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Contents

BIBLIOGRAPHY, CURRENT EVENTS, IMPORTANT WEB SITES

All contributions in this book are subject to academic review.

List of Abbreviations

A/RES	General Assembly resolution
AD	Anno Domini
ASEAN	Association of Southeast Asian Nations
BelCCI	Belarusian Chamber of Commerce and Industry
BIT	Bilateral Investment Treaties
BPS	Central Bureau of Statistics
CCR	Constitutional Court of Romania
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
COMI	Centre of main interests [of the debtor].
1995 Convention	Convention of the European Communities on Insolvency Proceedings of 1995.
CZK	Czech koruna
DNA	Deoxyribonucleic acid
EC	European Communities
ECJ	Court of Justice of the EU
ECPT	European Committee for the Prevention of Torture
ECHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
Eurofood	Judgment of the ECJ (Grand Chamber) in Case C-341/04 of 2 May 2006, Eurofood IFSC Ltd
FCIArb	Fellow of the Chartered Institute of Arbitrators
FDEAW	Framework Decision on the European Arrest Warrant

HIV	Human Immunodeficiency Virus
HLV Report	External evaluation of Regulation No 1346/2000/EC on Insolvency Proceedings.
HR	Human rights
IACL	International Association of Constitutional Law
ICC	The International Chamber od Commerce
ICSID	The International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
Interedil	Judgment of the Court of Justice of the EU in Case C-396/09 of 20 October 2011, Interedil Srl, in liquidazione v Fallimento Interedil Srl et Intesa Gestione Crediti SpA
LCIA	The London Court of International Arbitration
LLM	Master of law
MKAS	The International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation [RUS], also as ICAC RF
NAFTA	North American Free Trade Agreement
NGOs	Non-Government Organizations
OECD	Organisation for Economic Co-operation and Development
PCIJ	The Permanent Court of International Justice
RB	Republic of Belarus
Regulation 1346/2000	Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
Regulation 2015/848	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
RF	Russian Federation
RK	Republic of Kazakhstan
RM	Republic of Moldova
SCC	The Stockholm Chamber of Commerce
STM	The Helping Society
TEU	Treaty of European Union

TNCs	Transnational Corporations
TV	Television
UCC	Union Carbide Corporation
UML	UNCITRAL Model Law on Cross-Border Insolvency of 1997.
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNGA	United Nations General Assembly
UNO	United Nations organisation
UNTS	United Nations Treaty Series
USA	United States of America
VCCA	Vilnius Court of Commercial Arbitration
VCLT	The Vienna Convention on the Law of Treaties
VIAC	Vienna International Arbitral Centre
WALP	World Association of Law Professors
WMO	World Meteorological Organization
WTO	World Trade Organization

Articles

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access to court | centre of main interests of the debtor | checking court jurisdiction | claim | COMI | COMI-Shifting | creditor | debtor | establishment | fair trial | forum shopping | bankruptcy tourism | insolvency proceedings | insolvent debtor | international jurisdiction | judgment opening insolvency proceedings | main insolvency proceedings | ordre public | procedural guarantee | recognition of a decision | reservation of public policy | secondary insolvency proceedings | universality

The Determination of International Jurisdiction as an Important Aspect in the Protection of the Right of Access to Justice and the Right to a Fair Trial: Defence Mechanisms against the Decision on International Jurisdiction in EU Insolvency Proceedings [Regulation (EU) 2015/848 of European Parliament and of Council on Insolvency Proceedings]

Abstract | *The EU conflict-of-laws rules on the international jurisdiction of courts to open main insolvency proceedings are based exclusively on a single connecting factor, i.e. the centre of main interests (COMI) of the debtor. This connecting factor, whether or not the determination thereof is to be based on objective facts perceivable by third parties, often depends on a subjective assessment of a number of circumstances. Moreover, the COMI may – and often does – vary in time. Under a previous law, this variability of the COMI*

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often used to be the subject of an abuse of rights. The COMI was artificially transferred to other States whose legal regime was more favourable to the debtor. In extreme cases, it was the subject of an abuse of rights or even a criminal offence. Previous rules incorporated in Council Regulation (EC) No 1346/2000 were unable to respond to such abuse. The variability of the COMI and the high risk of subjective elements in the assessment of the localisation of the COMI were a principal threat to the right to a fair trial as incorporated in the right of access to court. Selected instruments incorporated in Regulation (EU) 2015/848 of the European Parliament and of the Council are designed to respond to the threat. The most significant of such instruments include the review mechanism under Article 5(1) of Regulation 2015/848, which is an autonomous procedure under EU law, independent of any other mechanisms provided for in the national law of the state where the insolvency proceedings are conducted, in line with lex fori concursus. Except for the requirement that the grounds for applying such a procedure must concern international jurisdiction, the grounds for which the debtors, as well as any creditors, may avail themselves of this mechanism are entirely unlimited. Similarly, no deadline has been stipulated by which the creditors or the debtor may initiate such a procedure. It is a unique and autonomous procedure, which may represent an important element of protection afforded to the main parties in insolvency proceedings conducted in the EU Member States (except Denmark), i.e. including the protection of their right of access to courts or, as applicable, their right to a fair trial.

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I. Introduction: Importance of International Jurisdiction of Courts in Cross-border Insolvency Proceedings, EU Law and International Standards

3.01. The volume of cross-border obligations has skyrocketed over the past several decades. As a consequence of such developments, a debtor's insolvency is connected with international elements that must be addressed in the insolvency proceedings. At the same time, a debtor's activities and property are not always concentrated in the territory of a single State.

In such circumstances, it is by no means exceptional for the requirements for opening insolvency proceedings, as prescribed by the national *leges concursus*, to be fulfilled in several States that simultaneously claim jurisdiction to conduct the insolvency proceedings. The need for international regulation in this area is undeniable, and the endeavour to adopt such regulation dates back to the 1960s. Nonetheless, for a long period of time, the results were rather questionable. The relevant laws include the EU (EC) rules and the rules adopted under the auspices of the UNCITRAL, i.e. the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (UML). The latter currently represents the primary inspiration in this area, and introduces the mechanism of effective cooperation and coordination of insolvency proceedings conducted in different States.

3.02. The conflict-of-laws rules on insolvency proceedings represent a key component of the judicial cooperation of EU Member States. Insolvency proceedings opened in any of the EU Member States (except Denmark) on or after 26 June 2017 are now governed by Regulation 2015/848,[1] which replaced the preceding law, namely Regulation 1346/2000,[2] which applies to insolvency proceedings opened in the EU Member States (again, except Denmark) from 31 May 2002 to 25 June 2017 (incl.). Regulation 1346/2000 principally copied the Convention of the EC on Insolvency Proceedings of 1995,[3] which never entered into force and was replaced five years later by Regulation 1346/2000.

3.03. International jurisdiction to open main insolvency proceedings under EU law is based on a single connecting factor, namely the centre of main interests (COMI) of the debtor. Hence, the centre of main interests (COMI) represents the sole conflict-of-laws criterion for the determination of international jurisdiction to open main insolvency proceedings (Article 3 of Regulation 2015/848,[4] as well as its predecessor, Article 3 of Regulation

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). Published in: Official Journal of the European Union, L 141, 05 June 2015, et. 19-72. [EUR-Lex: 32015R0848]. (Regulation 2015/848).

[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Published in: Official Journal, L 160, 30 June 2000, et. 0001-0018. [EUR-Lex: 32000R1346]. (Regulation 1346/2000).

[3] Council of the European Union Print No. 12830/95, Brussels, 1995 and Council of the EU, Document No. 6500/96, DRS 8 (CFC), Brussels, 03 May 1996 (1995 Convention).

[4] Article 3 of Regulation 2015/848 (quote):

> [International jurisdiction] – 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. (-)In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the 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. (-)In the case of an individual exercising an independent business

1346/2000[5]). This connecting factor **includes business (commercial, trade) and other professional, for-profit, economic activities**.[6] In other words, it is the place of the main economic interest in terms of the creation and management of the debtor's property values, as opposed to the place of habitual residence,[7] which is connected with the territory to which a particular person has their closest relationship. Although these two instruments are formally separate, it does not necessarily follow that the COMI could be identical in the case of natural

or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. (-)In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings. 2. Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. 3. Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings. 4. The territorial insolvency proceedings referred to in paragraph 2 may only be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 where (a) insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or (b) the opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings. (-)When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

[5] Article 3 of Regulation 1346/2000 (quote):

[International jurisdiction] - The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. 2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. 3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings. 4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only: (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

[6] Cf. Daniel Friedemann Fritz, Rainer M. Bähr, *Die Europäische Verordnung* über *Insolvenzverfahren. Herausforderung an die Gerichte und Insolvenzverwalter*, 11(6) DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND INSOLVENZRECHT (2001), 221 et seq. (here especially et. 224).

[7] See the fourth subparagraph of Article 3(1) of Regulation 2015/848.

persons other than traders.[8] Conversely, compared to the rules incorporated in Regulation 1346/2000, Regulation 2015/848 expanded the rules defining the COMI by this rebuttable presumption.[9]

II. Modified Universality and Parallel Proceedings against the Same Debtor

3.04. The issue of the conflict-of-laws criteria applicable to the determination of the State court with jurisdiction to open main insolvency proceedings, as well as the conditions for conducting the insolvency proceedings with respect to one and the same debtor in other Member States, is one of the crucial issues most discussed in connection with Regulation 1346/2000, and resulted in a review thereof and the adoption of a new law. Indeed, the HLV Report itself devoted the most attention to Article 3 of Regulation 1346/2000 and the proposed amendments thereto, and Article 3 is also the most intensively discussed provision in relation to Regulation 2015/848.

3.05. The reason is that the EU law on insolvency proceedings is based on the principle of universality. However, universality is subject to principal corrections by the elements of plurality manifested in the possibility of conducting particular insolvency proceedings in the individual States. From this perspective, the concept of universality cannot be perceived as producing universal or uniform insolvency proceedings, but only as universal effects of specific national proceedings opened in a Member State. Member States have refused the possibility of uniform insolvency proceedings, arguing that the differences in substantive law effectively preclude the introduction of insolvency proceedings with general effects throughout the entire EU; this would, conversely, give rise to many practical difficulties.[10] Hence, the EU legislature has chosen the alternative

[8] Regulation 1346/2000 and Regulation 2015/848 both apply regardless of whether the debtor is a natural person or a legal person, a trader or a different entity. Insolvency capacity is governed by the *lex fori concursus* in terms of Article 7(2)(a) of Regulation 2015/848 or, as applicable, see also Article 4(2)(a) of Regulation 1346/2000.

[9] See the fourth subparagraph of Article 3(1) of Regulation 2015/848.

[10] See Recital 22 of Regulation 2015/848 (quote):

> [T]his Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. At the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level. This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the applicable law in the case of particularly

of conflict-of-laws rules regulating jurisdiction, recognition and the law applicable to insolvency proceedings. It would not be appropriate to question these arguments, but one must ask whether, and to what extent, the true reason was indeed practical problems, or whether the insolvency proceedings have fallen victim to the political interests of the representatives of the individual Member States.

3.06. The justification would be more persuasive if the EU legislature had put forth actual problems that such universal insolvency proceedings would cause. For instance, one problem would be the more difficult opening of insolvency proceedings for smaller creditors from a Member State different from the State of the court which would have jurisdiction to open the universal insolvency proceedings. If the debtor has sufficient assets in the other State to satisfy domestic creditors, it would appear questionable, to say the least, if these creditors were forced to conduct investigations to determine the State in which the universal insolvency proceedings should be opened, including the corresponding conditions for the opening thereof. Indeed, even the preceding Regulation 1346/2000 operated on the premise, fully adopted by Regulation 2015/848, that territorial insolvency proceedings (Article 3(4) of Regulation 2015/848) may be conducted without the opening of main insolvency proceedings.

3.07. Hence, the EU insolvency law clearly emphasises that there are certain situations in which insolvency proceedings covering assets of the debtor in all Member States are not only unnecessary, but may even prove counterproductive. The inability of one establishment out of many, as the term is specifically defined in the EU rules on insolvency proceedings,[11] to pay its debts

significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope.)

and Recital 11 of Regulation 1346/2000 (quote):

> [T]his Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.).

[11] See Article 2(10) of Regulation 2015/848 (quote): [...] *"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;*[...].

need not necessarily trigger the opening of main insolvency proceedings under Article 3(1) of Regulation 2015/848, especially if the debtor's assets located in the State where the establishment is located are sufficient to settle the creditors' claims. In connection with this, it is necessary to point out the impact that Regulation 2015/848 has had with regard to one of the comments made with respect to Regulation 1346/2000, i.e. that the law envisages only such insolvency proceedings that result in the liquidation of the debtor (Regulation 2015/848 no longer adopts the premise), whereas the proper functioning of the internal market would benefit much more from an endeavour to rescue economically viable undertakings in hardship.

3.08. But the Preamble to Regulation 2015/848 mentions no such reasons, and paradoxically, invokes examples that confirm that, rather than the practical impossibility of creating uniform insolvency proceedings, the true reason is the unreadiness of the individual Member States to reach a compromise, and their insistence on their own national laws. The Preamble declares that one of the two methods employed by the Insolvency Regulation in dealing with differences in the laws of the individual Member States is the adoption of special rules on applicable law in the case of particularly significant rights and legal relationships,[12] which may in itself complicate the main insolvency proceedings, not to speak of the different approach to selected creditors. This *de facto* confirms that the diversity of laws is not generally insurmountable. It depends entirely on the Member States' political will to determine which specific issues they insist on their sovereignty and which they refuse unification. In other words, the underlying premise is that unified universally effective systems of insolvency law still operate in the territories of the individual Member States, and that national insolvency proceedings opened in a particular State have universal effects.[13] In the context of the EU insolvency law, one may speak of a modification of universality in the form of the so-called combined model.[14]

[12] See Recital 22 of Regulation 2015/848 (quoted above in this paper).

[13] STEFAN SMID, EUROPÄISCHES INTERNATIONALES INSOLVENZRECHT. Wien: Manzsche Verlags- und Universitätsbuchhandlung / Center of Legal Competence (2002), et. 39, marg. 30.

[14] Cf. also Stefan Leible, Ansgar Staudinger, *Die europäische Verordnung über Insolvenzverfahren*, 61 KONKURS, TREUHAND, SANIERUNG (2000), 533 et seq. (here especially page 537). The authors refer to *modified universality*.

III. Shifts in Definition of Centre of Main Interests (COMI) of Debtor and Increased Importance of Predictability

3.09. It may appear at first sight that the rules on international jurisdiction to open insolvency proceedings incorporated in Regulation 2015/848 have introduced far-reaching changes. On closer inspection, it is fairly easy to observe that the changes mostly do not reject the previous law, but codify the case law that has gradually developed with respect to Article 3 of Regulation 1346/2000. But when one refers to the previous existing case law, it is also necessary to point out that this means the case law of the Court of Justice. The need for a clear and unambiguous definition of the criteria for the determination of international jurisdiction arises especially due to the fact that, despite the existing case law of the Court of Justice of the European Union, the interpretations differ in practice of the centre of main interests (COMI) of the debtor as the sole connecting factor for determining the international jurisdiction to open main insolvency proceedings by national courts. Considering the above, as well as the fact that the definition of the COMI has undergone no major changes that would lay down clear and unambiguous criteria, the situation is understandable.

3.10. Regulation 2015/848 further enhances the principle that the court seized by the request to open insolvency proceedings is obliged to examine its international jurisdiction of its own motion;[15] hence, the pressure will continue forcing the court not to make do with the application of the presumption in Article 3 of Regulation 2015/848 (registered office or residence as the rebuttable presumption of the COMI) and take into account any and all circumstances. Further, it will exclude the possibility that the COMI could be located in a different State, even in the absence of any express objection that the presumption of existence of the COMI cannot stand in the particular case.

3.11. Compared to Regulation 1346/2000, no principal changes have been made to the principles governing the determination of international jurisdiction. The main insolvency proceedings affecting all assets of the debtor located in a Member State (universality of the main insolvency proceedings) may still be

[15] This obligation is new explicitly provided for in Article 4 of Regulation 2015/848; the court is obliged to examine the issue of international jurisdiction *ex officio* (of its own motion), and on top of that, must justify its conclusions in the judgment opening insolvency proceedings. Consequently, Articles 4 and 5 of Regulation 2015/848 represent a novelty compared to Regulation 1346/2000, although, for instance, the obligation to examine the court's own jurisdiction of its own motion (now explicitly stipulated in Article 4 of Regulation 2015/848) could have been inferred even from the previous law and the gradually expanding case law.

opened exclusively in the state where the debtor's COMI is located. However, compared to Regulation 1346/2000, Article 3(1) of Regulation 2015/848 now includes a definition[16] that in one form or another permeates any attempts at creating an effective international system of insolvency law. The rule is that the COMI is defined as the place where the debtor conducts the administration of their interests on a regular basis and which is ascertainable by third parties. This definition was articulated in the decision of the ECJ in C-341/04 (*Eurofood*),[17/18] as the conclusions made in the *Eurofood* case were subsequently also confirmed by the Court of Justice of the EU in C-396/09 (*Interedil*).[19/20] It follows from the above that this definition of

[16] See the second sentence of the first subparagraph of Article 3(1) of Regulation 2015/848.

[17] Judgment of the ECJ (Grand Chamber) in Case C-341/04 of 02 May 2006, *Eurofood IFSC Ltd.* ECR 2006, I-3813 et seq. [ECLI:EU:C:2006:281]. [EUR-Lex: 62004CJ0341]. (*Eurofood*).

[18] *Eurofood*, paragraphs 32 and 32 (quote):

> (32) The scope of that concept is highlighted by the 13th recital of the Regulation, which states that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". (33) That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

[19] Judgment of the Court of Justice of the EU in Case C-396/09 of 20 October 2011, *Interedil Srl, in liquidazione* v. *Fallimento Interedil Srl* et *Intesa Gestione Crediti SpA*. ECR 2011, I-09915 et seq. [ECLI:EU:C:2011:671]. [EUR-Lex: 62009CJ0396]. (*Interedil).*

[20] *Interedil*, paragraphs 47 and 49. In the original Italian version (quote):

> (47) Benché il regolamento non fornisca alcuna definizione della nozione di centro degli interessi principali del debitore, la portata di quest'ultima nozione è tuttavia chiarita, come rilevato dalla Corte al punto 32 della citata sentenza Eurofood IFSC, dal tredicesimo 'considerando' del regolamento, ai sensi del quale «per "centro degli interessi principali" si dovrebbe intendere il luogo in cui il debitore esercita in modo abituale, e pertanto riconoscibile dai terzi, la gestione dei suoi interessi». [...] (49) Con riferimento al medesimo 'considerando', la Corte ha peraltro precisato, al punto 33 della citata sentenza Eurofood IFSC, che il centro degli interessi principali del debitore deve essere individuato in base a criteri al tempo stesso obiettivi e riconoscibili dai terzi, per garantire la certezza del diritto e la prevedibilità dell'individuazione del giudice competente ad aprire la procedura di insolvenza principale. Si deve ritenere che tale esigenza di obiettività e tale riconoscibilità risultino soddisfatte qualora gli elementi materiali presi in considerazione per stabilire il luogo in cui la società debitrice gestisce abitualmente i suoi interessi siano stati oggetto di una pubblicità o, quanto meno, siano stati circondati da una trasparenza sufficiente a far sì che i terzi - vale a dire, segnatamente, i creditori della società stessa - ne abbiano potuto avere conoscenza.

English translation (quote):

> (47) While the Regulation does not provide a definition of the term "centre of a debtor's main interests", guidance as to the scope of that term is, nevertheless, as the Court stated at paragraph 32 of Eurofood IFSC, to be found in recital 13 in the preamble to the Regulation, which states that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties". [...] (49) With reference to that recital, the Court also stated, at paragraph 33 of Eurofood IFSC, that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken

the COMI is inherently incapable of eliminating the problems relating to the insufficient definition of this instrument, and it depends on each individual court or, as applicable, the individual circumstances of each case as to how the court assesses the place of administration and its quality of being ascertainable by third parties.

3.12. The place where the debtor's main interests are concentrated is the place where the debtor conducts the administration of their interests on a regular basis and which is ascertainable by third parties. Consequently, the COMI connecting factor is based on two main conceptual features. The first one is internal, while the other is external. It needs to be emphasized that the COMI must – always and as a rule – be identified on an individual basis and with due regard to all circumstances of the case. It is also necessary to bear in mind that the Court of Justice tends towards an objective approach, as the Court has demonstrated in the decision of the European Court of Justice (ECJ) in **C-341/04 (*Eurofood*)**[21] and in the decision of the Court of Justice of the EU in **C-396/09 (*Interedil*)**.[22/23]

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into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them.

21 *Eurofood*, paragraphs 32 and 33. Quoted above.

22 *Interedil*, paragraph 59, English translation (quote):

> [...] a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.

In the Italian version:

> La seconda parte della prima questione, la seconda questione e la prima parte della terza questione devono pertanto essere risolte affermando che, per individuare il centro degli interessi principali di una società debitrice, l'art. 3, n. 1, seconda frase, del regolamento deve essere interpretato nei termini seguenti: (-) il centro degli interessi principali di una società debitrice deve essere individuato privilegiando il luogo dell'amministrazione principale di tale società, come determinabile sulla base di elementi oggettivi e riconoscibili dai terzi. Qualora gli organi direttivi e di controllo di una società si trovino presso la sua sede statutaria e qualora le decisioni di gestione di tale società siano assunte, in maniera riconoscibile dai terzi, in tale luogo, la presunzione introdotta da tale disposizione non è superabile. Laddove il luogo dell'amministrazione principale di una società non si trovi presso la sua sede statutaria, la presenza di attivi sociali nonché l'esistenza di contratti relativi alla loro gestione finanziaria in uno Stato membro diverso da quello della sede statutaria di tale società possono essere considerate elementi sufficienti a superare tale presunzione solo a condizione che una valutazione globale di tutti gli elementi rilevanti consenta di stabilire che, in maniera riconoscibile dai terzi, il centro effettivo di direzione e di controllo della società stessa, nonché della gestione dei suoi interessi,

3.13. The objective approach to the qualification of the COMI must be emphasized in connection with the protection of the right to a fair trial and, consequently, the protection of access to justice as such. The reason is that the process of identifying and determining the COMI as the fundamental and sole connecting factor for the determination of the international jurisdiction to open main insolvency proceedings is specific to the fact that the dividing line between objective aspects and subjective evaluation is often nearly obscured. Considering the fact that the opening of insolvency proceedings constitutes a major interference in the affairs of any entity, one must conclude that Regulation 1346/2000 contained essentially no, or only minimal, mechanisms of protection against an erroneous determination of international jurisdiction, let alone such excesses as the abuse of a right. The argument that Regulation 1346/2000 contained a reservation of public policy (*ordre public*) as a defence mechanism cannot stand in view of, inter alia, the restrictive approach of the European Union to the application of this reservation. Hence, as concerns the protection of the fundamental right to a fair trial in terms of access to justice, it is only Regulation 2015/848 that has introduced the first acceptable defence mechanisms in the EU insolvency law, although, naturally, it still remains to be seen how effective these mechanisms actually are.

IV. Determination of International Jurisdiction to Open Main Insolvency Proceedings and Right to Fair Trial

3.14. The need for predictability, i.e. the requirement stipulating that the COMI must be ascertainable by third parties, is already emphasized in Recital 13 of Regulation 1346/2000 as one of its main aspects. This particular aspect, together with ascertainability by third parties, is also provided for and

è situato in tale altro Stato membro; (-) nel caso di un trasferimento della sede statutaria di una società debitrice prima della proposizione di una domanda di apertura di una procedura di insolvenza, si presume che il centro degli interessi principali di tale società si trovi presso la nuova sede statutaria della medesima.

[23] See External evaluation of Regulation No 1346/2000/EC on Insolvency Proceedings, JUST/2011/JCIV/PR/0049/A4 (*External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings)* prepared by Institute of Foreign and International Private and Business Law, Ruprecht-Karls-Universität Heidelberg [DEU] and the Institute for Civil Procedure, Universität Wien [AUT]. Also referred to as the "*Heidelberg – Vienna Report*", "*Heidelberg – Luxemburg – Vienna Report*" etc. in legal resources and literature (the "HLV Report"). Available at: http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf. (accessed on 24 January 2020). References to the HLV Report are references to this material published in electronic form. Here HLV Report, marg. 2.4, et. 16.

In the original English version (quote): 'The COMI must be determined in accordance with the circumstances of each individual case; according to the objective approach of the ECJ it must be identified by reference to criteria ascertainable by third parties.'

underlined in Recitals 28 and 30 [of Regulation 2015/848], as well as Article 3(1) [of Regulation 2015/848]. Hence, the quality of being ascertainable by third parties is currently also explicitly stipulated in Article 3(1) of Regulation 2015/848, which further enhances the importance of this evaluation criterion.

3.15. The Preamble to Regulation 2015/848 expressly refers to the interest of the creditors and their opinion on where the debtor manages their interests. If the COMI changes, the creditors must be informed in a timely manner, for example by drawing their attention to the change of address in commercial correspondence, or through other appropriate means. Predictability must also generally be considered one of the fundamental requirements imposed on the law from the perspective of the protection of fundamental rights. From the perspective of Regulation 2015/848, or indeed the EU and international insolvency law, this predictability is primarily reflected in the predictable connecting factor for the determination of international jurisdiction to conduct insolvency proceedings. Hence, as concerns the EU rules incorporated in Regulation 2015/848, this applies to the main insolvency proceedings.

3.16. As mentioned above, the localisation of the COMI as the connecting factor thus also represents a key moment from the perspective of the protection of fundamental rights in terms of the right to a fair trial. Potential changes of the COMI in the course of time, as well as the subjective factors involved in the identification and determination of the COMI, which cannot be eliminated in any decision-making processes and which are exceptionally powerful specifically in the determination of international jurisdiction in EU insolvency proceedings, are the reason why predictability and ascertainability of the COMI require special attention. However, another essential factor is the reinforcement of additional control mechanisms.

3.17. The European Court of Justice has already elaborated on this issue in its decision in *Eurofood*, namely from the perspective of the review and recognition by a court of the jurisdiction of another Member State's court to open insolvency proceedings. In compliance with Article 16 of Regulation 1346/2000,[24] the

[24] Cf. Article 19 of Regulation 2015/848 (quote):

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings. (-) The rule laid down in the first subparagraph shall also apply where, on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States.
2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

ECJ ruled that the principle of mutual trust requires that the courts of other Member States recognise the jurisdiction of the court that already opened the insolvency proceedings. But it is also necessary to mention the ECJ's explanation that it is inherent in that principle of mutual trust that the court of a Member State carefully check that it has jurisdiction to open the insolvency proceedings pursuant to Regulation 1346/2000. According to the decision in *Eurofood*, the court of a Member State that opens the proceedings is to (quote):

> [...] check that it has jurisdiction having regard to Article 3(1) [of Regulation 1346/2000], i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process.[25]

3.18. This decision and the interpretation provided by the Court of Justice in its following case law thus clearly indicate that the courts opening the insolvency proceedings pursuant to Regulation 1346/2000 are obliged to objectively assess whether the debtor has their establishment or directly their COMI in their territory, i.e. materially examine their jurisdiction to open and conduct the insolvency proceedings. Only rigorous respect for this principle may legitimately justify Article 16 of Regulation 1346/2000,[26] which reflects the principle of mutual trust. The mere fact that the registered office represents a rebuttable presumption of the COMI does not justify failure to examine and fulfil the investigative obligation of the court to examine its jurisdiction and check whether and what conditions of its jurisdiction are fulfilled or, conversely, lacking. Indeed, this conclusion is now explicitly confirmed by Article 4 of Regulation 2015/848,[27] and also follows from the decision in

[25] *Eurofood*, paragraph 41.

[26] Cf. Article 19 of Regulation 2015/848 (quoted above).

[27] Article 4 of Regulation 2015/848 (quote):

> [Examination as to jurisdiction] 1. A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2). 2. Notwithstanding paragraph 1, where insolvency proceedings are opened in accordance with national law without a decision by a court, Member States may entrust the insolvency practitioner appointed in such proceedings to examine whether the Member State in which a request for the opening of proceedings is pending has jurisdiction pursuant to Article 3. Where this is the case, the insolvency practitioner shall specify in the decision opening the proceedings the grounds on which jurisdiction is based and, in particular, whether jurisdiction is based on Article 3(1) or (2).

Interedil, which provides a more detailed specification of the COMI, as well as other case law concerning the requirements imposed on an establishment in terms of the EU insolvency law.

V. Revolutionary Change Consisting of the Review of International Jurisdiction of Court to Conduct Main Insolvency Proceedings Incorporated in Article 5 of Regulation 2015/848

3.19. Principal reform in the deficiencies associated with the provision of judicial protection in connection with the determination of the debtor's COMI now appears to have been introduced in Article 5 of Regulation 2015/848. Article 5 of Regulation 2015/848 (quote):

> [Judicial review of the decision to open main insolvency proceedings] 1. The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction. 2. The decision opening main insolvency proceedings may be challenged by parties other than those referred to in paragraph 1 or on grounds other than a lack of international jurisdiction where national law so provides.

3.20. Indeed, no rules analogous to Article 5 of Regulation 2015/848, and especially Article 5(1) of Regulation 2015/848, were contained in any previous international initiatives or EU legislative initiatives concerning the harmonisation of international insolvency law from the perspective of the determination of international jurisdiction. Likewise, no such rules were present in Regulation 1346/2000. Consequently, Article 5 of Regulation 2015/848 represents an important and revolutionary *novum*.

3.21. The provisions of Article 5 of Regulation 2015/848 only relate to a decision to open main insolvency proceedings. Hence, it does not cover any other proceedings falling within the scope of Regulation 2015/848, i.e. it does not relate to secondary insolvency proceedings. The said provision thus fails to address, inter alia, problems concerning assets that fall under two or more jurisdictional sovereignties. More precisely, it fails to address the problem of those creditors who have a claim against the estate outside the scope of jurisdiction of the court in the main proceedings.[28]

[28] Amir Adl Rubordeh, AN ANALYSIS AND HYPOTHESIS ON FORUM SHOPPING IN INSOLVENCY

VI. Purpose and Development of Case Law in Selected Countries in Review of Court Jurisdiction to Open and Conduct Main Insolvency Proceedings

VI.1. Purpose of Rule Incorporated in Article 5 of Regulation 2015/848

3.22. Article 5 of Regulation 2015/848 thus newly provides for the possibility of challenging before a court the decision opening main insolvency proceedings[29] on grounds of international jurisdiction. The purpose of the provision is to enhance the protection and legal certainty of the debtor and of the debtor's creditors in those areas where the rules incorporated in Regulation 1346/2000 were ineffective or entirely insufficient.

3.23. The new law is primarily connected with the phenomenon of forum shopping or insolvency/bankruptcy tourism, i.e. situations in which one of the parties to the insolvency proceedings endeavours to open the proceedings[30] in a State in which the party would have a more favourable position under the State's domestic legislation. At the same time, the new law is usually associated with the concept of COMI shifting, i.e. the frequently artificial, fictitious and ostensible transfer of the debtor's COMI between States for the purpose of securing advantages in the insolvency proceedings. The procedure under Article 5 of Regulation 2015/848 thus endeavours to introduce a mechanism that would provide an additional protection against such conduct.

3.24. However, the objective of Article 5 of Regulation 2015/848 is substantially broader than just protection against the artificial, fictitious and ostensible transfer of the COMI by the debtor. It also provides the same protection and legal standing to the debtors themselves. Consequently, and as mentioned above, this provision may be labelled as revolutionary for the extent of its effects on the decision on international jurisdiction in terms of the possibility to review the decision, both due to the fact that it prescribes essentially no limitations on the grounds for which the judgment opening insolvency proceedings may be challenged for lack of international jurisdiction, and with regard to the fact

LAW. FROM THE EUROPEAN INSOLVENCY REGULATION TO ITS RECAST [online], International Insolvency Institute (2016), et. 52. Available at: https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH%2C%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20%28EU%29.pdf (accessed on 12 August 2019).

[29] See Article 2(7) of Regulation 2015/848.

[30] See also Article 2(7) and (8) of Regulation 2015/848.

that this procedure is not subject to any temporal limitations (see below). It represents a substantive, directly applicable law. It is important to note that Article 5(1) of Regulation 2015/848 makes no reference to the *lex fori concursus,*[31] even though it provides for a procedure that could only be applied in the State where main insolvency proceedings are opened. Although there is as yet no or only marginal experience with the application of this instrument, it is – without exaggeration – one of the most important amendments of the law as compared to Regulation 1346/2000. At the same time, however, it is one of the basic instruments reinforcing the judicial protection of the main parties, i.e. creditors and the debtor.

3.25. Such protection, now represented by Article 5 of Regulation 2015/848, previously only depended on the procedural mechanisms afforded by the national legal systems of the EU Member States, namely the law of the State in which the main insolvency proceedings were opened. In some cases, though, the creditors and/or the debtor experienced major limitations in the application of such national procedural mechanisms; sometimes such procedural protection was entirely absent. This situation was the cause for major alarm from the perspective of the protection of fundamental rights, primarily the right to a fair trial, especially because the determination of the COMI in individual cases does not depend on objective criteria or, as applicable, only on criteria of an objective nature. Consequently, the determination of the COMI in individual cases was in fact often surprising in practice, despite the proclaimed basic criterion for the determination of the COMI, i.e. its ascertainability and predictability. Although there are political reasons preventing the EU from essentially admitting that the interests of the parties were consistently being jeopardised as a result of the unpredictable determination of the COMI, the reality in cross-border cases was frequently the opposite. But the EU structures or, as applicable, the EU legislation were obviously well aware of the fact, because Regulation 2015/848 also introduced other instruments protecting foreign creditors. Hence, the mechanism of protection against the determination of international jurisdiction, i.e. the determination of the debtor's COMI, as envisaged in Article 5 of Regulation 2015/848, may represent one of the fundamental turning points as regards the securing of judicial protection in cross-border insolvency

[31] Cf. Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 1, et. 153.

proceedings in EU law. In this regard, one must also bear in mind that the scope of the instrument laid down in Article 5 of Regulation 2015/848, including its temporal perspective (see below), is indeed very broad, and one may only hope that the rule meets the general expectations.

VI.2. Practices in Selected Member States as a Template for the Introduction of a New Defence Mechanism against Judgment Opening Insolvency Proceedings

3.26. As mentioned above, the changes in EU insolvency law were necessitated primarily, though not exclusively, by the increasing practice of forum shopping, when debtors picked out a more favourable forum and tried to fictitiously transfer the place of their main interests to States with a law that was more favourable to them. Gradually, over the course of the application of Regulation 1346/2000, England became an exceptionally popular destination for opening insolvency proceedings and attracted a number of debtors from other Member States, because its laws on insolvency proceedings allow for discharge within a year. Debtors in England may actually ask for an even faster discharge, which could be completed within several months. The reason is that insolvency proceedings in England are opened on the basis of information obtained from the debtor, without any closer examination of the corresponding factual background. If the debtor fails to truthfully describe their personal and financial situation, the creditors or insolvency practitioners may demand the cancellation of the insolvency order, but they must prove that the insolvency order was based on misleading or false statements of the debtor. Indeed, most of the remedies lodged in cross-border cases argue that the debtor's COMI is actually located in a country different from England.[32] In the interesting case of *Official Receiver* v. *Mitterfellner,* the court held that it suffices for the cancellation of the insolvency order if the debtor supplied the court with false information. This applies even if the debtor's statements are not relevant from the perspective of the assessment of the COMI.[33]

3.27. The possibilities of insolvency tourism and fictitious transfers of the COMI to England, as a very popular destination especially for German debtors, were undermined primarily in the 2011

[32] HLV Report, et. 150-151.

[33] REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016)., et. 101.

decision in *Steinhardt* v. *Eichler,*[34] when this particular procedure used by insolvent German debtors and the existing approach of English courts were beginning to represent a major problem of not only legal and financial dimensions, but also political ones.

3.28. Although the destination of such fictitious transfers of the COMI was not only England, but also Luxembourg and other countries, England became very popular in this regard. Transfers of the COMI were unexceptionally offered by specialised agencies in the form of various packages of services, and sometimes these services were even advertised in the media. There are two grounds for which this decision must be perceived as important. It was the decision in *Steinhardt* v. *Eichler* that resulted in the introduction of two new requirements for the transfer of the COMI in the decision-making practice, at least as concerns the approach adopted by English courts. Firstly, the debtor must present evidence to the court proving that the debtor's COMI is undoubtedly located in England. Secondly, the debtor must inform their creditors that the debtor's insolvency status has changed regarding the location, and that the debtor intends to file for insolvency in the State to which the debtor has transferred their COMI. The purpose of this requirement is to persuade the creditors to take steps against the debtors before the judgment opening insolvency proceedings is issued, primarily in the State in which the COMI is currently located in the eyes of the creditors.

3.29. Indeed, the decision in *Steinhardt* v. *Eichler*[35] was followed by an increased number of cases in which the creditors (usually from Ireland or Germany)[36] challenged in English courts the debtor's statement regarding the debtor's habitual residence or, as applicable, regarding the alleged location of the debtor's COMI in England. Hence, the expanding insolvency tourism ultimately encountered resistance from the judiciary and the creditors even in England itself, although the media and political pressure from other Member States, from which the debtors fictitiously relocated to England, certainly played their part.

3.30. However, as mentioned above, the problem was not limited to transfers of the COMI to England, although this practice apparently concerned the largest number of cases so far, at least those cases which were recorded and publicised. Judgments

[34] Decisions of *Chief Registrar Baister* of 30 June 2011 and 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation: [2011] BPIR 1293.

[35] Decisions of Chief Registrar Baister of 30 June 2011 and 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation: [2011] BPIR 1293.

[36] See also statistical overviews in: IAIN RAMSAY, PERSONAL INSOLVENCY IN THE 21st CENTURY: A COMPARATIVE ANALYSIS OF THE US AND EUROPE, Oxford: Bloomsbury Publishing (2017), et. 181 (for more details see elsewhere in this commentary on Article 5 of Regulation 2015/848).

opening insolvency proceedings under Regulation 1346/2000 were also challenged in other States. For instance, the French Court of Appeal in Colmar (*Cour d'appel Colmar*) delivered a decision in a case opened by an action lodged by a creditor, whereby the court cancelled the debtor's discharge on grounds that the debtor had achieved the discharge as a result of the abuse of a right.[37] The French court held that the debtor unlawfully pretended that their place of residence was in France. In actual fact, however, the debtor – who lived and worked in Germany [DEU] – had only rented his apartment in France in order to open insolvency proceedings in France and enjoy the benefits offered by the French Commercial Code, which he would not have enjoyed under German law.[38]

3.31. In another case in Germany, a creditor of a Greek debtor – a subsidiary of a German company – requested a review of the judgment opening insolvency proceedings against the Greek company by a German court. The court, however, denied the request and ruled that German insolvency proceedings had universal effects vis-à-vis the debtor's assets all over the world.[39]

3.32. The new rule enshrined in Article 5(1) of Regulation 2015/848 thus primarily has regard to the practice of courts in selected countries, although the rule will for some time apparently meet with obstacles consisting in the procedures applied in selected Member States. Regardless of the fact that this rule may be controversial from the perspective of certain countries, it undoubtedly enhances legal certainty and helps to prevent unfair transfers of the COMI, especially for creditors. But its advantages are undeniable even in those cases where the procedure is employed by the debtors themselves as persons with legal standing directly under Article 5(1) of Regulation 2015/848.

3.33. The possibility of challenging the decision opening main insolvency proceedings under Regulation 1346/2000 only according to the *lex fori concursus* was, in most Member States (according to the available information), only favourable to the debtors themselves or to those creditors who filed a request for opening insolvency proceedings. Hence, Article 5 of Regulation 2015/848 is often deemed important specifically for the extension of the category of persons or entities who may employ

[37] Judgment of the Court of Appeal in Colmar (*Cour d´appel Colmar*), case no. 1 and 11/01869 of 13 December 2011. Here according to: CHRISTOPH G. PAULUS, EUROPÄISCHE INSOLVENZVERORDNUNG: KOMMENTAR (Frankfurt a. M.: Fachmedien Recht und Wirtschaft / dfv Mediengruppe 5th ed., 2017), commentary on Article 33 of Regulation 2015/848, marg. 12, et. 386, note 40.

[38] See HLV Report, et. 195.

[39] See HLV Report, et. 140.

the applicable defence mechanisms – it now covers all creditors. Similarly to the expansion of the unfair insolvency tourism of debtors, statements regarding the location of the COMI were often abused by the creditors as well. This was frequently facilitated by the inconsistent, sometimes almost lax approach of the insolvency courts, which, at least in certain countries, often opened the main insolvency proceedings automatically and without a rigorous, or indeed any, examination of the COMI. The opening of insolvency proceedings in *insolvency* cases thus often became a *chase* for the earliest opening of the main insolvency proceedings based on the priority of earlier proceedings,[40] with no effective defence against such decisions. Hence, awarding legal standing to **all creditors, as well as debtors,** is fully adequate.

3.34. Article 5(1) of Regulation 2015/848 thus simultaneously represents a mechanism supporting the adherence to and application of the procedure under Article 4 of Regulation 2015/848 (quoted above), as well as protection against a – by no means exceptional and, unfortunately, very frequent – abuse of the artificially established COMI, i.e. a connecting factor that varies in time, and that, depending on the circumstances, could be perceived very subjectively. These negative effects of the definition of the COMI are not entirely eliminated by Article 5 of Regulation 2015/848, but the provision at least provides another possible defence against the abuse of the rules on international jurisdiction under the EU insolvency law.

VII. The Nature of Law and of the Instrument of Challenging a Judgment Opening Insolvency Proceedings

3.35. Contrary to the obligations of insolvency courts under Article 4 of Regulation 2015/848 quoted above, Article 5 provides for a court review of jurisdiction at the request of the debtor or any of the creditors. As I shall analyse in greater detail in connection with the relationship between the procedure under Article 5(1) of Regulation 2015/848 and the *lex fori concursus*, the mechanism laid down in Article 5(1) of Regulation 2015/848 is a fully independent and autonomous instrument provided for in directly applicable EU legislation. In other words, it is not a remedy in terms of the procedural mechanisms under the *lex fori concursus*. The application and scope of application of the procedures under the *lex fori concursus* are governed only

[40] See Article 3(3) of Regulation 2015/848 or Article 3(3) of Regulation 1346/2000, as applicable.

by Article 5(2) of Regulation 2015/848, not by Article 5(1) of Regulation 2015/848, because the essence of the mechanism under Article 5(1) of Regulation 2015/848 is independent of the national law applicable to the insolvency proceedings.

3.36. These new rules in the EU insolvency law are based on a Commission Proposal, and they regard a series of judgments (see especially the decisions in *Sparkasse Hannover*,[41] *Sparkasse Hilden Ratingen*,[42] *Steinhardt* v. *Eichler*,[43]

[41] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768.

[42] Decision of England and Wales High Court of Justice, Chancery Division, Birmingham District Registry (Judge *Purple QC)* [GBR], No. 957 of 2010, in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The official Receiver* of 29 August 2012, neutral citation: [2012] EWHC 2432, available at: http://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html (accessed on 10 August 2019).

[43] Decisions of Chief Registrar Baister of 30 June 2011 and 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation: [2011] BPIR 1293. In this case, the Registrar cancelled its own 2007 decision opening insolvency proceedings and issued a separate decision four years later in which the Registrar declared that the debtor's COMI was not located in England and Wales.
Similarly also:

Decision in *Schrade* v. *Sparkasse Ludenchild*, neutral citation [2014] EWHC 1049 (ch), or
Decision of High Court of Justice, Chancery Division, Birmingham District Registry (Justice *Purple QC)* [GBR], No 957 of 2010, in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The Official Receiver* of 29 August 2012 neutral citation: [2012] EWHC 2432; the decision is available at: http://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html (accessed on 10 August 2019).
Decisions of Recorder Neil Cadwallader of 19 May 2010 and 07 June 2010 in *Hagemeister*, neutral citation: [2010] BPIR 1093. This decision is annotated in greater detail below. See *Sealy, L., S. et Milman, D.* Annotated Guide to the Insolvency Legislation. London: Sweet& Maxwell, 2011, et. 265, 272, or
Decision in *Hunt* v. *Fylde BC*, neutral citation: [2008] BPIR 1368. See *Sealy, L., S. et Milman, D.* Annotated Guide to the Insolvency Legislation. London: Sweet& Maxwell, 2012, et. 330.
In all four last mentioned cases cf. also IAIN RAMSAY, PERSONAL INSOLVENCY IN THE 21st CENTURY: A COMPARATIVE ANALYSIS OF THE US AND EUROPE, Oxford: Bloomsbury Publishing (2017), et. 181, marg. 137. The same author also offers an interesting statistical overview concerning insolvency tourism with attempts to transfer the registered office to England and Wales in the period from 2008 to 2013. This overview, adopted from *The Insolvency Service*, indicates that the persons who attempted such insolvency tourism to England and Wales in the respective period were primarily debtors from Germany [DEU] (numbers: 2008 – 43 debtors, 2009 – 107 debtors, 2010 – 103 debtors, 2011 – 141 debtors, 2012 – 141 debtors and 2013 – 63 debtors), whereas the numbers from other countries are zero or close to zero. The second-ranking country (after Germany, but with significantly lower numbers) is only Ireland in 2011 – 2013.

Irish Bank v. *Quinn*,[44] *Official Receiver* v. *Mitterfellner*[45]) in which especially, though not exclusively, the English courts or indeed courts of the *common law* countries, reviewed their jurisdiction and held of their own motion that a transfer of the centre of main interests was unfair.[46] At the same time, these States allowed a separate request for cancelling the decision opening main insolvency proceedings, especially if new circumstances transpired or if the creditor was unable to defend their interests before the decision opening the main insolvency proceedings became final. These mechanisms are primarily connected with the specific aspects of opening insolvency proceedings, especially under English law, where the decision on the request for opening proceedings is in principle made immediately, and it is often permitted to prove the location of the COMI merely

[44] Decision of High Court of Justice in Northern Ireland, Chancery Division (Bankruptcy) [GBR] Case No 2011 No. 133303, of 10 January 2012, in *Irish Bank Resolution Corporation Ltd* v. *John Ignatius Quinn (also known as Sean Quinn)*, neutral citation [2012] NICh 1. In this case, the court refused to recognise an attempt of an Irish businessman to transfer the COMI to England in view of a much shorter time needed for debt discharge. See also PETER STONE, EU PRIVATE INTERNATIONAL LAW (Edward Elgar Publishing 3rd ed., 2014), et. 530.
Similarly also in:

Decision of England and Wales High Court, Chancery Division, London No 1789 et 1794 of 2012, of 21 December 2012, in *Brian O´Donnell et Mary Patricia O´Donnell* v. *The Governor and Company of the Bank of Ireland*, neutral citation [2012] EWHC 3749 (Ch), available online at: http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2011/3749.html&query=(.2012.)+AND+(EWHC)+AND+(3749) (accessed on 10 August 2019). The decision also indicates that the debtor is authorised to transfer the COMI to another State, but he or she is obliged to provide evidence thereof that proves, inter alia, that the change of the COMI was also known to third parties at the time of the transfer. Any debtor transferring their COMI to another State should, for instance, consider an announcement to the debtor's creditors or any other measure to make such transfers public. However, as the decision in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk et The Official Receiver*, mentioned elsewhere in this article, indicates, it is necessary to provide such information or make it publicly available to all creditors. Selective choice of informed creditors may be classified in individual cases as fraudulent conduct;

Decision of High Court of Justice, Chancery Division, Birmingham District Registry (Justice *Purple QC)*, No 957 of 2010, in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The Official Receiver* of 29 August 2012 neutral citation: [2012] EWHC 2432; the decision is available at http://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html (accessed on 10 August 2019). In this case, the German debtor (Mr Benk) claimed the transfer of his COMI to England, where he succeeded with his request for opening insolvency proceedings. *Sparkasse Hilden Ratingen Velbert* subsequently requested the cancellation of the judgment opening insolvency proceedings, arguing that Mr Benk's COMI de facto remained in Germany at the relevant time and claiming a lack of international jurisdiction of the English court. The court performed a detailed examination of all circumstances relevant for the COMI and found, for instance, that the insolvent debtor announced the transfer of his COMI to a number of creditors by registered letter, but failed to inform *Sparkasse Hilden Ratingen Velbert,* to which he owed approx. EUR 3 mil.;

Decision of *High Court of Justice, London, Chancery Division*, in *Sparkasse Bremen AG* v. *Armutcu*, neutral citation [2012] EWHC 4026 (Ch);

See also PETER STONE, EU PRIVATE INTERNATIONAL LAW, (Edward Elgar Publishing 3rd ed., 2014), et. 530.

[45] Decision of Chief Registrar Baister in *Official Receiver* v. *Mitterfellner* of 10 June 2009, neutral citation [2009] BPIR 1075.

[46] REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 99.

by a Statement of Affairs presented by the debtor or claimant themselves.

3.37. Hence, Article 5(1) of Regulation 2015/848 provides the debtor and/or the debtor's creditors with the possibility (right) of challenging the decision opening main insolvency proceedings. The provision is a directly applicable EU rule, which applies regardless of whether or not the debtor or the creditors enjoy that right under the *lex fori concursus*.

VIII. The Legal Standing to Make Use of the Mechanism under Article 5(1) of Regulation 2015/848

3.38. The mechanism under Article 5(1) of Regulation 2015/848 benefits solely (i) the creditors and (ii) the debtor.

3.39. In this regard, Regulation 2015/848 does not distinguish between domestic and foreign creditors and debtors. Hence, the right to challenge the judgment opening insolvency proceedings also benefits domestic creditors, i.e. all creditors other than those who may be subsumed under the definition of a foreign creditor.[47] An analogous conclusion holds true for a debtor who has their COMI in the State in which the court is located that issued the decision opening the proceedings. It is irrelevant if the case exhibits a special cross-border element of any kind at the moment at which the judgment opening the insolvency proceedings is challenged. Regulation 2015/848 applies to that case as well (with specific exceptions). Indeed, the Regulation itself does not refer to foreign creditors in Article 5 of Regulation 2015/848, although it otherwise consistently uses this term, even in the sense of the above-mentioned definition of a foreign creditor.[48] Consequently, any creditors may fully avail themselves of the mechanism envisaged in Article 5(1) of Regulation 2015/848.

3.40. This means that the decision opening main insolvency proceedings may conceivably be challenged by a domestic creditor or a domestic debtor seeking a positive decision confirming that the proceedings were opened. After all, the fact itself that a domestic creditor or a *domestic debtor* challenge the jurisdiction of the court using the mechanism under Article 5(1) of Regulation 2015/848 means that the creditor or the debtor, respectively, invoke cross-border aspects or the absence

[47] See Article 2(12) of Regulation 2015/848 (quote): [...]*'foreign creditor' means a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States*;[...].

[48] See Article 2(12) of Regulation 2015/848.

thereof, because a domestic creditor must logically claim that the debtor's COMI is not located in the State of their domicile.

3.41. Article 5(1) of Regulation 2015/848 does not specify the category of creditors who may invoke the procedure provided for in that provision. The word *creditor* with no adjective attached only emphasizes that it may indeed be any of the debtor's creditors. It must be a person who has or asserts their own claim. In this connection, Prof. Mankowski points out the potentially special status of claimants filing class actions, such as persons representing a particular class of claims (such as employment claims).[49] It is important to establish in this regard whether the assignment of the particular person involved in the insolvency proceedings is to assert and enforce a particular claim or claims. Prof. Paulus correctly emphasizes that the person must be a creditor connected to the proceedings[50] in which the international jurisdiction is challenged.

3.42. It is unimportant, in this respect, whether the creditor invoking Article 5(1) of Regulation 2015/848 has already asserted their claim or succeeded in doing so. Indeed, it would be unacceptable if, for instance, a creditor who has already filed their claim would lose their status as a creditor in the particular insolvency proceedings in the course of the proceedings initiated under Article 5(1) of Regulation 2015/848 on grounds of a successful denial of the creditor's claim. This would result in a corresponding dismissal of the creditor's petition under Article 5(1) of Regulation 2015/848 only and without any examination of the merits, due to the absence of the creditor's legal standing. Naturally, legal standing must be examined as a preliminary issue in the proceedings under Article 5(1) of Regulation 2015/848, but the assessment thereof cannot depend on whether or not such a claim is recognised in the insolvency proceedings themselves or in any potential incidental dispute. It is therefore sufficient if a person, for the specific reason of proving legal standing under Article 5(1) of Regulation 2015/848, presents sufficient evidence that they are or may be a creditor with relation to a particular, unambiguous and clearly specified claim. Indeed, despite the need to examine the claimant's legal standing, the purpose of the proceedings under Article 5(1) of Regulation 2015/848 is not the assessment of the claimant's claim.

[49] PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 8, et. 154.

[50] CHRISTOPH G. PAULUS, EUROPÄISCHE INSOLVENZVERORDNUNG: KOMMENTAR. (Frankfurt a. M.: Fachmedien Recht und Wirtschaft / dfv Mediengruppe 5th ed., 2017), commentary on Article 5 of Regulation 2015/848, marg. 4, et. 213-214, here et. 214.

IX. The Judgment Opening Insolvency Proceedings as an Object of Procedure under Article 5(1) of Regulation 2015/848

3.43. The object challenged by the procedure under Article 5(1) of Regulation 2015/848 is always a judgment opening insolvency proceedings. The *judgment opening insolvency proceedings* is a term defined in Article 2(7) of Regulation 2015/848.[51] Article 2(7) of Regulation 2015/848 indicates that a judgment opening insolvency proceedings denotes a situation in which the court has arrived at a positive conclusion regarding its international jurisdiction, which resulted in the opening of the insolvency proceedings. The fact that this involves cases in which the court decision under Article 2(7) of Regulation 2015/848 is positive and the court declares or confirms its jurisdiction to open and conduct main insolvency proceedings follows relatively clearly from all of the language versions of Regulation 2015/848.[52]

3.44. Article 5(1) of Regulation 2015/848 thus does not apply to cases in which the court[53] made a contrary ruling, i.e. that it lacks international jurisdiction, and issued a corresponding decision denying the request for opening insolvency proceedings. Such a negative decision of the court may only be challenged by instruments provided for under the *lex fori concursus,* if the law applicable to the decision allows any remedy or any other procedural defence mechanism. This conclusion is only logical, because one can assume that in many cases the request for opening insolvency proceedings will be filed in another State after a negative court decision. whereby it refuses its international jurisdiction, and it is necessary to make sure that the only bodies authorised to examine their own jurisdiction are the authorities of the other State. Indeed, the mechanism under Article 5(1) of Regulation 2015/848 may in such case be used in that other State which ultimately confirms its international jurisdiction and opens the insolvency proceedings.

3.45. The cases adjudicated in selected countries before the adoption of Regulation 2015/848 demonstrate that analogous mechanisms based on the national law of these States are also

[51] Article 2(7) of Regulation 2015/848 (quote): " ‚judgment opening insolvency proceedings´ includes (i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and (ii) the decision of a court to appoint an insolvency practitioner; [...]."

[52] For an identical opinion, see also PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 4, et. 154. In this regard, Prof. Mankowski makes a comparison with the English version of Regulation 2015/848 and emphasizes the word *opening* in the phrase *judgment opening insolvency proceedings*.

[53] In this case, however, it means the court pursuant to Article 2(6)(ii) of Regulation 2015/848.

applicable in these countries against negative decisions relying on the conclusion as to the lack of the court's own international jurisdiction.[54] If the *lex fori concursus* of a State also allows a decision to be challenged denying the opening of insolvency proceedings on grounds of a lack of international jurisdiction, such a procedure may naturally be applied in the particular case. But it is not the procedure under Article 5(1) of Regulation 2015/848, it is a procedure governed exclusively by the *lex fori concursus*. As we shall see below, in the paragraphs dealing with the relationship between the procedure under Article 5(1) of Regulation 2015/848 and other defence mechanisms against a decision on a request for opening insolvency proceedings, these are two entirely separate, mutually independent and parallel procedures. This makes it even less permissible to make the procedure under Article 5(1) of Regulation 2015/848 dependent, for instance, on the issue of whether the claimant, i.e. a person with legal standing, exhausted all other measures under the *lex fori concursus*. The assessment of whether the mechanism under Article 5(1) of Regulation 2015/848 may be applied must be governed exclusively by this particular provision, and under no circumstances may it be limited by the *lex fori concursus*.

3.46. Whether the decision in a particular case is indeed a judgment opening insolvency proceedings in terms of Article 2(7) of Regulation 2015/848 must always be assessed on a case-by-case basis, according to the actual contents of the decision and from the perspective of the definition provided for in Article 2(7) of Regulation 2015/848. Some situations may raise certain doubts, such as certain preliminary or interim measures[55] issued at the stage at which the court is deciding on the request for opening insolvency proceedings. Such moot cases therefore require that one first answer the question of whether or not the contested decision is a judgment opening insolvency proceedings pursuant to Article 2(7) of Regulation 2015/848.

3.47. The procedure under Article 5(1) of Regulation 2015/848 shall also not apply to actions deriving from insolvency proceedings

[54] See also decision of High Court of Justice in Northern Ireland, Chancery Division No 2002 No: 032846, of 07 February 2017, in the case of the debtor *Antonio Macari* Neutral citation: [2017] NICh 5, of 07 February 2017. Available online at:
http://www.bailii.org/cgi-bin/format.cgi?doc=/nie/cases/NIHC/Ch/2017/5.html&query=(Mitterfellner) (accessed on 10 August 2019). The action in the said case was filed by the debtor himself against the decision whereby the opening of insolvency proceedings was refused in Northern Ireland on the grounds of absence of the COMI. The court dismissed the action, because the transfer of the COMI from Ireland to Northern Ireland was proven neither in the said proceedings, nor in connection with the request itself for opening insolvency proceedings.

[55] Cf. also Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 4, et. 154.

and closely linked with them.[56/57] Hence, Article 5, together with Article 4 of Regulation 2015/848, are directly linked and only cover judgments opening insolvency proceedings. This case also requires a precise definition of the *judgment opening insolvency proceedings* under Article 2(7) of Regulation 2015/848, in conjunction with Article 3 of Regulation 2015/848, and its application to the particular case. It is also necessary to re-emphasise the purpose of the mechanism under Article 5(1) of Regulation 2015/848 (see also the separate section in this article below). Consequently, Article 5(1) of Regulation 2015/848 only relates to decisions opening main insolvency proceedings. Its application to secondary[58] or territorial[59] proceedings is excluded. This is also associated with the fact that the purpose of that mechanism is to afford sufficient protection against those decisions in which the court arrives at a positive conclusion regarding the existence of the COMI in the State where the court that opened the main insolvency proceedings is located. This is the only State in which the procedure may be used.

3.48. The court in which the decision opening main insolvency proceedings under Article 5(1) of Regulation 2015/848 may be challenged must be a court in the strict sense of the word, i.e. a court as an authority with judicial power.[60] In those cases where its jurisdiction in individual States is also or may be examined

[56] See Article 6 of Regulation 2015/848 (quote):

> 1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. 2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012. (-)The first subparagraph shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate. 3. For the purpose of paragraph 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceeding.

[57] In this connection, Prof. Mankowski also highlights the structure of Regulation 2015/848 and the importance of the fact that the rules regulating the defence mechanism under Article 5 of Regulation 2015/848 precede Article 6 of Regulation 2015/848. Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 7, et. 154.

[58] See Article 3(2) of Regulation 2015/848. Article 3 of Regulation 2015/848 is quoted above in this paper.

[59] See Article 3(4) of Regulation 2015/848. Article 3 of Regulation 2015/848 is quoted above in this paper.

[60] See Article 2(6)(i) of Regulation 2015/848 (quote):

> [...]´´court´´ means: (i) in points (b) and (c) of Article 1(1), Article 4(2), Articles 5 and 6, Article 21(3), point (j) of Article 24(2), Article 36 and 399, and Articles 61 to 77, the judicial body of a Member State; (ii) in all other articles, the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings;[...].´

under the *lex fori concursus* by a private-law entity before which the proceedings are opened, it is always an authority with judicial power that has this jurisdiction under Article 5(1) of Regulation 2015/848. Which particular court this is in any given State is to be determined according to the rules on jurisdiction of the *lex fori concursus*. In most cases, this court will be identical to the court with jurisdiction to hear all other issues relating to the given insolvency proceedings, but it need not always be the case. Just like in all similar cases, Regulation 2015/848 does not interfere with the issue of jurisdiction of a particular judicial authority competent to rule on a petition under Article 5(1) of Regulation 2015/848.

X. Grounds for Challenging a Judgment Opening Insolvency Proceedings under Article 5(1) of Regulation 2015/848

X.1. Grounds for Challenging a Judgment

3.49. The grounds for reviewing a prior judgment opening insolvency proceedings for a lack of jurisdiction are entirely unlimited. New evidence may appear concerning the debtor's COMI, or the opening of main insolvency proceedings may be tainted by fraud, including such extreme situations as a decision opening main insolvency proceedings and, consequently, recognition of the COMI in the State of the main proceedings achieved by way of corruption. Hence, the main insolvency proceedings may have been opened on the basis of misleading and fabricated facts, as a result of insufficient information or because of the withholding of key facts of the case.[61]

3.50. Consequently, the factual grounds for challenging the judgment opening insolvency proceedings under Article 5(1) of

[61] *Wessels, B.* EU Cross-Border Insolvency Court-to-Court Cooperation Principles, March 2014 version. Available online at http://bobwessels.nl/site/assets/files/1654/2014-03-21-first-public-draft-eu-judgeco-principles.pdf (accessed on 10 August 2019). The author invokes Principle 10 of court-to-court cooperation regarding the correction of already issued decisions (et.50) (quote):

> 1. Where *main insolvency* proceedings are pending in another State, the court that is deciding whether to open secondary proceeding may postpone its decision where it becomes aware of evidence which warrants such action. Such evidence may include evidence that (i) there was fraud in the opening of the foreign *main insolvency* case, or that (ii) the foreign *main insolvency* case was opened in the absence of international jurisdiction as provided in Article 3 of the EIR. 2. Where *main insolvency* proceedings are pending in another State, the court that has opened secondary proceeding may postpone a hearing where it becomes aware of evidence in the meaning of paragraph 1 or may in such a case revoke its decision if national law allows such revocation.

Wessels, B. invokes, inter alia, the decisions of Chief Registrar Baister of 30 June 2011 and of 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation [2011] BPIR 1293, primarily marg. 190 and 191 of the decision.

Regulation 2015/848 may vary, but they must always concern international jurisdiction.[62] Regulation 2015/848 intentionally desists from any limitation of the grounds, because these cases are essentially incapable of being fully subsumed under a clearly and unambiguously articulated rule. These grounds may also consist in the erroneous or unusual application of the law by the court if, for instance, other main insolvency proceedings are erroneously opened against the same debtor and no other mechanism exists or is available due to the stage of the insolvency proceedings that would ensure proper application of the principle of precedence of the main insolvency proceedings that had been opened earlier.[63]

3.51. The grounds for applying this procedure usually rely on factual issues.[64] However, this may also involve cases, as mentioned above, in which the information provided by the debtor with respect to the centre of main interests (COMI) of the debtor is incorrect, misleading or incomplete (see also the decisions in *Hiwa Huck*,[65] *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*,[66] *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The Official Receiver*,[67]

[62] Naturally, it is not prohibited to challenge other types of jurisdiction, such as subject-matter, territorial or institutional jurisdiction within the limits of a particular Sate, but the procedure in such cases is always governed by the *lex fori concursus*. The procedure under Article 5(1) of Regulation 2015/848 applies only to international jurisdiction. Cf. also Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 6, et. 154.

[63] Decisions of Recorder Neil Cadwallader of 19 May 2010 and 07 June 2010 in *Hagemeister*, neutral citation: [2010] BPIR 1093. In *Hagemeister* the English court did not have international jurisdiction to open main insolvency proceedings, because the main proceedings had been previously opened in Germany. The decision opening main insolvency proceedings was therefore cancelled by the English court upon a separate motion. The procedure applied in this case was necessary from the procedural perspective in order to allow the conduct of the previously opened insolvency proceedings.

[64] REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 99.

[65] Decision of Chief Registrar Baister of 10 December 2010 in *Official Receiver* v. *Hiwa Huck*, neutral citation [2011] BPIR 709. See also Bankruptcy and Personal Insolvency Reports, available at: http://www.jordanpublishing.co.uk/practice-areas/insolvency/news_and_comment/re-hiwa-huck-official-receiver-v-hiwa-huck-2011-bpir-709#.V7SNoyiLTIW (accessed on 05 April 2019). See also HLV Report, et. 214-215. The decision is annotated elsewhere in this paper, because the respective case has a closer connection to Article 5(2) of Regulation 2015/848 than to Article 5(1) of Regulation 2015/848 from the perspective of legal standing and grounds. But the decision mentions a broad spectrum of the grounds that may be invoked specifically in the case of actions filed by creditors or by the debtor under Article 5(1) of Regulation 2015/848.

[66] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768.

[67] Decision of High Court of Justice, Chancery Division, Birmingham District Registry (Justice *Purple QC)* [GBR], No 957 of 2010, in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The Official Receiver* of 29 August 2012, neutral citation: [2012] EWHC 2432; the decision is available at: http://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html (accessed on 10 August 2019).

The Official Receiver v. *Mitterfellner*,[68] *Steinhardt* v. *Eichler*,[69] *Official Receiver* v. *Eichler*[70]).

X.2. Burden of Proof

3.52. Article 5(1) of Regulation 2015/848 makes no reference to the claimant's burden of proof. The reason is that the broad category of situations which may occur in the application of this procedure prevent any unambiguous determination of the person or entity that has the burden of proof.

3.53. For an interesting example of an entire series of English decisions regarding a fictitious transfer of the COMI (in this case, habitual residence), although the mechanism under Article 5(1) of Regulation 2015/848 is by no means targeted merely at the protection against such cases, see the decision in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*.[71] Mr Körffer (debtor), a German citizen, was for 33 years an employer of the creditor, the German bank Sparkasse Hannover, which had a claim against Mr Körffer in connection with the extension of a loan. Sparkasse Hannover was surprised to learn in late 2008 that the debtor had filed for insolvency in England, claiming to have transferred his habitual residence to London. Sparkasse Hannover responded with an action challenging the judgment opening these insolvency proceedings. It succeeded in proving that the debtor had not transferred their COMI to England and thus managed to have the judgment opening insolvency proceedings cancelled. This decision is also significant from the perspective of the burden of proof, because the general rule is that the burden of proof lies primarily with the claimant who files a separate action contesting the debtor's COMI and, consequently, the international jurisdiction of the court which opened the main insolvency proceedings. However, this conclusion cannot be made categorically and in all cases, due to all of the potential situations that may occur. Indeed, the court held in its decision, inter alia, that despite the claimant's general burden of proof, the debtor may also not be entirely free of the burden of proof if and with respect to the circumstances that the debtor had failed to inform the debtor's creditors regarding the

[68] Decision in *Official Receiver* v. *Mitterfellner*, neutral citation [2009] BPIR 1075. The court in this case made a ruling regarding the COMI when the court held that the place of the COMI also requires an element of performance/active pursuit of activity, etc.

[69] Decisions of Chief Registrar Baister of 30 June 2011 and 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation: [2011] BPIR 1293.

[70] Decision of Chief Registrar Baister of 19 June 2007 in *Official Receiver* v. *Eichler*, neutral citation [2007] BPIR 1636.

[71] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768.

alleged relocation to another State and filing for insolvency, if one of the debtor's creditors challenges the debtor's statements regarding the COMI.[72] The procedure in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*[73] was a procedure under English law (according to the English *lex fori concursus*), and a case which was governed solely by Regulation 1346/2000 that did not provide for any mechanism analogous to Article 5(1) of Regulation 2015/848, yet it is a decision also very representative with respect to the interpretation of Article 5(1) of Regulation 2015/848, and possibly, the determination of future limits of the application thereof. The reason is that the situations fully corresponded to the purpose of Article 5(1) of Regulation 2015/848, as in a whole number of similar cases, primarily from England.

3.54. Hence, even though the commonly used procedural rule that stipulates that the claimant is obliged to adduce the relevant statements and bears the corresponding burden of proof is not generally excluded in the application of Article 5(1) of Regulation 2015/848, the burden of proof may transfer to another party, if the procedure applies and depending on the circumstances. As *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*[74] shows, the creditor may be the claimant, but the creditor may be objectively incapable of proving their statements, as such statements consisting in a negative fact (for example, the failure to inform the creditor or the creditor's ignorance). However, the burden of proof may also lie with both parties, i.e. the debtor may be obliged to prove that the debtor informed the creditor or, as applicable, took steps as a result of which the transfer of the COMI to another Member State became known generally, including to the particular creditor. At the same time, the creditor may be obliged to prove, depending on the circumstances, that the creditor did not neglect their claims and exerted such care that could generally be requested or expected of the creditor.

3.55. Most of the examples described above are governed by Regulation 1346/2000 and thus rely on national insolvency mechanisms. Though they concern cases where the transfer of the COMI is challenged by the creditor, a contrary situation may happen as well.[75] Article 5(1) of Regulation 2015/848 opens this

[72] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775, marg. 68 and 69.

[73] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768.

[74] Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768.

[75] See also decision of High Court of Justice in Northern Ireland, Chancery Division No 2002 No:

procedure not only to creditors, but also to debtors, to the same extent. This confirms the repeatedly mentioned broad scope of the law as concerns the factual situations to which it applies, as well as the necessity of a flexible approach to the burden of proof.

XI. The Relationship between the Mechanism under Article 5(1) of Regulation 2015/848 and *Lex Fori Concursus*

XI.1. The Autonomous Nature of Procedure under Article 5(1) of Regulation 2015/848 and the Parallel Application of the Mechanisms Provided for under *Lex Fori Concursus*

3.56. The influence of the common law and primarily the English practice and standards under the law of England and Wales is clear. It has also been invoked by the Commission in connection with the proposal for new rules now incorporated in Article 5(1) of Regulation 2015/848. This is the reason why the previous English rules may also be considered as an important, though by no means literally applicable, source of interpretation. This further increases the importance of the relationship between Article 5(1) of Regulation 2015/848 and the defence mechanisms provided for and afforded by the *lex fori concursus*.

3.57. Hence, the first paragraph of Article 5 of Regulation 2015/848 newly provides that the debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction. One may detect a certain connection to the decision in *Eurofood* in which the Court of Justice (ECJ) held that if an interested party, taking the view that the centre of main interests of the debtor is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the international jurisdiction assumed by the court that opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the

032846, of 07 February 2017, in the case of the debtor *Antonio Macari*, neutral citation: [2017] NICh 5. Electronic version available at: http://www.bailii.org/cgi-bin/format.cgi?doc=/nie/cases/NIHC/Ch/2017/5.html&query=(Mitterfellner) (accessed on 10 August 2019). The action in the case was filed by the debtor himself against the decision whereby the opening of insolvency proceedings was refused in Northern Ireland on grounds of the absence of the COMI. The court dismissed the action, because the transfer of the COMI from Ireland to Northern Ireland was proven neither in the proceedings, nor in connection with the request itself for opening insolvency proceedings.

national law of that Member State against the opening decision.[76] But the decision in *Eurofood* concerned a broader definition of beneficiaries compared to Regulation 2015/848, and it primarily concerned a mechanism relying on the national law of the State in which the proceedings were opened. The first paragraph of Article 5 of Regulation 2015/848 thus newly provides for a unique procedure independent of the *lex fori concursus*; this clearly follows from the comparison of the two paragraphs of Article 5 of Regulation 2015/848.

3.58. Consequently, the principal conclusion is that the procedure under Article 5 of Regulation 2015/848 does not represent a remedy against the decision opening **main insolvency** proceedings that arises from national law,[77] but it is a unique procedure for filing a petition that has essentially been adopted from the procedural cultures of *common law*.[78] This applies in spite of the fact that the procedure under Article 5(1) of

[76] *Eurofood*, paragraph 43.

[77] See Article 2(7) of Regulation 2015/848.

[78] Reinhard Bork et Renato Mangano refer in this regard to the following cases (REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 99, note 89), when a prior decision approving the relocation of the COMI to a different state was reversed by a separate action filed by a creditor and supported with new and later evidence:

Decision of *Chief Registrar Baister* of 15 February 2011 in *Sparkasse et Hannover Bank* v. *The Official Receiver et Peter Johann Joseph Körffer*, neutral citation [2011] BPIR 775 / [2011] BPIR 768. This illustrates the British approach – even if it was proven that the COMI had actually been transferred to another state, that conclusion can be refuted later on the basis of a new (separate) action of a creditor supported by new evidence.

Decision of High Court of Justice, Chancery Division, Birmingham District Registry (Justice *Purple QC)* [GBR], No 957 of 2010, in *Sparkasse Hilden Ratingen Velbert* v. *Horst Konrad Benk* et *The Official Receiver* of 29 August 2012 neutral citation: [2012] EWHC 2432; the decision is available at http://www.bailii.org/ew/cases/EWHC/Ch/2012/2432.html (accessed on 10 August 2019).

Decisions of Chief Registrar Baister of 30 June 2011 and 27 July 2011 in *Steinhardt* v. *Eichler*, neutral citation: [2011] BPIR 1293. This illustrates the *common law* approach – even if it was proven that the COMI had actually been transferred to another state, that conclusion can be refuted later on the basis of a new (separate) action of a creditor supported by new evidence.

Decision of High Court of Justice in Nothern Ireland, Chancery Division c. 2011 No. 1333034, of 10 January 2012, in *Irish Bank Resolution Corporation Ltd* v. *John Ignatius Quinn (also known as Sean Quinn)*, neutral citation: [2012] NICh 1-[2012] EIRCR(A) 351, available online at http://www.bailii.org/cgi-bin/format.cgi?doc=/nie/cases/NIHC/Ch/2012/1.html&query=(.2012.)+AND+(NICh)+AND+(1) (accessed on 16 February 2020).

Decision in *Official Receiver* v. *Mitterfellner*, neutral citation [2009] BPIR 1075. Annotated below.

Other similar decisions illustrate the common law approach. Even if it was proven that the COMI had actually been transferred to another State, that conclusion can be refuted later on the basis of a new separate action of a creditor supported by new evidence:

Decision in *Official Receiver* v. *Eichler*, neutral citation [2007] BPIR 1636;

Decision of High Court of Justice in Northern Ireland, Chancery Division (Master Kelly) [GBR] No 2012/082088, of 28 January 2013, in ACC Bank PLC v. Sean McCann, neutral citation [2012] IEHC 236, available online at: http://www.bailii.org/cgi-bin/format.cgi?doc=/nie/cases/NIHC/Master/2013/1.html&query=(ACC)+AND+(v)+AND+(McCann) (accessed on 10 August 2019). The judge in this decision has mentioned that a transfer of the COMI to another State may constitute grounds for refusing the motion to recognize the transfer of the COMI abroad on grounds of the reservation of public policy under Article 26 of Regulation 1346/2000 (Article 33 of Regulation 2015/848).

Regulation 2015/848 is in certain cases, especially in *common law* countries, identical to the procedures provided for under the *lex fori concursus*. Hence, the provision does not refer to an 'action' or any other term commonly used in national legislation, and it intentionally refers only to the possibility of challenging the decision.

3.59. Thus, the procedure under Article 5(1) of Regulation 2015/848 is no remedy. The nature and concept of the provision indicate that the decision on the petition challenging the decision opening main insolvency proceedings should primarily be rendered by the insolvency court that opened the main insolvency proceedings. Likewise, the decision on the petition under Article 5(1) of Regulation 2015/848 should be appealable to a higher tribunal. The need to provide for the possibility of review of the decision on the petition under Article 5(1) of Regulation 2015/848 follows from the very broad spectrum of grounds that the petition may invoke. These grounds may consist in the unusual or inconsistent application of the law, or in exceptional situations in which the State's power itself may have failed in its fundamental underlying principles, such as independence and impartiality. It is therefore necessary to provide for the possibility of review by a higher tribunal, despite the fact that Regulation 2015/848 itself guarantees no such review;[79] for instance, a review ultimately exercised by the forum competent to unify case law in the given Member State or, as applicable, to secure a uniform interpretation of the law. Naturally, this is also without prejudice to the possibility of filing a request for a preliminary ruling with the Court of Justice with the aim of unifying the interpretation of the provision, and one may indeed assume that the interpretation of Article 5(1) of Regulation 2015/848 will become the subject matter of preliminary ruling(s) in the future, or, as the case may be, that the courts will request a preliminary ruling specifically in the proceedings under Article 5(1) of Regulation 2015/848, which cannot be confused with the proceedings opening insolvency proceedings. The reason is that the dividing line between EU law and the *lex fori concursus* is rather unclear in Article 5(1) of Regulation 2015/848, at least as concerns the application of

[79] See Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 11, et. 155. In this regard, one may agree with Prof. Mankowski that Regulation 2015/848 provides no guarantee of such a review. But considering the objective of the law and its importance, as mentioned in this paper, and considering the fact that the corresponding procedural instruments afforded by the *lex fori concursus* must be modified for the purposes of the procedure under Article 5(1) of Regulation 2015/848, a review of lower court decisions is certainly appropriate, if not desirable.

the corresponding procedural mechanisms, or, as applicable, as to whether and to what extent even the procedures should be perceived to be fully autonomous in this regard.

3.60. The nature and the purpose of the possibility of challenging the decision opening main insolvency proceedings are rather similar to instruments such as extraordinary remedies, where the persons with legal standing were prevented from raising an effective defence or new circumstances and evidence have transpired, etc. Despite this, it is hardly possible to consider the procedure under Article 5(1) of Regulation 2015/848 as identical to any other. It is a unique mechanism relying directly on EU law.

XI.2. The Scope of Procedure under Article 5(1) of Regulation 2015/848 and the Absence of Any Deadline Limiting the Application

3.61. The fact that it is not a remedy against the judgment opening insolvency proceedings is important from a number of perspectives. One example would be because the procedure is not subject to limitations laid down in national laws, such as the presentation of new evidence.[80] If the *lex fori concursus* provides for a remedy against the judgment opening insolvency proceedings, such a mechanism under the *lex fori concursus* exists alongside the procedure under Article 5(1) of Regulation 2015/848. Both mechanisms exist side by side, and the use of the mechanism under Article 5(1) of Regulation 2015/848 is not limited by any deadline which usually limits the filing of a remedy under national procedures. Hence, if the debtor and/or the creditors avail themselves of the remedy under the *lex fori* and such a remedy is limited by a deadline for filing the remedy, the creditors or the debtor are limited by no such deadlines when filing the petition under Article 5(1) of Regulation 2015/848.

3.62. The absence of a deadline limiting the application of the procedure under Article 5(1) of Regulation 2015/848 is sometimes criticised for being a factor contributing to legal uncertainty. The conclusion that this procedure is not tied to any deadlines, i.e. that it is not limited by any deadlines, may also be inferred from the *travail préparatoire*. Indeed, the European Parliament originally wished to stipulate a limitation in the form of a three-week time limit from the public announcement of the opening of insolvency proceedings.[81] Hence, the application of

[80] REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 101, marg. 3.56.

[81] European Parliament legislative resolution No 1346/2000 on insolvency proceedings, in relation to

any deadline limiting the filing of the petition under Article 5(1) of Regulation 2015/848, for instance, by reference to the *lex fori concursus*, is out of the question.[82] Issues that are not provided for from the procedural perspective in Article 5(1) of Regulation 2015/848 may be resolved by an analogous application of similar instruments under the *lex fori concursus*, especially in procedural matters. But the *lex fori concursus* may not be applied in such a manner as to limit the application itself of Article 5(1) of Regulation 2015/848 and in excess of the wording of Article 5(1) of Regulation 2015/848 regarding the applicability thereof. The only limitations of the application of Article 5(1) of Regulation 2015/848 are the issue of legal standing and the fact that the use of this procedure must concern challenging international jurisdiction. Any other limitations, including any deadlines, would unlawfully limit the procedure itself, whose applicability is a question of EU law only.

3.63. The necessity of this measure relating to widespread unfair insolvency tourism, the abuse of the variable nature of the COMI, as well as the relatively superficial approach of a number of courts bordering on a desire to open insolvency proceedings in their own States, rather supports the need for a most extensive subject-matter and temporal applicability. Indeed, the three-week time limit originally proposed by the European Parliament was *prima facie* too short in view of all the situations that the law might cover, as well as the fact that such a time limit would be manifestly insufficient for a number of reasons. For instance, it may be expected that the said defence mechanism will mostly be used by creditors who must address foreign courts.

XI.3. Other Formal Requirements Imposed on Claimant

3.64. The requirements that would potentially be imposed by national law on court reviews and that would potentially also be reasonably applicable to the procedure under Article 5(1) of Regulation 2015/848, must not be of such a nature as to significantly limit

Article 3(3) of Regulation 1346/2000 in terms of the proposal for a regulation presented by the Commission and having regard to (i) opinion of the European Economic and Social Committee of 22 May 2013, as well as (ii) report of the Committee on Legal Affairs (A7-0481/2013). The above-mentioned EP legislative resolution is available online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0093+0+DOC+XML+V0//CS (accessed on 09 September 2018).

[82] Prof. Mankowski is somewhat unclear on this point. He does refer to gaps in the law and suggests that they should be covered by the application of the *lex fori concursus*; in his opinion, these gaps also include the absence of any time limits for the application of the procedure. But he is also aware of the fact that the absence of a time limit is a very specific situation in connection with issues that are not provided for in Article 5(1) of Regulation 2015/848. Peter Mankowski, In: PETER MANKOWSKI, MICHAEL F. MÜLLER, JESSICA SCHMIDT, EUINSVO 2015: EUROPÄISCHE INSOLVENZORDNUNG 2015. KOMMENTAR, München: C. H. Beck (2016), commentary on Article 5 of Regulation 2015/848, marg. 10, et. 154-155.

the applicability of the procedure. It needs to be emphasized that Article 5(1) of Regulation 2015/848 represents an important instrument or, indeed, one of the principal instruments for the protection of creditors and debtors directly connected to one of the pillars of EU insolvency law, namely the COMI as the sole connecting factor for the determination of international jurisdiction for the opening of main insolvency proceedings. The significant enhancement of the protection of the parties, in this case creditors and debtors, was one of the main objectives of the amendment of Regulation 1346/2000, and is also reflected in Article 5(1) of Regulation 2015/848.

3.65. Consequently, any potential requirements imposed on the claimant must have regard to the objective of the law and reasonably factor in similar procedures laid down in Regulation 2015/848. For instance, it is not possible to request mandatory professional legal representation. The only limitation conceivable in this regard could be, for instance, the requirement of a mailing address in the State where the court is located.[83]

3.66. Similarly, no limiting requirements may be imposed regarding, for instance, court fees. Connected with this, it is desirable that the Member States set the court fee, if provided for by a statute or other legislation, in such an amount that corresponds to the procedure under Article 5(1) of Regulation 2015/848 and the objective thereof, namely in the minimum acceptable amount. Considering the fact that international jurisdiction and the review thereof are an absolutely fundamental condition for any proceedings, and that the examination of the court's own jurisdiction is not only a material expression of State sovereignty, but also a basic obligation of the court (at least under Regulation 2015/848),[84] the proceedings under Article 5(1) of Regulation 2015/848 should also, if possible, be exempt from court fees, or the court fee should be a minimal fixed amount covering only the basic costs incurred by the court.

[83] *Paulus, Chr.* refers here to the *effet utile* of the law and the need to have regard to circumstances such as the fact that the parties to the proceedings under Article 5(1) of Regulation 2015/848 will often include foreigners, persons or entities from distant places, He mentions, for instance, procedural limits, the language of the proceedings, etc. CHRISTOPH G. PAULUS, EUROPÄISCHE INSOLVENZVERORDNUNG: KOMMENTAR (Frankfurt a. M.: Fachmedien Recht und Wirtschaft / dfv Mediengruppe 5th ed., 2017), commentary on Article 5 of Regulation 2015/848, marg. 3, et. 213.

[84] See Article 4 of Regulation 2015/848 (quoted above).

XI.4. The Consequences of Challenging a Decision on a Request for Opening Main Insolvency Proceedings

3.67. It is necessary to mention that Article 5(1) of Regulation 2015/848 only provides for the right to challenge the judgment opening insolvency proceedings. It does not set forth the consequences of such procedure, and these consequences are left entirely to the national law.[85]

XII. The Procedure Adopted by Persons or Entities Other than Creditors and Debtors as Part of a Defence against a Decision on International Jurisdiction of Insolvency Court: the Exclusive Application of *Lex Fori Concursus*

XII.1. The Objective and Nature of the Procedure under Article 5(2) of Regulation 2015/848

3.68. Contrary to the first paragraph of Article 5 of Regulation 2015/848, the second paragraph guarantees legal standing to a much broader class of persons or entities to challenge the above-mentioned decision for a lack of international jurisdiction of the court or for other reasons, provided that the national law enables such a procedure. The second paragraph of Article 5 of Regulation 2015/848 stipulates as follows (quote): 'The decision opening *main insolvency* proceedings may be challenged by parties other than those referred to in paragraph 1 or on grounds other than a lack of international jurisdiction where national law so provides.' Hence, the main purpose of this second paragraph is the clarification of the relationship between the rights awarded by national law and the rights awarded by international law, or more precisely, the explanation that these rights are not mutually exclusive.[86]

3.69. However, Article 5(2) of Regulation 2015/848 is rather a confirmation and guarantee of the fact that the decision opening

[85] See:

Recital 34 of Regulation 2015/848 (quote): [*I*]*n addition, any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings. The consequences of any challenge to the decision to open insolvency proceedings should be governed by national law.*
REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 99, marg. 3.52.

[86] Cf. REINHARD BORK, RENATO MANGANO, EUROPEAN CROSS-BORDER INSOLVENCY LAW, Oxford: Oxford University Press (2016), et. 99, marg. 3.53; GABRIEL MOSS, IAN FLETCHER, STUART ISAACS, THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE, Oxford: Oxford University Press (2002), marg. 8.584, et. 452.

main insolvency proceedings may also be challenged by persons and entities other than those listed in Article 5(1) of Regulation 2015/848, and, as the case may be, also on grounds other than a lack of international jurisdiction of the court, provided that such a possibility is available under the *lex fori concursus*. However, Article 5(2) of Regulation 2015/848 exclusively regulates a procedure governed by the *lex fori concursus*. Hence, the second paragraph primarily emphasises the independence of the mechanism under Article 5(1) of Regulation 2015/848 of the *lex fori concursus*.

3.70. In this regard, the grounds for and the methods of challenging the decision opening main insolvency proceedings under the national or domestic legal systems are highly variable. For instance, in England, the decision opening main insolvency proceedings may also be challenged by the insolvency practitioner.[87/88]

XII.2. The Subject-matter, Scope and Object of Procedure under Article 5(2) of Regulation 2015/848

3.71. Article 5(2) of Regulation 2015/848 also exclusively targets the positive decision opening main insolvency proceedings. In this regard, the scope of Article 5(2) of Regulation 2015/848 is no different from similar issues concerning Article 5(1) of Regulation 2015/848. Article 5(2) of Regulation 2015/848 also explicitly refers to the main insolvency proceedings, and it is also necessary to consider whether this means a judgment opening insolvency proceedings under Article 2(7) of Regulation 2015/848. The difference is that the application

87 HLV Report, et. 150.

88 See also the decision of Chief Registrar Baister of 10 December 2010 in *Official Receiver* v. *Hiwa Huck*, neutral citation [2011] BPIR 709. See also Bankruptcy and Personal Insolvency Reports, available at: http://www.jordanpublishing.co.uk/practice-areas/insolvency/news_and_comment/re-hiwa-huck-official-receiver-v-hiwa-huck-2011-bpir-709#.V7SNoyiLTIW (accessed on 05 April 2019). See also HLV Report, et. 214-215.

> In the *Hiwa Huck* decision, the insolvency practitioner requested the cancellation of the judgment opening insolvency proceedings (in the form of an insolvency order). The insolvency practitioner argued, firstly, that Mr Huck had not had his COMI in England when the request for opening insolvency proceedings was filed; the COMI was allegedly located in Germany, and consequently, the English courts lacked international jurisdiction. Secondly, the insolvency practitioner argued that the debtor had supplied the court with false information in the request for opening insolvency proceedings and in the debtor's Statement of Affaires. Mr Huck was unable to supply any evidence confirming that he indeed lived or lives in England. The court granted the insolvency practitioner's request. But a procedure corresponding to the procedure in *Hiwa Huck* cannot be applied in compliance with the regime under Article 5(2) of Regulation 2015/848 that refers exclusively to the *lex fori concursus* in those legal systems that do not recognize the insolvency practitioners' legal standing, at least as concerns the legal standing of the insolvency practitioner as the claimant.

of the procedures under the *lex fori concursus* need not only concern issues relating to international jurisdiction.

XII.3. Term *Court* under Article 5(2) of Regulation 2015/848: Conceptual Error in Drafting of Czech Language Version

3.72. Contrary to all other language versions, the Czech version of Regulation 2015/848 uses the term *court* also in the second paragraph of Article 5 of Regulation 2015/848 (referring to 'a lack of international jurisdiction of the court'.[89] In this regard, a conceptual error has apparently occurred in the drafting of the Czech version. None of the other language versions employs the term, and they only refer to international jurisdiction, not the international jurisdiction of the court, as the Czech version does. A problem concerning the definition of a court, i.e. whether this means 'court' under Article 2(6)(i) or under Article 2(6)(ii), only arises if one uses the Czech version of Regulation 2015/848.

3.73. However, the definition of a *court* in Article 2(6)(i) of Regulation 2015/848[90] refers to the fact that the more restrictive concept of a court in terms of an authority with judicial power applies to the entire Article 5 of Regulation 2015/848, i.e. both paragraph 1 and paragraph 2. But the use of this narrow definition of a court makes no sense in the case of Article 5(2) of Regulation 2015/848. Rather, in this case (at least as concerns the context in which the term *court* is used in the Czech version) the term must be used in the broader sense, i.e. in the sense stipulated in Article 2(6)(ii) of Regulation 2015/848. Indeed, it was primarily in the cases well documented in international practice where there existed an interest in the possibility of reviewing the decisions of those authorities that are not an authority with judicial power, but which may still open insolvency proceedings depending on the national insolvency concept.

3.74. The problem should be resolved by a potential future amendment of the Czech language version by omitting the word *court* in Article 5(2) of Regulation 2015/848. After all, the term is unnecessary from the perspective of the wording of the provision, and the translation service, as well as the persons charged with corrections of the Czech version, clearly failed to

[89] This deficiency is also not present in the Slovak version, which is otherwise closest to the Czech version, and the Czech and Slovak versions often copy each other as concerns the relevant formulations.

[90] Article 2(6)(i) of Regulation 2015/848 (quote): ‚[...] "'court" 'means: (i) in points (b) and (c) of Article 1(1), Article 4(2), Articles 5 and 6, Article 21(3), point (j) of Article 24(2), Articles 36 and 39, and Articles 61 to 77, the judicial body of a Member State;[...]."The entire Article 2(6) of Regulation 2015/848 is quoted in the footnotes above.

have regard to the connection with Article 2(6) of Regulation 2015/848.

3.75. On the other hand, the wording of Article 2(6)(i) itself is also incorrect. This provision refers to Articles 5 and 6. But it would be more appropriate if the reference to Article 5 of Regulation 2015/848 were made more specific and were supplemented, i.e. that the provision would, as concerns the more restrictive definition of the term *court*, invoke only Article 5(1) of Regulation 2015/848, not the entire Article 5 of Regulation 2015/848, regardless of the paragraph in question. However, the appropriateness of a reference solely invoking Article 5(1) of Regulation 2015/848, should have been mentioned by the Czech delegation and the Czech language service if the Czech delegation also desired to have the term *court* used in the Czech version specifically in Article 5(2) of Regulation 2015/848. Consequently, it is a manifest error and oversight on the part of the Czech delegation.

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Summaries

FRA [***La détermination de la compétence internationale en tant qu'aspect fondamental de la protection du droit d'accès à la justice (droit à un procès équitable) : les mécanismes permettant de contester les décisions sur la compétence internationale dans la procédure européenne d'insolvabilité (règlement (UE) 2015/848 du Parlement européen et du Conseil relatif aux procédures d'insolvabilité)***]

Les règles de conflit régissant la compétence internationale des juridictions pour ouvrir une procédure d'insolvabilité principale se fondent dans le droit de l'UE sur un seul critère de rattachement, à savoir le centre des intérêts principaux (COMI) du débiteur. Ce critère de rattachement, quoique fondé sur des faits objectifs et perceptibles par des tiers, dépend souvent d'une appréciation subjective d'un grand nombre de circonstances. De surcroît, le COMI peut évoluer dans le temps. C'est cette variabilité du COMI qui a souvent fait, selon l'ancienne législation, l'objet d'abus qui prenait la forme de transfert frauduleux du COMI dans un autre État présentant un régime de droit plus favorable pour le débiteur (COMI Shifting, « tourisme d'insolvabilité »), voire d'agissements de nature criminelle. L'ancienne législation, représentée par le règlement (CE) 1346/2000 du Conseil, n'était

pas en mesure de remédier à cette situation. La variabilité du COMI et un risque élevé de subjectivité lors de sa détermination présentaient une menace considérable pour le droit à un procès équitable, et plus particulièrement le droit d'accès à la juridiction. Le règlement (UE) 2015/848 du Parlement européen et du Conseil cherche à y répondre par certains nouveaux éléments, l'un des plus importants étant le mécanisme de contrôle selon l'article 5, paragraphe 1, du règlement 2015/848, qui est une procédure autonome, régie par le droit de l'UE et indépendante de tout autre mécanisme prévu par le droit national de l'État de la procédure d'insolvabilité (lex fori concursus). Le règlement ne limite en aucune manière les motifs pour lesquels les débiteurs ou les créanciers peuvent avoir recours à ce mécanisme, à l'exception du fait qu'il doit s'agir de motifs de compétence internationale. De même, aucun délai n'est fixé pour le recours des débiteurs ou des créanciers à cette procédure. Il s'agit d'une procédure autonome et unique en son genre, susceptible de jouer un rôle crucial dans la protection des parties à des procédures d'insolvabilité menées dans les États membres de l'UE (exception faite du Danemark), et, par conséquent, dans la protection de leur droit d'accès à la juridiction, sous-catégorie du droit à un procès équitable.

CZE [***Určování mezinárodní příslušnosti jako významný aspekt ochrany práva na přístup ke spravedlnosti – práva na spravedlivý proces: obranné mechanismy proti rozhodnutí o mezinárodní příslušnosti v evropském insolvenčním řízení (nařízení Evropského parlamentu a Rady (EU) 2015/848 o insolvenčním řízení)***]

Kolizní úprava mezinárodní soudní příslušnosti pro zahájení hlavního insolvenčního řízení je v právu EU postavena výlučně na jednom hraničním určovateli, a to na středisku hlavních zájmů (COMI) dlužníka. Tento hraniční určovatel, ať již jeho určení má vycházet z objektivních skutečností vnímatelných třetími osobami, závisí často na subjektivním hodnocení řady okolností. COMI navíc může být a často je v čase proměnné. Právě variabilita COMI byla doposud podle předchozí úpravy často předmětem zneužití práva v podobě účelového přesouvání COMI do jiných států s právním režimem výhodnějším pro dlužníka (COMI Shifting, insolvenční turistika) a dokonce v krajních případech i předmětem zneužití práva, či dokonce jednání s kriminálním pozadím. Dřívější úprava v podobě nařízení Rady (ES) č. 1346/2000 na to nebyla schopna reagovat. Právě variabilita COMI a vysoké riziko subjektivních prvků při hodnocení jeho lokalizace zásadním způsobem ohrožovala právo na spravedlivý proces v podobě práva na přístup k soudu. Nařízení

Evropského parlamentu a Rady (EU) č. 2015/848 se na to snaží reagovat některými instituty. Mezi nejvýznamnější z nich patří přezkumný mechanismus podle čl. 5 odst. 1 nařízení 2015/848, který je autonomním postupem podle práva EU nezávislým na jakýchkoli jiných mechanismech podle vnitrostátního práva státu insolvenčního řízení (lex fori concursus). S výjimkou toho, že důvody pro tento postup se musí týkat mezinárodní příslušnosti, nejsou důvody, pro které mohou dlužníci, stejně jako kteříkoli věřitelé tento mechanismus využít, jakkoli omezeny. Stejně tak není stanovena žádná lhůta, ve které by věřitelé nebo dlužník mohli tento postup iniciovat. Jde o unikátní a autonomní postup, který může představovat významný prvek ochrany hlavních stran v insolvenčním řízení vedených v členských státech EU (s výjimkou Dánska) a tedy i ochrany jejich práva na přístup k soudu, resp. práva na spravedlivý proces.

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POL [***Określanie właściwości międzynarodowej jako istotny aspekt ochrony prawa dostępu do wymiaru sprawiedliwości – prawa do sprawiedliwego procesu: mechanizmy obrony przed orzeczeniem międzynarodowej właściwości w europejskim postępowaniu upadłościowym (Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2015/848 w sprawie postępowania upadłościowego)***]

Przepisy unijne regulujące postępowanie upadłościowe, w których określenie właściwości międzynarodowej sądu celem wszczęcia i przeprowadzenia głównego postępowania upadłościowego oparte jest na jednym decydującym parametrze – głównym ośrodku podstawowej działalności dłużnika (COMI), jak dotąd nie oferowały wystarczającej ochrony prawa stron do dostępu do sądu lub prawa do sprawiedliwego procesu. Braki te próbuje usunąć Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2015/848 z dnia 20 maja 2015 r. w sprawie postępowania upadłościowego, wprowadzając nowy mechanizm ochrony praw wierzycieli i dłużnika. Za jeden z najważniejszych instytutów należy tutaj uznać instytut uregulowany w art. 5 ust. 1 rozporządzenia 2015/848.

DEU [***Bestimmung der internationalen Zuständigkeit als wichtiger Aspekt beim Schutz des Rechts auf Zugang zur Justiz – das Recht auf ein faires Verfahren: Abwehrmechanismen gegen internationale Zuständigkeitsentscheidungen***

im europäischen Insolvenzverfahren (Verordnung des Europäischen Parlaments und des Rates (EU) 2015/848 über Insolvenzverfahren)]
Die europäische Regelung des Insolvenzverfahrens, in der die Bestimmung der internationalen Zuständigkeit des Gerichts für die Eröffnung und Durchführung des Hauptinsolvenzverfahrens auf einer einzigen Grenzdeterminante – dem Hauptinteressenzentrum des Schuldners (COMI) – beruht, gewährleistet bisher keinen ausreichenden Schutz des Zugangsrechts der Parteien zur Justiz bzw. des Rechts auf ein faires Verfahren. Diesen Mangel soll die Verordnung des Europäischen Parlaments und des Rates (EU) Nr. 2015/848 über das Insolvenzverfahren durch die Einführung neuer Mechanismen zum Schutz der Rechte von Gläubigern und Schuldnern beheben. Das in Artikel 5 Absatz 1 der Verordnung 2015/848 vorgesehene Institut ist als eines der wichtigsten Institute anzusehen.

RUS [***Определение международной юрисдикции как важного аспекта защиты права на доступ к правосудию — права на справедливый судебный процесс. Механизмы защиты от решений о международной юрисдикции в европейских процедурах несостоятельности (Регламент (ЕС) 2015/848 Европейского парламента и Совета «О процедурах несостоятельности»)***]
Европейское регулирование процедур несостоятельности, в котором определение международной юрисдикции суда для возбуждения и ведения главного производства по делу о несостоятельности основано на едином граничном показателе — центре основных интересов должника (COMI), до сих пор не имело достаточной защиты права сторон на доступ к правосудию или же права на справедливый судебный процесс. Этот недостаток пытается исправить Регламент (ЕС) № 2015/848 Европейского парламента и Совета «О процедурах несостоятельности» путем внедрения новых механизмов защиты прав кредиторов и должника. Одним из важных положений следует считать положение, определенное в пункте 1 статьи 5 Регламента 2015/848.

ESP [***Determinación de la competencia jurisdiccional internacional como un elemento importante de la protección de los derechos y acceso a la justicia – derecho a un juicio justo: los mecanismos de defensa contra la resolución de la determinación de la competencia jurisdiccional internacional en el procedimiento de insolvencia europeo***

(Reglamento del Parlamento Europeo y del Consejo (CE) 2015/848, del procedimiento de insolvencia]

La normativa europea del procedimiento de insolvencia, que establece la competencia jurisdiccional internacional para la incoación y tramitación del procedimiento de insolvencia principal a base del único factor de conexión – Centro de Intereses Principales del Deudor (COMI), carecía hasta la actualidad de un mecanismo eficaz de protección del acceso de las partes a la justicia, respectivamente el derecho a un juicio justo. Este defecto pretende eliminar el Reglamento del Parlamento Europeo y del Consejo (CE) 2015/848 del procedimiento de insolvencia, por el cual se establecen nuevos mecanismos de protección de los derechos de los acreedores y los deudores. Uno de los mecanismos jurídicos más importantes se introduce en el art. 5, apartado 1 del Reglamento 2015/848.

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