolvency proceedings opened in a Member State is the recognition of the appointment of the liquidator and his powers in all other Member states in connection to allocation, distribution of debtor's assets. Another effect of the recognition of insolvency proceedings opened in a Member State is inclusion of the debtor's assets in the estate regardless of the state in which they are situated. Furthermore, whole set of creditors rights are directly linked to the moment of recognition of insolvency proceedings opened in a Member State, such as lodging claim, obligation to return what has been obtained by individual creditors in secondary proceeding, after opening main insolvency proceedings etc. The law also ensures that decisions closely linked to insolvency proceedings - such as actions to set aside detrimental acts (i.e. acts that are harmful to the creditors) - are recognised in the other country.

## **5. CONCLUSION- IS RECAST INSOLVENCY REGULATION A STEP FORWARD TOWARDS UNIFORM EU INSOLVENCY LAW OR JUST THE *STATUS QUO*?**

Recast Insolvency Regulation has not yet entered into force. However, its announcement and its adoption, almost 2 years ago, in year 2015, prompted many

---

<sup>81</sup> *Ibid.*

<sup>82</sup> The fact that insolvency proceedings have been opened in a Member State, and therefore, recognized throughout the EU, doesn't preclude the opening of secondary territorial proceedings in another Member State. One or several secondary territorial proceeding may be opened in country of debtor's establishment.

<sup>83</sup> Article 33 of the Recast Insolvency Regulation.

<sup>84</sup> Wessels, Bob, *op.cit.* note18, pp. 25.

discussions about the course or direction of a future of EU insolvency law. Opinions on that are quite different. While some consider that more intensive harmonization, in particular of substantive insolvency law on EU level is not possible or feasible due to significant differences in substantive insolvency law of EU Member States, the other argue that after years of struggling with “soft” coordination of insolvency proceedings it is time to accelerate the process of convergence of insolvency law on EU level or even, “for the sake” of the internal market, to adopt uniform EU insolvency law<sup>85</sup>.

So, the question is, which of those conflicted approaches Commission adopted in the Recast Insolvency Regulation?

A closer look reveals that the Recast Insolvency Regulation provides a sensible revision of the 2000 Insolvency Regulation. The overall impression is that the Recast Insolvency Regulation does not drastically alter the concept adopted by 2002 Insolvency Regulation.

However, it introduces number of novelties, most of them already mentioned in the paper. Some of the most prominent Recast Insolvency Regulations innovations are:

- Redefinition and clarifications of debtor’s COMI
- The definition of main proceedings has been broadened to include pre-insolvency rescue proceedings
- Recast Insolvency Regulation introduced several new mechanisms in order to prevent and/or minimise the need to open secondary proceedings
- It introduces rules which enable that cross-border claims are dealt with in a more centralized manner
- Under the new regime, any creditor may challenge the decision to open main proceedings on jurisdictional grounds
- Recast Insolvency Regulation also provides for various additional amendments in connection to setting up interconnected insolvency registers, it prescribes a standardised EU wide claim form, etc.

---

<sup>85</sup> See more: Mucciarelli, Federico, *Optimal allocation of law –making power over bankruptcy law in „federal“ and „quasi-federal“ systems:is there a case for harmonizing or unifying bakruptcy law in the E.U?*, Law and Economics Research Paper Series, Working Paper No11-28, New York University School of Law, September 2011.;Wessels, Bob, *The Changing Landscape of Cross-border Insolvency Law in Europe*, Juridica International, No.12, 2007, pp. 116-124.; Kilborn, Jason J., *The Personal Side of Harmonizing European Insolvency Law* (August 1, 2016). URL=<https://ssrn.com/abstract=2816618> or URL=<http://dx.doi.org/10.2139/ssrn.2816618>. Accessed 12 March 2017.



From above it is obvious that the Recast Insolvency regulation does not provide for only „cosmetic” innovations. Proposed innovations will result with increased efficiency and effectiveness of EU cross-border insolvency proceedings. However, at the moment, and based on approach taken by the Commission in the Recast Insolvency Regulation, it seems that unification of EU insolvency Law is still not on Commission’s agenda.

But, enactment of the new Recast Insolvency Regulation is not the end of Commission work in area of cross-border insolvency proceedings. Undoubtedly, European legislatures in field of cross-border insolvency proceedings on EU level will continue.

## REFERENCES

### BOOKS AND ARTICLES

1. Burman, Harold, *Harmonization of International Bankruptcy Law: A United States Perspective*, Fordham Law Review, Vol. 64. Issue 4, 1996, pp. 2544.
2. Caneco, A., Joseph, *Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU*, Setton Hall University, Scholarship Paper 909, 2016, p. 5.
3. Latella, Dario, *The COMI Concept in the Revision of the European Insolvency Regulation*, ECFR, No. 4, 2014, pp.1-16
4. Mucciarelli, Federico, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or Restatement of the Status Quo?* ECFR, No. 1, 2016, p.1.
5. Mucciarelli, Federico, *Not Just Efficiency: Insolvency in the EU and Its Political Dimension*, European Business Law Organization Review, No. 14, 2013, p.176.
6. Mucciarelli, Federico, *Optimal allocation of law –making power over bankruptcy law in „federal“ and „quasi-federal“ systems: is there a case for harmonizing or unifying bankruptcy law in the E.U?*, Law and Economics Research Paper Series, Working Paper No11-28, New York University School of Law, September 2011.
7. Muir, Hunter, *The Draft Bankruptcy Convention of the EEC*, International and Comparative Law Quarterly, Vol. 5, No. 2, 1976, pp. 310-328.
8. Paulus, Christoph, *Global Insolvency Law and the Role of Multinational Institutions*, Brook. J. Int’l L, Vol. 32, No. 3, 2007.
9. Paulus, Christoph, *A Vision of the European Insolvency Law*, Norton Journal of Bankruptcy Law and Practice, Vol. 17, No. 5, 2008, p. 608.
10. Wessels, Bob, *The Changing Landscape of Cross-border Insolvency Law in Europe*, Juridica International, Vol. 12, 2007, pp.116-124.
11. Wessels, Bob, *Rights in rem of third parties under the EU Insolvency Regulation*, Fordham University School of Law, New York, 2006.

## EU LAW

1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015, Official Journal of the European Union [2015] OJ L 141/19
2. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, pp. 1–18
3. Draft Convention on bankruptcy, winding –up arrangements, composition and similar proceedings, Bulletin of the European Communities, Supplement 82, 1982.
4. Report from the Commission on the Application of Council Regulation No 1346/2000 On Insolvency Proceedings, COM (2012)743, December 2012
5. Communication from the Commission to the European Parliament, the Council and The European Economic and Social Committee, A new approach to business failure and insolvency, COM (2012) 742 final, Strasbourg, 12 December 2012., p. 2
6. Proposal for a Regulation of the European parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM/2012/0744 final, p.2
7. Report on the Convention on Insolvency Proceedings, prepared by Virgos. M., Schmidt, E., European Union Council, 6500/96, Brussels, 3 May 1996, p. 70

## INTERNATIONAL TREATIES

1. UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL, 1997
2. UNCITRAL, Practical Guide on Cross-Border Insolvency Cooperation, United Nations, New York, 2010, p.12

## WEBSITE REFERENCES

1. Garcimartin, Francisco, *The EU Insolvency Regulation: Rules on Jurisdiction*, URL= [http://www.ejtn.eu/PageFiles/6333/Rules\\_on\\_jurisdiction.pdf](http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf). Accessed 16 February 2017.
2. Kilborn, Jason J., *The Personal Side of Harmonizing European Insolvency Law* (August 1, 2016). URL= <https://ssrn.com/abstract=2816618> or <http://dx.doi.org/10.2139/ssrn.2816618> Accessed 12 March 2017.
3. Hastings, Paul, *The New EU Regulation on Insolvency Proceedings*, June 2015, and URL= <https://www.paulhastings.com/publications-items/details/?id=2011e669-2334-6428-811c-ff00004cbded>, Accessed: 12 February 2017.
4. Hey, Jon, *Harmonising Insolvency Law- Nice but Not Necessary*, Global Capital, May, 2015. URL=<http://www.globalcapital.com/article/rmwjf2st641x/harmonising-insolvency-law-nice-but-not-necessary>. Accessed 3 February 2017.
5. Marshall, J., *The Future of the European Insolvency regulation, Article 5 (rights in rem)*, URL= [http://www.eir-reform.eu/uploads/PDF/Jennifer\\_Marshall.pdf](http://www.eir-reform.eu/uploads/PDF/Jennifer_Marshall.pdf), Accessed 28 February 2017.

6. Stones, Kathy, *What harmonisation provisions have the EU Commission recommended and what is their legal status?* LexisNexis, 19 March 2014, URL=<http://blogs.lexisnexis.co.uk/randi/the-challenges-of-harmonising-insolvencies-and-restructurings/>. Accessed 15 February 2017.
7. Principles and Guidelines for Effective Insolvency and Creditor Right System, The World Bank, April 2011, URL=<http://documents.worldbank.org/curated/en/936851468152703005/pdf/481650WP02001110Box338887B01PUBLIC1.pdf>. Accessed 12 February 2017.
8. Wessels, Bob, *EU Regulation on Insolvency Proceedings*, INSOL, 2006, p. 6, URL=<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis,%20Bob%20Wessels.pdf>. Accessed 16. February. 2017.
9. Wessels, Bob, *Twenty Suggestions for a Makeover of the EU Insolvency Regulation*, International Caselaw Alert, No. 12, 2006, pp. 68-73 URL=[https://www.biiicl.org/files/3159\\_biiicl\\_twenty\\_suggestions.pdf](https://www.biiicl.org/files/3159_biiicl_twenty_suggestions.pdf). Accessed 16 February 2017.